

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2010-404-003038
[2014] NZHC 737**

BETWEEN JOSEPH FRANCIS KARAM
 Plaintiff

AND KENT PARKER
 First Defendant

VICTOR PURKISS
Second Defendant

Hearing: 14-18, 21 October 2013

Appearances: M P Reed QC and P A McKnight for Plaintiff
 First Defendant in Person
 Second Defendant no appearance

Judgment: 9 April 2014

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 9 April 2014 at 4.30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

Table of Contents

	<u>Para No.</u>
Introduction	[1]
Was Mr Parker the publisher of statements by third parties?	[7]
<i>Section 21 – the relevant principles</i>	[9]
<i>Was Mr Parker a publisher of statements by third parties on the Facebook page?</i>	[14]
<i>Was Mr Parker the publisher of posts on Counterspin</i>	[20]
The meaning of statements – relevant principles	[24]
<i>The meaning of the words – relevant principles</i>	[26]
The defence of honest opinion – relevant principles	[30]
The Facebook page	
<i>FB 2, 3 and 4 – the “too prejudicial” thread</i>	[35]
<i>FB 6A – “A misuse of Legal Aid?”</i>	[40]
<i>FB 9 and 10 – The “happily uninformed”</i>	[42]
<i>FB 11 – “why not petition for a third trial?”</i>	[46]
<i>FB 14 – “Relationships”</i>	[49]
<i>FB 15 – “Psychic”</i>	[51]
<i>FB 16 – “Men’s bladders”</i>	[53]
<i>FB 20 – “Missed????”</i>	[55]
<i>FB 21 – “Our prickly Joe”</i>	[57]
<i>FB 22</i>	[59]
<i>FB 23</i>	[61]
<i>FB 24 “Karam speaking engagement”</i>	[63]
<i>FB 25 and 26</i>	[65]
<i>FB 27, 28 and 30 – “The Blind Tyranny of Belief”</i>	[69]
<i>FB 31</i>	[74]
<i>FB 38 – “Book Canned”</i>	[76]
The Counterspin website	
<i>CS 4 and 6</i>	[78]
<i>CS 7</i>	[81]
<i>CS 8 – “conflicting evidence”</i>	[83]
<i>CS 9 – 11 – “how the not guilty verdict was obtained”</i>	[85]
<i>CS 13 – “create a following using personal charisma and influence”</i>	[88]
<i>CS 14, 16 and 17 – “13 years’ promoting one point of view”</i>	[91]
<i>CS 19 – “muddied waters”</i>	[93]
<i>CS 20 – “Arthur Allan Thomas’s 30th”</i>	[95]
<i>CS 21 – “Yahoo does it AGAIN”</i>	[97]
<i>CS 25 and 26 – “Karam gets 50 per cent of income from case????”</i>	[99]
<i>CS 36 – “muddied waters”</i>	[102]
<i>CS 39 and 41 – “the Court of public opinion P5”</i>	[104]
<i>CS 53 and 58 – “what is justice?”</i>	[106]
<i>CS 60 and 61 – “Joe Karam wears his defamation suit”</i>	[109]
<i>CS 65 and 66 – Posts following the “where’s Joe’s defamation suit now?” article</i>	[111]
<i>CS 67 – 70</i>	[115]
<i>CS 71</i>	[121]
<i>CS 72</i>	[123]
<i>CS 75</i>	[127]

CS 83 and 84	[129]
CS 85	[132]
CS 86	[134]
CS 89 – 91	[136]
CS 92	[141]
CS 94	[144]
CS 96	[146]
CS 97	[148]
CS 98	[151]
CS 105 and 106	[153]
CS 107	[157]
CS 110 and 111	[161]
The other websites	[166]
<i>Trade Me – “poof – another Bain thread bites the dust”</i>	[167]
<i>TM 2 – 5 “Bainaholics anonymous”</i>	[169]
<i>TM 22 and 23</i>	[180]
<i>TM 27 – 30</i>	[183]
<i>TM 40</i>	[188]
<i>TM 41 and 42</i>	[190]
<i>TM 42</i>	[193]
<i>TM 43</i>	[196]
YouTube	[198]
Were the statements made on occasions of qualified privilege?	[201]
Damages	
<i>My approach to fixing damages</i>	[221]
<i>Compensatory damages</i>	[225]
<i>Punitive damages</i>	[244]
Injunction	[247]
Result	[248]

Introduction

[1] The plaintiff in this case is Joseph Karam, who is well known for supporting David Bain through Mr Bain's appeal against conviction and retrial on charges of murdering his parents and three siblings. Mr Bain's acquittal at the 2009 retrial attracted numerous comments on social media sites. Mr Karam claims that many of the comments defamed him by conveying, among other things, that he lacked integrity, was dishonest, was motivated to support Mr Bain by the prospect of financial gain and had defrauded the Legal Services Agency (LSA). He seeks damages from two of those responsible for some of the comments and a permanent injunction prohibiting further publication of defamatory material.

[2] The first defendant, Kent Parker, was an administrator of the Facebook page "Justice for Robin Bain"¹ and creator of the Counterspin website. Mr Karam has sued Mr Parker in respect of comments that Mr Parker himself posted on these sites and also as the publisher of comments posted by third parties. Mr Parker denied being the publisher of statements by third parties, relying on the defence of innocent dissemination under s 21 of the Defamation Act 1992.

[3] The second defendant, Victor Purkiss, was a contributor to the Facebook page, Counterspin and other sites. Mr Karam has sued him only in respect of comments that he himself posted.

[4] Both defendants pleaded the affirmative defences of honest opinion,² qualified privilege³ and truth.⁴ Mr Purkiss did not appear at the trial. Mr Parker was unrepresented at trial and abandoned the truth defence during the trial.

[5] The issues for determination are:

¹ The Facebook page was initially called "David Bain is guilty" before being changed to "Justice for Robin Bain". David Bain's case was run on the basis of murder/suicide by David's father, Robin.

² Defamation Act 1992, ss 9-10.

³ Section 16.

⁴ Section 8.

- (a) Was Mr Parker the publisher of statements by third parties? If not, Mr Karam cannot succeed in relation to those statements and there will be no need to consider them further;
- (b) Did the comments published by the defendants relate to Mr Karam and have the defamatory meanings contended for?
- (c) Is the defence of honest opinion available in respect of any comments I find to be defamatory?
- (d) Is the defence of qualified privilege available?
- (e) What are the appropriate damages?
- (f) Should injunctive relief be granted?

[6] Before addressing these issues I briefly describe the structure of this judgment. I consider the question of Mr Parker's status as a publisher first. Then I outline the principles relevant to whether the statements sued on are defamatory and whether the defence of honest opinion is available in respect of them. After that I consider each statement separately. Mr Reed QC, for Mr Karam, invited me to take a global approach to the statements complained of similar to that taken by in *Korda Mentha v Siemer*.⁵ I have, however, felt obliged to consider each of the statements separately. This is because Mr Parker properly sought to place the various statements in the context of the ongoing dialogue of which the statements formed part. I then turn to consider the defences of qualified privilege. Finally, I consider the issue of damages and injunctive relief.

Was Mr Parker the publisher of statements by third parties?

[7] The statements that are the subject of the Facebook page cause of action were made on various occasions between July and December 2009, though posts continued to be published at least up to the date of the proceedings being issued in 2010. The statements that are the subject of the proceedings on the Counterspin website were posted on various dates from July 2009 up to February 2010 but the

⁵ *Korda Mentha v Siemer* HC Auckland CIV-2005-404-1808, 23 December 2008.

Counterspin website continued to attract postings after that. It was still live as at the date of trial.

[8] During the trial, following an apology to Mr Karam, Mr Parker advised that he intended to take down the Counterspin site, which he apparently did. However, after the trial Mr Reed advised that the site had gone live again. Mr Parker did not respond to that memorandum and I proceed on the basis that the site is still live.

Section 21 – the relevant principles

[9] The claim against Mr Parker for statements by third parties rests on his status as administrator of the Facebook page and Counterspin site when the comments were posted. A person who takes part in or contributes to the publication of someone else's statement is, prima facie, liable as a publisher unless they can establish the defence of innocent dissemination.⁶ This is a defence typically relied on by distributors such as booksellers who, although prima facie publishers of defamatory material they have distributed, neither knew nor ought to have known that that material contained defamatory statements. The general principle was stated by Lord Esher in *Emmens v Pottle*.⁷

I agree that the defendants are prima facie liable. They have handed to other people a newspaper in which there is a libel on the plaintiff ... The question is whether, as such disseminators, they published the libel? If they had known what was in the paper, whether they were paid for circulating or not, they would have published the libel and would have been liable for doing so. But here ... the defendants did not know that the paper contained a libel. I am not prepared to say that it would be sufficient for them to show that they did not know of the particular libel ... taking the view of the jury to be right that the defendants did not know that the paper was likely to contain a libel, and what's more that they ought not to have known it, having used reasonable care – the case is reduced to this, that the defendants were innocent disseminators of a thing which they were not bound to know was likely to contain a libel.

[10] The defence is now that of innocent dissemination set out in s 21 of the Defamation Act 1992:

In proceedings for defamation against any person who has published the matter that is the subject of the proceeding solely in the capacity of, or as the

⁶ Defamation Act 1992, s 21.

⁷ *Emmens v Pottle* (1885) 16 QB 354 (CA).

employee or agent of, a processor or 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.

[11] The internet has proved a challenging context in which to apply the defence of innocent dissemination. The question in this case is whether Mr Parker, as an administrator of the Facebook page and Counterspin website, was a processor or a distributor for the purposes of s 21. He denies that his status as an administrator of these sites makes him a publisher.

[12] In my decision in *Wishart v Murray & Ors* I traced the history of US, UK and Australian decisions that considered publication via Facebook.⁸ I concluded that the status of publisher in an internet context depended upon editorial control rather than actual knowledge of the existence of defamatory material.⁹ A Facebook page is to be regarded as similar to a noticeboard.¹⁰ Where the host of the Facebook page has the power to control who can access the site to post material and who can also edit the posts, they cannot, realistically, be regarded as passive instruments or mere conduits of content posted on the Facebook page.

[13] I concluded in *Wishart* that those who host Facebook pages or similar sites are to be regarded as publishers of postings made by others in two circumstances. The first is if they know of the defamatory material and do not remove it within a reasonable time in circumstances that give rise to an inference that they are taking responsibility for it. The second is where they do not know of the defamatory statement but ought, in the circumstances, to know that material being posted is likely to be defamatory.

⁸ *Wishart v Murray & Ors* [2013] NZHC 540, [2013] 3 NZLR 246.

⁹ *Tamiz v Google Inc* [2013] EWCA Civ 68, [2013] EMLR 14.

¹⁰ *Davison v Habeeb* [2011] EWHC 3031, [2012] 3 CMLR 6.

Was Mr Parker a publisher of statements by third parties on the Facebook page?

[14] Mr Parker did not start the Facebook page. He gave evidence that he joined it in August 2009 and at that time did not have any right to edit or delete any posts but his own.¹¹ However, he later became a group administrator (an “admin” member). The Facebook Help Centre page produced in evidence confirms that a group administrator controls the membership and content of the group, can send messages, appoint other admin members and edit group information and settings. I am satisfied that a person with those powers is not to be regarded as merely a processor or distributor.

[15] On the evidence Mr Parker became an admin member at the end of August 2009. Although he asserted that he was made an admin member because of his technical knowledge rather than editorial privilege or rights, that status meant that he had those rights. Further, the evidence was clear that he exercised those rights.

[16] After Mr Karam complained about the content of the Facebook page in late 2009 Mr Parker actively worked within the Facebook group to edit objectionable material. This effort began in late 2009. There is a post by Mr Parker on Counterspin on 26 December 2009 at 1.19 pm in which he raised the issue of “cleaning up the Facebook site to remove content that is potentially defamatory and blatant”. A little later that afternoon Mr Kent identified criteria for the deletion of posts including noting that any post clearly making claims that Mr Karam defrauded the legal aid system should go but that he did not recall that anyone had actually made that assertion. The post concluded with the suggestion that “we need to convey the impression (true or not) that we are a reasonable bunch of people and are not malicious or hateful”.

[17] On 27 December 2009 Mr Parker noted that an option was to “let other people take over as admin”. A short time later he posted that “... I think we should

¹¹ Three of the posts sued on were posted in July 2009; these are numbers 33, 36 and 40 in Table 1 of the second amended statement of claim. Since Mr Parker could not have been a publisher of these posts I do not consider them.

clean up our Facebook page ... I want to make sure that [Mr Karam's] case against Vic and me is very weak..." And later that day he posted that "my initial thoughts is (sic) to have a terms and conditions and to announce that from now on the page will be moderated and to specify what type of content will be removed". A few days later Mr Parker proposed that the problem of managing defamatory material on the Facebook site could be solved by making the Facebook site private so that only members could access it. There were conflicting views amongst the Facebook page members about this course.

[18] At one point, on 29 December 2009, Mr Parker observed that, although he could control what happened at Counterspin he did not have the mandate to do so at the Facebook page and that "... if some discipline is not set in place at the FB site then I will rescind any connection with it and thus remove any liability I have", adding that he did not have the time to moderate the Facebook site. By 8.32 pm he posted that "I am no longer admin" and was not taking responsibility for the content of the Facebook site. However, it is apparent from posts on 30 December 2009 that Mr Parker was either still an admin member or had assumed that status again. In posts on 30 and 31 December he acknowledged deleting another member's post and announced that "because of the increasing exposure of the contents of the site to the public and the articles in SST (Sunday Star Times) and elsewhere we have removed the site from public view".

[19] I find that Mr Parker was a group administrator between 30 August and 8.30 pm on 29 December 2009 and again after 11.30 am on 30 December 2009. As such he had the power to edit and remove posts. Further, it is clear that Mr Parker knew that the posts on the Facebook site did or were likely to contain defamatory material. Mr Parker is therefore to be regarded as a publisher of posts made during this period.

Was Mr Parker the publisher of posts on Counterspin?

[20] In his evidence Mr Parker described his growing interest in the Bain case and his idea for "an anti-propaganda website". After the acquittal, and following reports of legal aid payments to Mr Karam for work on the defence, Mr Parker "took umbrage to what I saw and so began to implement my website idea". The website

had a variety of content including information about the evidence, editorial items in relation to the retrial verdict and editorial items about legal aid payments to Mr Karam. Mr Parker described Counterspin as “not a blog but a media site with a multitude of features and a number of contributors”.

[21] In a post on the Facebook site on 30 December 2009 Mr Parker said, in the context of a discussion about possible defamation claims against him, that:

... Regarding the facebook site Karam could consider the admin people (Gavin, Blair and myself) as responsible parties and direct his attentions to us. However he may have difficulty considering it is a social networking site and as far as I know there is no precedent for action against such a site.

The counterspin site however is quite different in that it is built expressly for the purpose of telling the other side of the story. As creator of the site and publisher of the content I have sole responsibility and would be the target of any defamation action. I believe that I have cleaned out the content of anything that is directly defamatory. If any of the content remaining is defamatory and should be removed then so should hundreds of news reports and public blogs and forums throughout the internet.

[22] On 14 January 2010 Mr Parker posted on the Facebook site, in the context of a discussion about raising the profile of Counterspin that:

So, if you want to keep our side of the story with a high profile then I ask you to have your discussions over at counterspin but note that counterspin is a moderated forum so if you are going to be controversial or defamatory keep it here at Facebook. At counterspin we can edit and do searches on posts and if a thread becomes a little on the dark side we can make it private. We cannot do that here on Facebook ...

[23] Given the stated nature of the Counterspin site and Mr Parker’s posts regarding his control over the site and efforts to moderate and edit posts made on the site I am satisfied that Mr Parker does not fall within the scope of s 21. He is to be treated as a publisher of all posts on Counterspin, whether they were his or those of third parties.

The meaning of the statements – relevant principles

[24] The plaintiff in a defamation case must establish that the statement published by the defendant was about him or her and was defamatory.

[25] There is no statutory definition of what constitutes a defamatory statement. However, the common law has produced a number of well recognised characteristics of defamatory statements. Relevantly, these include a statement that may tend to lower the plaintiff in the estimation of right-thinking members of society generally¹² and a false statement about a person to his or her discredit.¹³

[26] The principles to be applied in determining whether the various statements have the meaning Mr Karam attributes to them are summarised in *New Zealand Magazines Ltd v Hadlee (No 2)*:¹⁴

- (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 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.
- (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.

[27] The last principle, that the words complained of are to be read in context, is particularly relevant in this case. Some of the statements were made during conversations that continued over many hours, sometimes days. The meaning of each statement and whether it is properly regarded as an expression of opinion

¹² *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240.

¹³ *Youssouf v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581 (CA) at 584.

¹⁴ *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.

cannot be determined without considering the posts leading up to it. Mr Parker submitted that a crucial part of this context is that the comments occurring on internet fora and blogs will not be taken by reasonable readers to be accurate, but merely as vulgar abuse. This concept is derived from the case of *Smith v ADVFN* which held that, in relation to a bulletin board thread, it was:¹⁵

... often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment. The remarks are often not intended, or to be taken, as serious.

[28] Mr Parker also relied on *Baglow v Smith* which distinguished internet fora and blogs from other forms of publication.¹⁶ This distinction was made on the basis that the context of an ongoing debate would reduce the sting of the defamatory comments as sharp and witty replies are seen merely as part of the ‘parry and thrust’ of the debaters.¹⁷

[29] However, there is no principled basis on which internet fora and blogs should attract a different test for what constitutes a defamatory statement. There may well be a degree of casualness associated with contributions to online conversations. In this regard they might be likened to talk-back radio. However, the capacity for harm resulting from the permanent nature of posts means that those posting statements should not be relieved of the usual constraints imposed at law.¹⁸

The defence of honest opinion – relevant principles

[30] Mr Parker raised the defence of honest opinion in relation to all the statements.¹⁹ This defence recognises the important right that everyone has to hold and express his or her opinion on any matter of interest or concern. There are, however, limitations on this right. The right and the limitations on it have increasing relevance today in relation to social media; social media sites allow opinions to be disseminated effortlessly to potentially vast numbers of readers without constraints

¹⁵ *Smith v ADVFN* [2008] EWHC 1797 (QB) at [17].

¹⁶ *Baglow v Smith* (2011) ONSC 5131 at [60].

¹⁷ At [64].

¹⁸ A similar view was expressed by Judge Ross in *O’Brien v Brown* [2001] DCR 1065 (DC).

¹⁹ Defamation Act 1992, ss 9-10, which largely reflect the common law defence of fair comment.

in terms of time or geography. The sense of relative anonymity and the immediacy of social media sites can have a disinhibiting effect.

[31] The principles that relate to the defence of honest opinion are well established. First, the defendant must show that the publication was an expression of opinion rather than a statement of fact. That is a question to be determined by reference to the whole of the publication, rather than specific statements or words.²⁰ The importance of context, as the Court of Appeal explained in *Mitchell v Sprott*, is that isolated statements, which appear as assertions of fact may properly be read as comment on or conclusions drawn from other facts when read against the entire publication:²¹

[17] ... Sometimes it is not easy to distinguish fact from comment on fact. If that cannot be done, the words are not protected by the honest opinion defence. Sometimes words may in isolation appear to be stating a fact but when read in context and properly understood to be drawing a conclusion from facts which have also been stated or indicated by the author or which would have been known to the person to whom the words were addressed. They can then be seen to be in the nature of a comment or expression of opinion based on those facts. The person who hears or reads the words can recognise them as opinion which he or she can evaluate on the basis of the stated or known facts. As Gatley on Libel & Slander (9th ed, 1998) says at para 12.7:

Words which are clearly comment are likely to be treated with more caution by the reasonable reader and hence are less damaging than assertions of fact.

[32] Secondly, the comment must indicate, either expressly or implicitly, the facts on which the opinion is based. This is so the reader knows what the maker of the statement is commenting on and can make his or her own assessment. Thirdly, the facts on which the opinion is based must be shown to be true or not materially different from the truth or must be based on facts generally known at the time of publication. However, even if several facts are relied on, not all need to be proved to be true; one fact that supports the comment may be sufficient.²²

²⁰ *Television New Zealand Ltd v Haines* [2006] 2 NZLR 433 (CA).

²¹ *Mitchell v Sprott* [2002] 1 NZLR 766 (CA) at [17].

²² At [22]; *Joseph v Spiller* [2010] UKSC 53, [2011] 1 AC 852, discussing *Kemsley v Foot* [1952] AC 345 (HL) at 358.

[33] Finally, if the opinion is that of the defendant it must have been honestly held.²³ The position is different where the defendant is not the author of the opinion; if the author is neither an employee nor agent of the defendant then the defendant must prove that the opinion, in its context and in the circumstances of the publication, did not purport to be his or her opinion²⁴ and, further, that the defendant had no reasonable cause to believe that the opinion was not the author's genuine opinion.²⁵

[34] I turn now to consider each of the statements sued on. The statements complained of are set out in tables in the Second Amended Statement of Claim. I have used the same "ID" numbers as are used in the tables.²⁶

The Facebook page

FB 2, 3 and 4- the "too prejudicial" thread

[35] These statements were posted by third parties as part of a conversation on 21 December 2009 under the thread title "Too Prejudicial". The initial post referred to a "new case that Karam appears to be getting involved with ...". Then:

- FB 2 said:

Is it just me or does Karam have a thing for Dunedin crimes? Must be his new way to get legal aid money, after David's compensation is denied!!

- FB 3 said:

I think JK is deluding himself – or looking for another campaign to run. Obviously the whole legal aid gravy-train scenario proved to be so lucrative for him he's going to have another crack at it. Must think he's some kind of Sherlock Holmes (wannabe that is). Boy, anything to be in the limelight!

[36] The complaint is that these statements meant and were understood to mean that Mr Karam lacked integrity, was motivated by money and had defrauded the LSA. I consider that the ordinary meanings of FB 2 and 3 is that Mr Karam

²³ Defamation Act 1992, s 10(1).

²⁴ Section 10(2)(b)(i).

²⁵ Section 10(2)(b)(ii).

²⁶ Table 1 related to the Facebook page, Table 2 to the Counterspin site, Table 3 to Trade Me and Table 4 to You Tube. So the reference to "FB 2" would be a reference to the first item in Table 1, which is ID 2 and relates to a Facebook post. The numbers are sequential because of changes to the pleadings over the course of the proceedings.

supported David Bain's case for financial gain because he believed that he could obtain legal aid payments. The statements were defamatory though they fall short of asserting actual dishonesty.

[37] I consider that they were both expressions of opinion. The apparent basis for the comments was not the "new case" but the generally known fact that Mr Karam had received payments from LSA in connection with the Bain case, this fact having been publicly reported in June 2009 following the retrial. I consider that these comments indicate sufficiently the factual basis for opinions.

[38] FB 4 said:

Definitely makes one wonder at the calibre of 'witnesses' Karam came up with in the 2nd trial. Prostitutes and pimps?

[39] FB 4 was a continuation of the preceding discussion. It is difficult to discern any logical thread in the comments immediately prior. Therefore the context of FB 4 can only be seen as a general conversation about the issues raised by prostitute and pimp witnesses. FB 4 plainly suggested that the witnesses that Mr Karam located were not genuine and that he knew that. This conveys that Mr Karam is dishonest and acted improperly in assisting with the defence. It is defamatory. The only factual basis indicated for the statement was the fact that some of the witnesses at the retrial were "prostitutes and pimps". However, although there were witnesses whose occupation fitted that category, there was no evidence to support the assertion that Mr Karam "came up" with these witnesses. Therefore the defence of honest opinion fails.

FB 6A – "A misuse of Legal Aid?"

[40] The complaint is that the statements at FB 6A regarding Mr Thomas conveyed that Mr Karam lacked integrity, behaved improperly in relation to Mr Bain's defence and used propaganda. The statement at FB 6A appeared under the thread title "A misuse of legal aid?" and said:

AAT's appearance was carefully orchestrated to make it look like db was of a similar ilk when clearly he is NOT. Also I don't think AAT has the brains to see that he is being used by jk as a publicity stunt.

[41] Only the second sentence is sued on. That sentence conveys that Mr Karam orchestrated Mr Thomas' appearance at the Bain retrial and cynically used him to elicit sympathy and support for Mr Bain, which meant that Mr Karam lacked integrity, was dishonest and conducted himself improperly in relation to David Bain's defence. I agree that the statement did have these meanings and was defamatory. I also consider it to be an expression of opinion. However, the indicated basis for the opinion, which appears from the preceding sentence, is not the known fact that Mr Thomas did attend court in support of Mr Bain but, rather, the assertion that AAT's appearance had been orchestrated. This was untrue; Mr Thomas gave evidence that he had attended the retrial of his own volition. Therefore the defence of honest opinion fails.

FB 9 and 10 – The “happily uninformed”

[42] FB 9 and 10 appeared on 1 and 2 December 2009 under the thread title “Happily uninformed???” The posts, both by third parties, were part of a conversation that explored the idea that many people who had concluded that Mr Bain was innocent were “happily uninformed”. The posts, which were the third and ninth of this conversation said:

- Appearances can be deceiving, and certainly with the propaganda from Herr Karam, (cf Herr Goebbels) it is no wonder so many believe David is innocent. Goebbels was very efficient at telling lies until people believed him. Herr Karam isn't in the same league, but still the method still works.
- Gavin, you are right. Josef Goebbels knew and understood these principles perfectly. Jochmen Fest the famous German Historian in his book “The Faces of the Third Reich” did an in depth profiles of Hitler's leading henchmen and found it most disturbing that these people seemed so ordinary and “normal”.

[43] The complaint is that FB 9 meant and was understood to mean that Mr Karam lacks integrity and is a liar, uses methods of the kind used by Goebbels and is to be compared to tyrants such as Hitler. I consider that the obvious comparison between Mr Karam and Josef Goebbels and the explicit reference to lies means that the statement did have the meaning contended for. Self-evidently, it was defamatory.

[44] FB 10 was clearly referring back to FB 9 in its address to the author of FB 9 (Gavin James) and reference to Josef Goebbels. The first sentence seeks to confirm FB 9 in linking Mr Karam with Goebbels' methods and therefore continues the suggestion that Mr Karam uses such methods. I therefore accept that FB 10 carries the same meaning as FB 9 and is defamatory.

[45] Nor do I consider either to be expressions of opinion. They both effectively assert baldly that Mr Karam used the same method of lies and propaganda as Goebbels. As a result, I find that the defence of honest opinion fails in relation to both statements.

FB 11- "why not petition for a third trial?"

[46] Mr Purkiss was the author of this post, which occurs in a conversation on 13 December 2009 under the thread titled "Why not petition for a third trial?". FB 11 appears well into that discussion:

If jk ever gets his hands on half of BigEars compensation then the tie will be broken and BigEars will be cast adrift to fend for himself. "Show me the money!!!!"

[47] This conversation explored the idea of a third trial and various concerns about the verdict at the retrial. Mr Karam was mentioned occasionally in passing during these posts but not the issue of compensation for David Bain, which was raised for the first time by FB 11.

[48] Mr Karam complains that FB 11 means that he lacked integrity, and misrepresented his motives for supporting David Bain. I find that the statement did have these meanings; the clear suggestion is that Mr Karam's true motivation was to obtain a share of any compensation paid to Mr Bain. The statement is not clearly an expression of opinion and, in any event, there is no factual basis for it referred to and no indication of what the opinion was based on. The fact that compensation had been raised as a possibility in the public arena could not provide an adequate foundation.

FB 14 – “Relationships”

[49] The next impugned statement is FB 14, posted on 17 December 2009 under the heading “Relationships”:

He knows he did it, they know he did it, and I rather suspect Mr Karam knows he did it also. The enticing possibility of compensation will be foremost in Mr Karam’s mind though – at least 50% of it anyway, so he won’t be cutting him loose until that avenue has been fully investigated – then there’s the royalties from the books, the inheritance (not that there is one anymore) but JK will be looking into all of these ...

[50] The conversation leading up to FB 14 centred around the relationship between David Bain and his brother, Stephen, and, to a lesser extent, the dynamics between David Bain and Mr Karam. Mr Karam complains that, to the extent it refers to him, it means he lacks integrity, is dishonest and has misrepresented his real motive for helping Mr Bain. I find that these meanings are contained in the statement and are defamatory; they suggest that Mr Karam knew, but chose to ignore, the likelihood or fact that Mr Bain committed the crimes and that he is motivated to continue supporting Mr Bain by the prospect of a share of any compensation paid to Mr Bain. Although the former is clearly an expression of opinion regarding Mr Karam’s motive, the latter assertion is not. Even if it could be viewed as an expression of opinion, there is no factual foundation for it.

FB 15 – “Psychic”

[51] FB 15 appears under the undated conversation “Psychic?”

I think JK is a complete idiot and he knows damn well that he assisted a murderer off ... if he is proud of that, then he is to be pitied.

[52] This conversation was about the use of psychics in murder investigations. Mr Karam is barely mentioned. Mr Reed submitted that FB 15 meant that the post is clearly the author’s opinion that Mr Karam knew that Mr Bain was guilty of murder. This is defamatory. However, there is no specific basis asserted for it, no reference to material in the surrounding texts and not even actually general indication as to the basis for this opinion. The defence of honest opinion fails.

FB 16 – “Men’s bladders”

[53] FB 16 was the first post under the heading “Men’s bladders” on 22 December 2009 and concerned the evidence regarding the state of Robin Bain’s bladder at the time of death:

Perhaps someone should ask Karam whether he goes to the toilet first thing, but he would probably deny it, even if he did.

[54] Mr Karam complains that the post means that he is a liar. I agree. Mr Parker also accepted this to be so. I find that there is no basis indicated for that conclusion and the honest opinion defence fails.

FB 20 – “Missed????”

[55] The undated conversation under this thread title was a general exchange of views about the Crown handling of the retrial and a few comments regarding Mr Karam’s involvement. In FB 20 Mr Purkiss then said:

If Karam REALLY cared about db he would not do another thing in relation to this case/NO compo claim, NO inheritance claim, NO book/NOT another thing/not even a reply to letters to the ed’s. He should forget about it and let the people slowly but surely forget it. Every time he opens his mouth it prolongs the issue. But then this is what he wants. More ways to make a dollar/NOT justice for david bain.

[56] The statement meant that Mr Karam was motivated to help David Bain by the prospect of financial gain and was continuing to be involved for that reason rather than any genuine desire to assist Mr Bain. The statement was defamatory. It is an expression of opinion but there is no apparent basis for it. Nor is there anything to indicate the basis for the conclusion that is expressed. As a result, the honest opinion defence fails.

FB 21 – “Our prickly Joe”

[57] This statement appeared in the course of a conversation prompted by media reports, including a reference to an article by Deborah Coddington about Mr Karam. The author of the immediately preceding post referred to a Listener article in which

Mr Karam reportedly said “no-one will ever know what really happened that day”.

Mr Purkiss then wrote FB 21:

Well Joe if “no one will ever know what really happened that day” it may help to read the evidence so that one could make a better informed conclusion.

AND of course be honest with yourself when the evidence has been read instead of fighting on so that a guilty person walks free, 12 people have to live now knowing they made the wrong choice and millions of taxpayers dollars have been used to bring about an injustice!! It's one thing to get a person most likely to be guilty freed but to throw the blame for that person's crime onto an innocent man that cant defend himself is about as low as any person can sink. Shame on you!!

Joe, you know the truth as well as or maybe even more so than most people.

[58] I find that these statements did convey that Mr Karam lacks integrity and is dishonest in that he assisted Mr Bain when he knew or should have known that the evidence did not support the conclusion that Mr Bain was not guilty. However, the basis for the opinion is the statement previously attributed to Mr Karam. Therefore the defence of honest opinion succeeds.

FB 22

[59] Mr Parker posted FB 22 on 12 October 2009:

I think this case is interesting because it involves two complex and fractured personalities: that of David Bain and Joe Karam, who have jointly conspired to create this circus out of the media and our justice system.

[60] I do not consider the comments regarding Mr Karam's personality to be an attack on his integrity. However, the second sentence of FB 22, in my judgment, conveys that Mr Karam lacked integrity in his support of Mr Bain, the suggestion plainly being that his efforts were not directed at a genuine issue but that he and Mr Bain had deliberately misused both the media and the criminal justice system. To that extent I consider the post to be defamatory. However, I also consider that it is an expression of opinion for which a sufficient basis existed in the fact of Mr Karam's publicising of Mr Bain's position. Mr Karam's efforts through his books and interviews were well known and it was open to Mr Parker to express his own opinion as to the nature of those efforts.

[61] This post by a third party said:

I strongly believe that Karam knows the truth. Once he had access to all trial documents and had talked with Guest he couldn't have had any doubt but he had already allowed himself to be seen as champion of the cause (photographed outside the Privy Council as the anonymous benefactor) and so couldn't bare [sic] to lose face. I wouldn't be surprised if that was the reason he "let Guest go" as legal advisor (Guest may have had more scruples than he has been credited with!).

[62] Whilst this statement also impugns Mr Karam's integrity by suggesting that he deliberately promoted Mr Bain's innocence when he knew that he was not innocent, it is an opinion founded on the basis of the trial documents and the author was entitled to express that view. The defence of honest opinion therefore succeeds in relation to this statement.

FB 24 "Karam speaking engagement"

[63] FB 24 relates to a letter written by Mr Parker to St Patrick's College and reproduced on the Facebook page. The purpose of the letter was to dissuade the College from inviting Mr Karam to speak, or at least to speak about the Bain case. The relevant portion stated:

... I ask you to look at the other side of the case which has not received Karam inspired media attention and in which the conclusion is that David Bain is most likely guilty and that Joe Karam has caused considerable damage to at least one policeman's career, slandered a dead person who cannot defend himself, cost the country millions in legal aid for a false campaign and undermined the NZ Justice system.

[64] I find that ordinary meaning of this statement is that that Mr Karam has defamed people and defrauded the LSA and the taxpayer through obtaining millions of dollars in legal aid on the strength of Mr Bain's innocence when he knew that Mr Bain was guilty. It undoubtedly means that Mr Karam lacks integrity. Read in its entirety I am satisfied that the statement is an expression of opinion. However, there is no reference to specific facts on which that opinion could be seen to be based, nor any general indication as to the basis for the conclusion. The defence of honest opinion fails.

FB 25 and 26

[65] FB 25 was a statement by Mr Purkiss suggesting that Mr Karam was not being honest with himself about David Bain's guilt:

Hey joe. If you read the evidence and are true to yourself you discover like I have that David Bain is guilty of murdering his family and Robin Bain is an innocent man. Joe, you got it wrong and a man that could kill again is walking the streets a free man all due to you.

[66] I find that the statement conveyed that Mr Karam lacked integrity in that he has deliberately ignored the evidence of Mr Bain's guilt. However, the reference to the evidence and to Mr Purkiss' view based on the evidence takes the statement into the realm of an expression of opinion and provides a factual basis for that opinion. The defence of honest opinion succeeds in relation to FB 25.

[67] FB 26 is part of a post by Mr Parker soon after FB 25. The whole post said:

I do not want to choke democracy by suggesting that Karam not be allowed to write his books but he shouldn't be allowed to have a retrial if he is writing them for the purpose of obtaining 'justice'. Self-expression yes but 'justice' no because his books are inherently too biased and he has positioned himself to directly benefit (from compensation and other payouts).

He should stick to fiction because that is what he is best at. He shouldn't be slandering dead people for the sale of his writing career or any other part of his career for that matter, which is basically all he has done.

[68] It is only the latter part of the statement that is sued on. The ordinary meaning of this statement is that Mr Karam's writings on the Bain case were inaccurate and defamatory and written to advance a career as a writer. I find that it does convey that Mr Karam lacks integrity. However, it is plainly an expression of opinion about Mr Karam's books. Mr Parker was entitled to express a view about that.

FB 27, 28 and 30 – "The Blind Tyranny of Belief"

[69] These posts were by Mr Parker on 14 September 2009. FB 27 said:

When it comes to truth, evidence, thought, and discussion, Joe Karam is a tyrant.

2. In terms of evidence, he carefully smudges each item that incriminates David Bain to such an extent that it opens the door to reasonable doubt, while at the same time promoting an alternative scenario so believably ridiculous that would make the Nazi Gestapo proud.

4. In terms of discussion, Karam deals with opponents to his belief system with vitriol, bullying, defamation suits and other such attack methods. He is not capable of rational discussion and only acceptable of ideas that fit his belief system.

Karam would be right at home in another type of political climate, such as North Korea but he is in a place where democracy and scientific reasoning prevail.

Karam's tyranny might be small and irrelevant, but it is a tyranny nevertheless.

[70] FB 28 said:

... so all the things said in representation of DB have been JK inventions.

the David Bain case is about Joe Karam testing his meticulously constructed belief system.

[71] The meaning of these posts is that Mr Karam improperly threatens those who disagree with him, misrepresents the evidence, uses methods such as those used by the Nazi propaganda and is to be compared to political tyrants such as those controlling North Korea. The post is a mixture of assertions of fact and opinion. But I find that the assertion that he "smudges" evidence is a statement of fact and the assertion that he responds to those who disagree with him by improper threats is an assertion of fact, neither of which was proven. The statements comparing Mr Karam's methods to those used by the Nazis and that he is tyrannical and fairly compared to those in power in North Korea are also assertions of fact. The statements certainly convey that Mr Karam lacks integrity and is dishonest but more than that, is guilty of such gross distortion of the truth as to be compared to Nazi propagandists. They are unquestionably defamatory and are not expressions of honest opinion.

[72] FB 30 said:

We find that over 2 mil has been handed out by Legal Aid Services to defend DB, which is the greatest sum ever, and Robyn Nicholas forked out \$330,000 to JK as legal assistant because of his extensive knowledge/obsession/tyrannous hold on the case (see item 1 in the post).

...what's to say that he can't sway the caretakers of the legal system, such as Robyn Nicholas and the one crucial QC who looks at the case, into giving him what he wants?

[73] Although this post does express an opinion about Mr Karam as being someone who has an obsession about the case and a "tyrannous hold" over it, it does not convey any dishonesty on Mr Karam's part and, further, refers to facts regarding the amount of money paid to Mr Karam by LSA, thereby providing a factual basis for the opinion being expressed. The defence of honest opinion therefore succeeds in relation to this post.

FB 31

[74] This post by Mr Purkiss said:

I believe he knows db is guilty but having come this far how can he now back down?

[75] The meaning of this is obvious. It conveys that Mr Karam lacks integrity, is dishonest and misrepresented his motivation for helping Mr Bain. It is defamatory. There is no reference in the post itself to suggest any factual basis for thinking that Mr Karam believed David Bain to be guilty. Nor, when one goes back through the previous posts in this thread, is there any factual material from which that conclusion might have been drawn. The defence of honest opinion fails in relation to this post.

FB 38 – "Book Canned"

[76] FB 38 by Mr Purkiss appeared well into a conversation about news that Harper Collins had decided against publishing another book about the Bain case (not by Mr Karam). Mr Purkiss said:

Harper Collins must know they have made a bad investment regarding Noddy's proposed new book. The pro-Bainers have lost interest in the whole thing as they believe they have achieved their aim. You only have to look at their sites to see how uninterested they are in defending him against the likes of us. Not that I suppose they have to bother.

I think a new book which contained the evidence that Robin Bain is innocent would be a far better seller and perhaps Harper Collins should commission someone to produce a book along those lines to recoup some of the dosh they would of [sic] already advanced to Noddy.

Any new book from Noddy will only be about him so perhaps he should title it “Mein Kampf”.

[77] The complaint is that the emboldened part of the statement conveyed that Mr Karam’s methods can be equated with those of the Third Reich. I do not consider that the statement does have this meaning. The meaning is stated clearly, namely that anything Mr Karam writes will likely be about him. The reference to Hitler’s book *Mein Kampf* may invite parallels with Hitler given previous posts referring to Hitler and Goebbels. But in the context of the conversation it forms part of I think it more likely a suggestion that Mr Karam was only interested in writing about himself. The claim fails in respect of this item.

The Counterspin website

CS 4 and 6

[78] Both these statements appear in the same article by Mr Parker on the Counterspin home page on 8 January 2011. They said:

This site has been put together to counter the spin surrounding David Bain that has been publicly promoted over the last decade or more by Joe Karam in his insistence that David is innocent of the murder of his family. In the retrial of 2009 certain elements unique to this case have produced a result that is unlikely to reflect the truth ...

In light of the above, Joe Karam did not hesitate to file defamation suits against people who published supposedly unsubstantiated material about him and has created an atmosphere of constant threat in the media which has had the effect of stifling constructive criticism of his campaign.

[79] CS 4 is said to carry the meaning that Mr Karam lacks integrity and is dishonest. The word “spin” means, in this context, placing a particular slant (usually favourable) on a situation. It is generally regarded as pejorative. However, the first sentence alone falls short, in my judgment, of actually conveying that Mr Karam lacks integrity or was dishonest. It is a statement made against the background of Mr Karam’s very public efforts, including the production of several books, about the David Bain case. It would, even if I considered the meaning to be defamatory, attract the defence of honest opinion. The second sentence makes no mention of Mr Karam and certainly satisfies the requirements of honest opinion.

[80] In comparison, I consider that CS 6 does carry the meaning attributed to it, that Mr Karam makes improper threats to anyone who disagrees with or opposes him. The meaning is plainly that Mr Karam threatens defamation suits where grounds for doing so either do not exist or are doubtful and does so in order to prevent criticism of his support for Mr Bain. However, general knowledge of Mr Karam's defamation suits provides a factual foundation on which this opinion can be based. Therefore the defence of honest opinion succeeds.

CS 7

[81] This statement also appeared on the home page of the Counterspin website. It said:

There also remains the question of compensation and if this goes ahead then more than \$1 million of taxpayers' money could be paid out. As a result of an agreement made in 1996 Joe Karam is entitled to receive half. He may be on a campaign for justice but he is also lining his own pockets in the process, thank you very much to you, the taxpayer. In many ways Joe Karam has made David Bain a career strand and is endeavouring to make as much money out of the case as he can ...

[82] Only the last two sentences of this statement are sued on. Plainly, they do mean that Mr Karam lacks integrity and has misrepresented his real motives for supporting Mr Bain. The preceding two sentences, if correct, would provide a factual basis for the subsequent opinion. However, Mr Karam confirmed in evidence that while in 1996 he signed an agreement which gave him an entitlement to half of the proceeds, this agreement had been superceded by the creation of a second agreement shortly after the first. Therefore, the defence of honest opinion fails, as at the time the statement was written it was not correct that Mr Karam was entitled to half of the case proceeds.

CS 8 – “*conflicting evidence*”

[83] This post said:

Joe Karam made much of the computer timing and the bloody sock prints but they are probably both red herrings, much in the same way that a rugby player feints a pass in order to hide their real intention of blunderbusting [sic] all the way to the goal line.

[84] The complaint is that this statement suggested that Mr Karam lacked integrity and misrepresented his real motive for supporting Mr Bain. The clear suggestion in the statement is that Mr Karam deliberately overstated the significance of the computer timing and the sock prints in order to hide other flaws in the defence case. Whilst that may convey a lack of integrity, it is undoubtedly an expression of opinion which was made against the fact that Mr Karam had written about (among other things) the computer and the sock prints. Further, that statement was part of a post that included the assertion that the margin of error of the computer and witness testimonies and margin of error in the evidence of expert witnesses about the footprints was sufficient to allow for both defence and prosecution scenarios. Looked at in its entirety, I consider that CS 8 was a statement of honest opinion.

CS 9 – 11 “how the not guilty verdict was obtained”

[85] This post took the form of a number of short points, three of which are sued on. They are:

Karam used his personal charm and influence to convince a sizeable proportion of the population that his cause has merit and that David Bain is innocent. This was done without reference to facts but simply through persistent promotion and persuasion ...

Karam enlisted experts from around the world to testify on technical aspects of the case and smudging what would otherwise have been robust incrimination evidence against David ...

With careful use of overseas experts Karam was able to narrow the requirements for reasonable doubt to such an extent that even the most unlikely sequence of events is given a reasonable chance of occurring.

[86] Mr Karam complains that CS 9 meant and was understood to mean that he lacked integrity and was dishonest. I find that the words meant that Mr Karam did not refer to any facts in his promotion of the defence scenario but relied solely on personal charm and influence. This amounts to a lack of integrity; given the extensive consideration given to the evidence in Mr Karam’s books (whether one agrees with it or not) this statement of opinion had no basis and, to the contrary, suggested to readers that there were no facts on which to assess the opinion.

[87] CS 10 and 11 are said to have meant and be understood to mean that Mr Karam lacks integrity, acted improperly and counter to the interests of justice in

assisting in David Bain's defence. However, the only objectionable aspect of either of these statements is the use of "smudging", the ordinary meaning of which is to make blurred. Since Mr Karam did arrange expert witnesses and, in the context of a criminal case, that could have been only for the purpose of raising a reasonable doubt, I do not see that these statements are defamatory. They would, in any case, satisfy the honest opinion defence.

CS 13 – "create a following using personal charisma and influence"

[88] This lengthy post includes the statements that:

All you need is a charismatic leader and a slightly wacky cause or philosophy, tie that in with a decade of passionate ambition and persuasion and you have the makings of a cult. Like Ron Hubbard of Scientology fame, Karam is business wise and money savvy. He knows how to work an audience both through books and other forms of self-promotion. He knows how to upset the authorities and make them look mean and unforgiving in the public eye. Furthermore he knows how to take a grain of untruth and turn it into the biggest of truths ...

His promotion and propaganda has gathered around him something akin to a cult following consisting of people who are willing to overlook considerable empirical evidence ...

Once a cult has been established with its ingrained belief system it is very hard to remove especially if its leader continues to write books and attempt to profit from any social vindication of its fundamental beliefs (eg the not guilty verdict in the retrial) ...

Cult leaders generally prey on insecurity and the need for escapism. By focusing on the needs of another person you can escape dealing with your own problems. One has to wonder what the initial belief fulfilled in Joe Karam when he allowed it to overcome his life and become an obsession ... For [Paul] Holmes to describe Karam as obsessed ... illustrates two things ...

That he really does have a problem. Calling Karam obsessed is not a compliment. There is at least one clinical psychological disorder that involves obsession ...

[89] The complaint is that these statements meant and were understood to mean that Mr Karam lacked integrity, was dishonest, misrepresented his real motives for supporting Mr Bain, used a propaganda of lies, innuendo and fabrication and had a personality disorder. The general thrust of these statements is to suggest that Mr Karam worked to create a type of cult through his promotion of the Bain cause and had an unhealthy obsession with the case, suggestive of a personality disorder. I

accept that the statements did mean and were understood to mean what is alleged and were defamatory.

[90] However, it is also clear that the post is an expression of opinion and, further, that it is an opinion based on known facts about Mr Karam, such as the level of time and energy he has put into the Bain case, the promotion of the defence case through his books and the NZ Herald interview with Paul Holmes in which the latter described Mr Karam as being obsessed with the case. In these circumstances there is a sufficient foundation for the statements made to find that the defence of honest opinion is made out.

CS 14, 16 and 17 – “13 years’ promoting one point of view”

[91] This post was relatively short and contained the following statements:

[During the 13 years Mr Karam had been supporting Mr Bain] the result was a power of a lot of propaganda ... With so much time and influence pushing towards the idea that David is innocent, empirical facts have been smudged and the door of reasonable doubt has been opened so wide that many now claim that Bain is innocent ...

If you promote a fallacy enough eventually you can make it a fact.

[92] Mr Karam complains that these statements meant and were understood to mean that Mr Karam lacked integrity, was dishonest, used a propaganda of lies, innuendo and fabrication. I agree that the statements complained of do mean and would have been understood to mean that Mr Karam misrepresented facts and evidence to such an extent as to persuade people that Mr Bain was innocent, when he was not. However, those statements are to be read in the context of the post as a whole. The post refers to the fact that for some 13 years Mr Karam had written books and articles and been the public face of Mr Bain’s cause and promoted the opinion that Mr Bain was innocent. The author also points out that because the Crown had so many other crimes to deal with and no-one else had the authority, time or money to promote Mr Bain’s case there was little opposition to it. Whether the conclusions that the author drew from the extent of Mr Karam’s involvement in the Bain case are justifiable is not the issue. I consider that the reference to factual matters relating to Mr Karam’s involvement in the Bain case provide an adequate

foundation for the expression of opinion recorded in that post. The defence of honest opinion succeeds in relation to these statements.

CS 19 – “muddied waters”

[93] This post opened with the reference to Mr Karam’s initial involvement in the Bain case including the agreement he had that he would receive half of any earnings that Mr Bain might one day earn from the proceeds of the case (and the fact that Mr Karam had referred to this agreement in his book *David & Goliath*). The author went on:

While proving David’s innocence is important to Karam, he must have gone into this with some idea of the potential to earn it into a money spinner for himself.

Karam would have us believe that he has spent a lot of his own money on this case but it is also evident that he spent a lot of taxpayer money as well, not only during the retrial but also for the Appeals that he undertook. In addition, over the years he has earned money from legal aid, publishing books, law suits against journalists and through fundraising. If he is successful in his bid for compensation then he gets half of the payout for himself ...

During the retrial Karam’s defence team managed to draw over \$2 million of legal aid, the largest amount ever for a single trial. Of this Karam took his slice as remuneration for his work in assembling the documents for the case.

[94] The complaint is that these words meant or were understood to mean that Mr Karam lacked integrity, had misrepresented his motives for supporting Mr Bain and had defrauded the LSA. I agree that the ordinary meaning of the words conveyed and would have been understood to mean that Mr Karam did support Mr Bain at least partly for financial motives and that he obtained legal aid money for work that did not justify such payment. However, all of these statements are plainly expressions of opinion and offer as their foundation information known to be in the public arena and to be correct. In these circumstances the honest opinion defence succeeds.

CS 20 – “Arthur Allan Thomas’s 30th”

[95] This post was, unlike the previous Counterspin posts I have discussed, made by a third party. It referred to Mr Thomas’ recent celebration of the 30th anniversary

of his pardon and the fact that Mr Karam and Mr Bain had attended the celebration.

The author then said:

... Karam will do anything to manipulate events in his quest for a Compensation hand out ... [The author refers to journalist Pat Booth and scientist Dr Jim Sprott who were involved in the Thomas case] they did not eg seek Power of Attorney or 50/50 split or engage in media manipulation etc. And so it goes on. Incidentally who paid for Arthur Allan Thomas' trip to Christchurch for the retrial?

[96] Mr Karam complains that these statements meant and were understood to mean that he lacks integrity and uses methods that involve a propoganda of lies, innuendo and fabrication. I agree that the ordinary meaning of the statements was that Mr Karam lacked integrity and would therefore do anything, including using cynical or improper means to obtain compensation for Mr Bain, that he was compared unfavourably with those involved in the Thomas case because he had arranged a power of attorney and a share of any compensation and also implied that he had paid for Mr Thomas to go to Christchurch for the retrial as a means of manipulating the media. This post was defamatory. However, it also offered a factual basis for the opinions being expressed. Mr Karam acknowledged holding a power of attorney for Mr Bain. Although reference to the superceded agreement for half of the proceeds is inaccurate and does not provide a factual basis, Mr Karam acknowledged holding a power of attorney and I am satisfied that this alone provides a foundation for the opinion. The honest opinion defence succeeds in relation to this post.

CS 21 – “Yahoo does it AGAIN”

[97] This post, also by a third party, refers to a news report on the website Yahoo.com which referred to Mr Bain as “a man who also knows what years of wrongful imprisonment means”. The author says:

The article comes from NZPA – a reporter no doubt hand picked by karam ... Perhaps legal action against [NZPA] as a deterrent to lie? karam is quick to throw out threats and this should be countered.

[98] Mr Karam complains that these statements meant and were understood to mean that he lacks integrity. I agree. The implication these words carry is that Mr Karam interferes with or improperly influences journalists so as to secure untrue

stories in the media. The statements do have the flavour of expressions of opinion but offer no foundation or factual reference that would support the defence of honest opinion.

CS 25 and 26 – “Karam gets 50 per cent of income from case???”

[99] This post by a third party said:

That’s an outrageous fact – I can’t believe it! Joe Karam gets 50 per cent of money from David Bain’s proceeds from the case??? All along I’ve been wondering why this guy keeps supporting David Bain despite the evidence. Thanks for that information, it’s intriguing and it clarifies things for me. Great rugby player, great investor!!

[100] Immediately after that, Mr Parker responded by advising of a link relating to “Karam’s income sources from the case” and then said:

In many ways he is simply running this as a business.

[101] The complaint is that these posts meant and were understood to mean that Mr Karam had misrepresented his motives for supporting David Bain and was doing so as an investment, to make money. I agree that the posts do carry that meaning. Further, the first post indicates the basis for the author’s opinion as being the thread title suggesting that Mr Karam would receive 50 per cent of income from the case. The second post provides a link which would, if it contained correct information, have provided an adequate foundation. However, Mr Parker was not able to demonstrate the accuracy of the information contained in that link or the assertion that Mr Karam would receive 50 per cent of the income from the case. As a result, the honest defence fails in relation to these statements.

CS 36 – “muddied waters”

[102] This post is a promotion and comment on an online book “Muddied Waters”.

The description of it was:

Brian gives a very good account of Karam’s character and methods as well as an analysis of the retrial from a legal perspective. He describes Karam’s uncompromising style, his penchant for “obfuscating” the facts of the case and his tendency to play “Justice” like a game of rugby using the rules of the game to maximum advantage.

[103] This is an expression of opinion about the book being described. It falls well within the scope of honest opinion.

CS 39 and 41 – “the Court of public opinion P5”

[104] These two statements form part of an article (for want of a better word) posted on Counterspin:

I have a name for the Joes of this world. I call them the “high grounders”. They are the ones who claim the high ground of each argument. They are the ones who generally precede a claim they make in the argument with a phrase such as “most thinking (or informed) people will agree that”. Having claimed the high ground, woe betides anyone who disagrees with them. Unfortunately their strategies often work. The timid hearer or reader is cowed into submission and decides that whatever one, so smart as to speak that way, is saying must of course be true. Bullshit, or to put it more politely: “obfuscating”.

[The author then discusses the dictionary definition of the word “obfuscate”, including the fact that Joe Karam used it in one of his books].

Unfortunately for Joe the word is a two-edged sword, as capable of being directed at him as for him. His method of campaigning is to “obfuscate”, to blacken everything and everyone in the opposing camp.

[105] Mr Karam pleads that these statements meant and were understood to mean that he lacked integrity and was dishonest. I consider that the meaning of the words is, self-evidently, that Mr Karam sought to mislead the public over the Bain case through obfuscation and through blackening those who did not agree with him. I agree that these meanings do convey that Mr Karam lacked integrity and was dishonest. Although there is mention in these statements of strategies and methods used by Mr Karam, there is no specific example given, no indication either specific or general, of the basis on which the author concluded that the methods and strategies were obfuscation. The defence of honest opinion therefore fails in relation to these statements.

CS 53 and 58 – “what is justice?”

[106] On this page of Counterspin there is a lengthy article by Mr Parker that discusses Mr Karam’s reference in David & Goliath about the book, Death Comes As the End, found beside Robin Bain’s bed in the caravan and whether it might have

had any relevance to Robin Bain's state of mind. The author of the post says in the course of this article:

The obvious conclusions that present themselves at the start of the programme or the beginning of an Agatha Christie novel never pan out. That is the essence of entertainment but real life is usually much more straightforward. **Perhaps Joe's real gift lies in writing fiction ...**

[Later in the same article the author referred to evidence about Laniet Bain's relationship with her father not presented at the first trial] ...

It is true that the hearsay evidence regarding Laniet's alleged relationship with her father was omitted from the first trial but there is more to the story than what Karam makes out.

[107] Mr Karam alleges that these statements meant that he lacked integrity and was dishonest. As to the first, I consider it to be plainly an expression of opinion and plainly based on the author's view about Mr Karam's book David & Goliath. It is a statement that falls within the scope of the honest opinion defence.

[108] CS 58 is different. The statement regarding the evidence about Laniet was not preceded by any discussion and is in the nature of a statement of fact not opinion. The author conveys that Mr Karam has withheld information about this evidence, the implication being that he did so dishonestly. I consider that CS 58 is defamatory and is not a statement of opinion.

CS 60 and 61 – "Joe Karam wears his defamation suit"

[109] This article addressed the approach Mr Karam had made to the "Justice for Robin Bain group" about defamatory comments on the Facebook page. To put the statements sued on in context I set out most of Mr Parker's comments; those which are sued on emboldened:

On Christmas Eve three members of the justice for Robin Bain group were issued with a defamation warning from Joe Karam. This was not surprising given the often provocatively defamatory manner of some of the posts on the Facebook site and the way in which the site was represented in the press. The problem with Karam's defamation threat is that he was not able to cite any passages that he considered defamatory ...

What does it say about a person when they make a defamation threat and ask you to remove defamatory material when they are not able to cite the offending comments? ...

In response to his threats we have made the Facebook site private because it is very difficult to moderate or search the posts ...

On the Counterspin site great care has been taken to screen out any content that is potentially defamatory, even against David Bain, so it is not surprising that Joe Karam has not been able to cite anything. May be he made that threat before he actually looked at the content who knows. **The only conclusion I can make is that he sought to bully and intimidate. What does this say about the man and his methods?**

While Karam did not cite any particular comment or post he did say that someone had made suggestions that he defrauded the legal aid system. **Prior to this I had always thought that, while excessive, Karam's legal aid reimbursements were absolutely clean and pure and had never for a moment thought that he might have done anything dodgy. Now the thought that this may not be the case has been well and truly established in my mind by Mr Karam himself and I am having difficulty removing it.**

It is now almost a month since Joe Karam made his defamation threat and we await with eager anticipation just exactly what we have said that is actually defamatory and not simply fair and robust criticism ...

[110] I consider that both statements are expressions of opinion and, further, the basis on which they have been made are set out clearly in the body of the article. The honest opinion defence succeeds in relation to these statements.

CS 65 and 66 – Posts following the “where’s Joe’s defamation suit now?” article

[111] On 26 March 2010 the Counterspin posts record an editor’s note that the thread had become too long and the posts increasingly inflammatory so “I have called it quits on anymore comments”. Posts continued to be made over the next day or so. On 28 March 2010 the issue of Mr Bain’s application for compensation was raised. At a fairly early stage in that discussion Mr Purkiss posted CS 65:

An application or are they just discussing the possibility of making an application with SP? [Presumably Simon Power, the then Minister of Justice].

A discussion first up makes sense to me as I’m sure the MoJ would tell them if they are wasting their time as he would of [sic] had many discussions about this already with some people close to the case. He may be able to tell them not to waste their money, sorry, I mean our money and time.

The next major headline could easily be “Bain withdraws compo application” in which case the family had better be prepared for a claim for the inheritance ... There could also be writs for defamation flying about as they will want some dosh from someone!!!

It's always been about the money!!!

[112] Immediately following Mr Purkiss' post Mr Parker posted CS 66:

Yes it is all about the money and that includes the media as well ...

Karam knows full well that his case would fail an inquisitorial examination by a QC ... His only bet at compensation is through some kind of special circumstance.

[113] CS 65 does not specifically mention Mr Karam. However, looked at in the context of the preceding posts, particularly a longish post by Mr Parker two hours prior to Mr Purkiss' post, it is obvious that the object of the comment was Mr Karam. Likewise, it is clear from the entirety of Mr Parker's post, CS 66, that he is discussing Mr Karam.

[114] The complaint is that these posts conveyed that Mr Karam lacked integrity and was dishonest. I consider that the posts do convey, plainly, that Mr Karam was motivated solely by financial gain in his support of Mr Bain and that necessarily conveyed that he lacked integrity or was dishonest. There is no indication, either specific or general, to support or to indicate the basis for these opinions. The honest opinion defence fails in relation to these statements.

CS 67 – 70

[115] These three posts, all by Mr Parker, were made on Tuesday, 30 March 2010. CS 67 was a response to a previous post about defamation law:

Ahr ... nostalgia, the good old days. I think that you will find that newspapers in the past were just as, if not even more candid than you think the internet is now. Defamation law was brought in to stop papers from making those very unfounded allegations that you describe so that people with a lot more merit than Joe Karam could defend themselves from false allegations.

[116] Mr Karam says that this post meant and would have been understood to mean that he makes improper threats of defamation proceedings to anyone who disagrees with him. The statement is not specifically directed towards Mr Karam; he is used as an example of the point being made about the laws of defamation. However, aside from the muddled reference to someone in Mr Karam's position defending

themselves (as opposed to asserting themselves through proceedings), I find that the statement does convey that Mr Karam uses the defamation laws improperly. Since there is no indication in that post or in any of the preceding posts on that day or the previous day to indicate the basis for the assertion, I find that the defence of honest opinion fails in relation to it.

[117] CS 69 appeared later the same day in the context of a discussion about aspects of the evidence discussed in David & Goliath. Mr Parker posted:

That book really should be in the fiction section.

[118] There is no specific assertion of meaning pleaded in the second amended statement of claim in relation to this statement. In any event, I consider that it simply conveys the author's disagreement or non-acceptance of statements made in David & Goliath that have been discussed in the preceding posts. This statement would attract the defence of honest opinion.

[119] CS 70 was also posted on Tuesday, 30 March 2010 and was a response to the criticism a post that said the objective of the site was unclear. Mr Parker replied:

The objective of this site is simply to counter the spin that Joe Karam has supplied about the case ...

[120] Mr Karam complains that this statement meant that he lacked integrity. I already formed the view in relation to CS 4 that a very similar statement fell short of conveying that Mr Karam lacked integrity. It was an expression of opinion made against the well-known background of Mr Karam's speaking and writing on the Bain case. I do not consider it to be defamatory and I do consider it to be an expression of honest opinion.

CS 71

[121] This post by Mr Parker on Wednesday, 31 March 2010, was part of an ongoing conversation with the same person that criticised the Counterspin website. The conversation canvassed the various aspects of the evidence. Although the previous posts had not mentioned Mr Karam, Mr Parker did turn his attention to Mr Karam's part in the retrial and concluded that:

The other aspect of this case is the length to which Karam went to promote his belief. Not only have there been several books but there was also a 37 page promotional pamphlet. Now all of this is a reminiscent of a product campaign; media appearances, books, pamphlets and Karam is an entrepreneur with a nose for a buck. He has used every trick in the book to try and lever a positive verdict out of this and along the way lined his pockets with various forms of royalties, legal aid payments and defamation suits.

[122] The complaint about this statement is that it meant that Mr Karam lacked integrity, had misrepresented his real motive for supporting Mr Bain and had defrauded the LSA. I accept this allegation. The plain meaning of these statements was that Mr Karam was motivated solely by money in seeking to ensure that there was an acquittal at the retrial and had cynically used his writing and media appearances for financial gain. Further, it conveyed that he obtained legal aid payments to which he was not entitled and issued defamation suits for which there was no basis, all for financial gain. The statements were made against the public knowledge of Mr Karam having received legal aid payments and having commenced defamation proceedings. However, those facts provide a factual foundation for the comments. I find that these statements were defamatory but that the defence of honest opinion succeeds in respect of them.

CS 72

[123] This post by Mr Parker was made on Thursday, 1 April 2010. It was part of an ongoing conversation about the evidence in support of and against Mr Bain's position. Mr Parker said:

... The only thing opposing or nullifying the many points of evidence is Karam's completely untrained observations and insistent persuasions not to mention smoke and mirrors, fudging and smudging ...

Again, more strands to the rope: Joe Karam is an entrepreneur. He is not a social activist. He is not in this to uncover the truth. He is in this to win and do something for himself not for society or the justice system.

[124] Mr Karam complains that these statements meant and were understood to mean that he lacked integrity, had misrepresented his real motive for supporting Mr Bain, had used a propaganda of lies, innuendo, fabrication, smoke and mirrors to advance Mr Bain's defence. I agree with these characterisations. The ordinary meaning of these statements is that Mr Karam misrepresented the evidence and was

solely motivated by money in his support of David Bain. The meanings are defamatory. They do not indicate any basis, specific or general, on which these views could be seen to have been founded. The defence of honest opinion fails in respect of them.

[125] This post, made on 7 April 2010 by a third party, was part of an ongoing conversation about the evidence at the two trials. This particular post centred on the time of Mr Bain's arrival at home:

Now the problem with my reconstruction was Denise Laney's sighting of Bain going through the gate at 65 Every Street around 6.45. Why the difference I asked myself. And, just like Karam, I tried to fudge. Maybe Bain's watch was slow. Maybe he forgot to pick up the paper at the gate ...

[126] The allegation is that the statement conveyed that Mr Karam lacked integrity. The statement, read in its context, was defamatory. The discussion is a general one about the uncertainties around trying to identify the precise time of Mr Bain's arrival at home, and this provides no factual foundation for the assertion that Mr Karam 'fudges'.

CS 75

[127] This post by Mr Parker was made on 1 April 2010 shortly before CS 72 and in the context of the conversation about the various pieces of evidence. Mr Parker had posted a list of bullet points of evidence that he saw as suggesting that Mr Bain had committed the murders and another series of bullet points suggesting that Robin Bain may have done so. There was a brief intervening post and then Mr Parker said:

I might also add that the Defence cooked up some story that Robin Bain was "clinically depressed" which cannot be true because you cannot be clinically depressed while at the same time working fulltime and you have to be diagnosed by a psychiatrist or a clinical psychologist following a suitable examination. This story was generated by an educational psychologist who testified decades after the crime that Robin appeared depressed during a school interview or session or something. **So Karam leapt upon this revelation to declare without grounds that Robin was clinically depressed. He has been reported as such repeatedly in the press ever since when it fact that is quite false.** If Robin appeared sad/depressed at times maybe it was because of the situation at home and maybe the behaviour of his eldest son contributed significantly to that emotion.

[128] The complaint about this post is that it is said to have meant that Mr Karam lacked integrity, was dishonest, a liar, that he used lies, innuendo and fabrication. The first sentence does not refer to Mr Karam. However, read as part of the entire post there is no real doubt that the reference to defence is a reference to Mr Karam. That first sentence plainly suggests, by the use of the phrase “cooked up” that Mr Karam promoted the idea of Robin Bain being depressed knowing it to be untrue. However, it is evident from the rest of the post that this and the second statement sued on in the post were conclusions drawn from the report of Robin Bain having appeared to be depressed. I consider that these statements are, in reality, expressions of opinion and that the basis for them is indicated clearly in the statement itself. The defence of honest opinion therefore succeeds in relation to this post.

CS 83 and 84

[129] These two posts, one by a third party and one by Mr Purkiss, on 3 and 4 April 2010 relate to a report regarding the registrar of the Privy Council. The preceding posts were general discussions about the Privy Council hearing and retrial. The post CS 83 by a third party said:

If you are in contact with the Privy Council why not ask for some information on Mary McDonald aka Parrot Woman, is she still on “gardening leave” or has she been dismissed. It could be very interesting if this situation is related to the Bain case.

She had a huge influence on the Law Lords, it almost seemed like she was the one who decided yes or no for the second trial.

[130] The intervening post rejected that idea saying he was “not going there”. Mr Purkiss responded:

I understand you not going there regarding the Parrot Lady Mike as if they (the PC) are replying to you and being cooperative you don’t want to upset them.

But I, as you know, do think her “gardening leave” (dismissal) does have something to do with this case ...

[131] These posts are said by Mr Karam to convey that he lacks integrity. However, Mr Karam is not mentioned at all in these posts. It is true that Mr Karam was publicly linked with the Bain case and with the Privy Council appeal. But there

is simply nothing in either statement that could be read as a direct attack on Mr Karam personally.

CS 85

[132] This post by a third party on 6 April 2010 said:

Apart from the “not guilty” plea does anyone know if he has ever actually said he didn’t do it? JK keeps trying to blame Robin, as far as I can recall I don’t think DB actually said that either. He also denied the incest between his father and Laniet, that was another accusation by JK with no real basis in truth.

[133] Mr Karam says that this post conveyed that he lacks integrity and I agree that it meant or would have been understood to mean that Mr Karam made several accusations that, to his knowledge, were untrue. Further, it is a statement that is couched as a statement of fact rather than opinion. There is no indication, specific or general, as to the basis for it. The defence of honest opinion fails in relation to this statement.

CS 86

[134] This post by a third party was a peripheral contribution to a conversation between a number of contributors unrelated to the Bain case but, rather, directed towards an anonymous contributor whom others disagreed with. CS 86 said:

Please don’t get that Mr Aardvark dude mixed up with me ANTeater.

I know the cap fits the son, not the slandered father and am firmly against Baino and bad KarmaKaram getting another cent of ill-gotten gains.

[135] This statement is sued on as one that is said to convey that Mr Karam lacked integrity. I agree that it conveys that Mr Karam had received money from the Bain case which he should not have done. It conveys this as a matter of fact rather than an opinion. There is nothing in the statement to suggest that it was conclusory or suggest any basis for the statement. I find that the statement is defamatory and the defence of honest opinion does not apply.

[136] This post was made by Mr Purkiss on 24 July 2009. This post came during a series of comments regarding the apparent return of a contributor known as Plainjane. The contributor Plain Jane had offered some of the reasons she considered the acquittal to be the right verdict. Mr Purkiss said:

Jane I think you could be innocent. Either that or gullible. You have read too many of jk's books and are now part of his cult!

The Destiny Church would love you among their ranks. How many of your hard earned dollars have you donated towards the culprit's world travels?

If the defence team thought they had a chance of getting yet more money out of the taxpayer they would of [sic] done it by now but they know they have fooled as many people as they are ever going to. db is destined to live the rest of his days as a recluse and alone. Even overseas people go up to him and call him a murderer!!! jk done [sic] db no favours. IT WAS all about the money!!!

[137] This was immediately followed by CS 90 by Mr Parker:

Jane, news flash! Experts working for the Defence weren't doing so because they believed that David Bain was innocent or even Not Guilty. They made their testimonies because they got paid to and we understand many were paid fares to fly from the other side of the world to turn up for the trial and oh, maybe do a bit of site [sic] seeing as well. That's how the system works. Karam went through more than \$2 million of Legal Aid which gave him access to quite a bit of legal testimony ...

[138] And again, several posts later in which another contributor commented on the nature of expert evidence, Mr Parker went on:

Yes and it is exactly the kind of person like Jane whom Karam intended to deceive through his presentation of the "expert" Defence testimony.

Maybe "deceive" is too strong a word. Anyway, in Jane's case ignorance is bliss. She is certainly an interesting example of the effectiveness of a good PR/propaganda campaign, the absolute antithesis of all the things that we should have in a good justice system ...

[139] Mr Karam sues on these statements, alleging that they were meant and were understood to mean that he lacked integrity, had misrepresented his real motives for supporting Mr Bain, acted improperly and counter to the interests of justice in doing so, had defrauded the LSA and used methods that involved lies, innuendo and fabrication.

[140] Insofar as CS 90 is concerned, I consider the statement to be defamatory. It conveys that Mr Karam lacked integrity and misrepresented his real motives for supporting Mr Bain, with any factual foundation. CS 90 and 91 conveyed that Mr Karam used legal aid money for the improper purpose of securing unreliable expert testimony from witnesses who would say whatever they were paid to say. These statements were defamatory. Further, CS 90 was couched very much as a statement of fact. Likewise, the reference to Mr Karam's "presentation" of the 'expert' defence testimony" in CS 91 is also couched as a statement of fact rather than opinion and not amenable to the honest opinion defence.

CS 92

[141] CS 92, posted by Mr Parker on 9 March 2010, was part of the ongoing discussion between the third party Plain Jane, Mr Purkiss and Mr Parker following several posts focused on what Robin Bain's death certificate may have recorded as the cause of death. In CS 92 Mr Parker discussed the difference between innocence and not guilty in the context of a criminal trial and went on to note that errors are common:

... Joe Karam successfully used minor mistakes made in the first trial to get the Privy Council to declare it a miscarriage of justice. Joe Karam is like the insistent door-to-door shoe salesman that you finally given in to on his one hundredth visit to your door, after offering you all manner of discounts and persuasive illustration, colourful brochures and endless family stories. That is all that Joe Karam is. He is not a legal professional. He does not have any professional ethics he has to live by, yet he managed to suck \$330,000 of our taxpayer money out of the legal aid system as a "legal representative" on \$70-90 an hour. He is an expert in smoke and mirrors and he will play people like you until the day he dies. You don't seem to understand that he was/is completely obsessed by this case in what is probably quite an unhealthy manner and is prepared to see it through regardless of the truth. He had sufficient money and high level contacts to ensure that the Justice System would eventually give in and not hold Bain in jail and then provide only a half-hearted Prosecution case ...

[142] Mr Karam alleges that this post meant that he lacks integrity, misrepresented his real motives for supporting Mr Bain, acted improperly in relation to Mr Bain's defence, defrauded the LSA and used methods involving lies, innuendo, fabrication, smoke and mirrors.

[143] CS 92 contains a mixture of opinion and statements of fact. I agree that the statement does convey that Mr Karam lacks integrity, misrepresented his motive for supporting David Bain, acted improperly in relation to the defence and used methods that involved smoke and mirrors. These were all expressions of opinion but without any indication as to a factual basis. The statement relating to legal aid is also an expression of opinion by virtue of the word “suck” which connotes obtaining money that he was not entitled to. However, it is plainly based on the public fact that Mr Karam had received substantial payments from legal aid. Mr Parker was entitled to express a view on whether those payments were justified. In that respect the defence of honest opinion succeeds but it fails in relation to the other statements made in CS 92.

CS 94

[144] This post by Mr Purkiss contained the following statement which seemed unrelated to the conversation preceding it:

I still think that Parrot Lady has some answers!!! You know Lee? The PC adviser that disappeared after they had heard jk's case. OOPS sorry!! I mean db's case.

[145] The complaint over this statement is that it meant that Mr Karam had somehow improperly influenced the Registrar of the Privy Council. I do not agree that it does carry that meaning. It is difficult to say what meaning was intended but I am satisfied it was not defamatory. The claim fails in relation to this statement.

CS 96

[146] This post by Mr Parker on 13 March 2010 was addressed to potential witnesses who did not give evidence:

Yes, Koch and Buckley's evidence was not heard by the court because Karam battled tooth and nail to get them suppressed because he wanted to maximise his chance of getting a not guilty verdict by suppressing as much of the evidence as possible ...

If Karam represented the truth then there would have been no need to have this evidence suppressed.

[147] Mr Karam complains that this statement meant that he lacked integrity and was dishonest. Both of these statements convey a factual position rather than an opinion. The assertion of the reason as to why this evidence was not heard, what the outcome would have been had Mr Karam represented the truth. I find, too, that they both convey that Mr Karam did lack integrity and acted dishonestly in relation to this evidence and that he actively sought to prevent the evidence from being adduced because it would risk a not guilty verdict. This was a defamatory statement and the claim succeeds in respect of it.

CS 97

[148] This post was one that Mr Parker made in December 2009. This post was the third in a dialogue between Mr Parker and a third party over Mr Karam's role in the Bain case. In CS 97 Mr Parker referred to Paul Holmes' article about Joe Karam and went on:

In addition to the above you might also go here to see how much money he has made out of the case. Essentially this is a career strand for him and the more he can draw in legal aid to fight his good fight the more he will continue. Apparently he is looking at another case in Dunedin ...

In our opinion Joe Karam squeezed the justice system to the max to get what he wanted and it had nothing to do with Justice or the Truth but solely to do with Joe Karam getting what he wanted and winning.

[149] Mr Karam alleges that these statements conveyed that he lacked integrity, had misrepresented his real motives for supporting David Bain and had defrauded the legal aid system.

[150] First, I consider both statements to be expressions of opinion. I agree that they do mean and would have conveyed to a reasonable reader that Mr Karam lacked integrity and had continued his involvement in the Bain case for financial gain and that his involvement had no relation to justice or truth. These were defamatory statements. However, reference is made to the legal aid received by Mr Karam which provides a sufficient factual foundation for the opinion. The defence of honest opinion succeeds.

CS 98

[151] This post was made by a third party on 12 March 2010:

But what motivates Karam is the money to be made out of this mass murderer [David Bain]. Karam and David are from the same carton of eggs.

[152] The complaint about this post is that it conveyed that Mr Karam lacked integrity. I consider it to be an expression of opinion but one that is clearly defamatory through suggesting that Mr Karam knowingly supported Mr Bain for financial gain. There is no factual basis and the defence of honest opinion fails.

CS 105 and 106

[153] These posts by Mr Parker came during a conversation with a third party over the possibility of compensation for David Bain. Mr Parker said:

You say this: "Because the police didn't do a good job of gathering evidence and testing it" and all that demonstrates is that you are prone to a good bit of Karam's propagandaising ...

[154] And later in that conversation a third party posted:

If you have enough money you can buy yourself a set of expert witnesses who will testify to anything if the money's right. If I had a financial stake in the compensation I'd invest in a few expert witnesses to spin a bit of a false picture. Speaking of which, will Karam be getting 50 per cent of any compensation money? Heck, a bank would probably lend David the money, everyone knows you can buy this evidence ...

[155] The complaint is that these statements meant that Mr Karam lacked integrity, was dishonest (CS 106), acted improperly in relation to the defence (CS 106) and used methods involving lies, fabrication, smoke and mirrors (CS 105).

[156] I consider that CS 105 does convey that Mr Karam attempts to persuade or influence people through untrue propaganda. I consider that CS 106, read as a whole, was a statement of opinion that suggested that Mr Karam had paid expert witnesses for false testimony. Although Mr Karam is not specifically identified in the first sentence, the reference to the possibility of him getting 50 per cent of the compensation and references in preceding posts to Mr Karam make it clear that it

was directed at him. There is no basis indicated for the statement and the defence of honest opinion fails in relation to both.

CS 107

[157] Mr Parker made this post on 15 February 2010. The material provided does not show the preceding posts so I cannot comment on the context. However, the impugned statements come towards the end of a reasonably lengthy post by Mr Parker about aspects of the evidence and criticisms of the police investigation. He said:

How would you like if I attacked your standard of work and whatever job you do with the full force of persuasive rhetoric and multiple publications and media presentations? Do you think that I will find you make mistakes? Yes, definitely I will. We all make mistakes. Joe Karam has made lots of mistakes but no-one has as yet put it all under the spotlight. Further how would you like it if I started saying unfounded and slanderous things about one of your dead relatives? Do you understand that if Robin was alive and the allegations of incest made against him were tested in a defamation court that Karam would lose hands down? Because Robin is dead and you can't defend a dead person against defamation then **Karam has been able to promote hearsay as "truth"**. Obviously you are one of the many who has bought this story hook, line and sinker.

Joe Karam has threatened to sue us for defamation. He has not carried out with this threat, probably because there is nothing on this site which would pass the test in a court of law and because there are certain aspects of his behaviour that he doesn't want people to know too much about. If Karam was on the side of truth surely there would be no need for these obviously empty and desperate defamation threats ...

[158] The complaint about the emboldened parts of the statement are that they conveyed Mr Karam lacked integrity, was dishonest and made improper threats to those who disagreed with him.

[159] First, the statement "Karam has been able to promote hearsay as truth" is, in my judgment, an assertion of fact. It is made in the context of a number of statements regarding the effect of defamation law and certainly conveys that Mr Parker knows the correct position and is asserting it. Further, although the meaning, strictly, is not defamatory, since hearsay evidence may well be truthful, it is evident from the context that Mr Parker was using "hearsay" in a pejorative sense as meaning second rate or unreliable evidence offered up as truth by Mr Karam. I

consider that the statement was defamatory and the defence of honest opinion does not succeed in respect of it.

[160] The second part of the statement is an expression of opinion insofar as it relates to the speculation about why Mr Karam had not commenced defamation proceedings. They do convey that Mr Karam improperly threatened people with defamation suits. On the other hand, it is an opinion based on the fact that, at that stage, Mr Karam had threatened a defamation proceeding but had not yet commenced the proceedings. In the circumstances that existed at the time, I consider that the defence of honest opinion is made out.

CS 110 and 111

[161] These two posts on 18 February 2010 were made by a third party. They were part of an ongoing discussion involving the contributor Plain Jane whose posts generally attracted criticism from other contributors to this site. CS 110 said:

Jane how do you know what was and was not accepted by the jury? What utter tosh! Complete speculation. The jury hasn't published anything explaining how they reasoned and decided on the evidence. I am sure you are JOE KARAM IN DRAG. That's the sort of preposterous crap I have been reading in his books (of fiction).

[162] A little later the same contributor said:

... Joe Karam has fed the public of New Zealand an absolute fiction by saying that they were not able to get the evidence of incest into the first trial. If David Bain had evidence to give of incest there was nothing to prevent him giving that evidence at the first trial. The only evidence that was suppressed by the court was the "HEARSAY" evidence from Mr Cottle ...

[163] It is said that these statements meant that Mr Karam lacked integrity and used methods involving propaganda, fabrication and lies.

[164] In relation to CS 110, I regard that as an expression of opinion about Mr Karam's books. The reader of a book is entitled to express a view about it and I consider the defence of honest opinion made out in respect of that statement.

[165] In relation to CS 111, although it might be read as a statement of fact, in the context of the fairly long post that it forms part of, I consider it to be an expression

of opinion to the effect that Mr Karam had misrepresented the position regarding evidence of incest at the first trial. However, reading the post as a whole, including the statements immediately after the subject statement, I consider that the author has given an indication as to the basis of his opinion and that the defence of honest opinion is made out in respect of it.

The other websites

[166] The fourth cause of action relates to the Trade Me and YouTube websites. These relate only to posts by Mr Purkiss. In the statement of defence filed on behalf of him and Mr Parker, Mr Purkiss admitted posting the comments that are sued on and admitted that they referred to Mr Karam. He denied that any were defamatory. He also pleaded the affirmative defences of truth and honest opinion. As I have noted, Mr Purkiss did not appear at trial to advance either defence. There is no basis on which I could consider the truth defence on the evidence that I heard. However, I do consider the honest opinion defence in relation to these statements.

Trade Me – “poof – another Bain thread bites the dust”

[167] In this Trade Me post, it is said:

If jk releases a book it should be found in the fiction section like the others he has written. Complete karamalisations!!!

karamalisation equals “to fudge the facts”

Karamalites equals “followers of jk and db”

[168] This post followed a comment to the effect that books about the Bain case would not attract much interest. The complaint about this statement is that it meant and would have been understood to mean that Mr Karam lacks integrity and used methods that involved a propaganda of lies, innuenda, fabrication, smoke and mirrors. The critical point of the statement is the use of the expression “karamalisation”. I consider that it is defamatory to say of a writer of non-fiction that he or she would “fudge the facts”. That phrase is commonly understood to mean misrepresenting the facts. I find that the use of “karamalisation” and as it is specifically defined is defamatory. Read as a whole the statement is one of opinion

but cannot fairly be said to be a literary criticism. I find that it is defamatory and that the defence of honest opinion does not apply.

TM 2 – 5 “Bainaholics anonymous”

[169] All of these posts were made within days of each other between 12 January and 4 February 2010. They were part of a thread entitled “Bainaholics anonymous” that attracted numerous posts. TM 2 and 5 were posted in relation to a discussion about aspects of the evidence. TM 2 was a response to questions posed by someone else about fingerprints. Mr Purkiss responded with answers and then added:

Your [sic] karamalising the facts!!!

[170] TM 5 was posted a few days later in the context of a discussion about whether there were scratches on David Bain’s chest. Mr Purkiss responded:

You karamalites make me laugh!! You really grab at straws. Okay the actual picture of the injuries to db’s chest are proving difficult to find BUT statements under oath are not good enough for you???

Even then you are just like your leader and can’t help but karamalise the fact that he DID have those injuries which looked important enough for both those people to testify about them ...

[171] Mr Karam complains that these statements conveyed that he lacked integrity and used methods which involved lies, innuendo, fabrication, smoke and mirrors.

[172] The statements are both, clearly, expressions of opinion. I find that TM 2 is defamatory for the reasons I have already discussed in relation to the use of the word “karamalise”. I find that TM 5 is also defamatory because it is an effective assertion that Mr Karam did misrepresent the facts. Neither offers any factual basis for these assertions or opinions. The defence of honest opinion therefore fails in respect of them.

[173] TM 12 and 15 are also statements that use the expression “karamalise” and variants of it in a way that is defamatory and without indicated factual basis.

[174] TM 16 said:

Tell you the truth I'm actually now starting to feel really sorry for db because the likes of you and karam have taken away from that guy any chance he had of living a normal life! He may of [sic] done his time, come out as quite a normal guy, settled into a good job etc and contributed to society. But not now!! The likes of you lot have screwed it for him.

“Show me the money!!!” “Screw justice!!!”

[175] The complaint about TM 16 is that it conveyed that Mr Karam lacks integrity and has misrepresented his real motives for assisting David Bain. However, I am not convinced that the statement does read as though directed specifically towards Mr Karam. As a result, I do not consider that it is actionable by Mr Karam.

[176] TM 17 said:

Plenty of murderers have returned to some sort of normal life after doing their time. db is being used to make a profit, nothing more nothing less, much the same as a lot of Karamalites. Hey he was only a young guy and probably never met anyone like jk before. He would of [sic] been very impressionable so when some famous ex-All Black comes visiting with promises of freedom and money he would of [sic] had his hopes boosted sky high.

Well that relationship has screwed him for life no matter what the final outcome!!!

[177] Read as a whole I consider that the statement complained of is an expression of opinion and does mean, as alleged, that Mr Karam lacks integrity and has misrepresented his motives for assisting David Bain. It is defamatory. There is no indicated basis for the opinion and the defence of honest opinion fails in respect of it.

[178] TM 19 said:

I wonder what jk's and his “product range” are doing this morning? Church maybe?

[179] The complaint is that this statement conveyed that Mr Karam had misrepresented his real motive for supporting David Bain. The material provided to me did not adequately show the context in which that statement was made, apparently as a result of edits to the website. As a result, I can judge this statement only as it appears in isolation and I do not consider that it conveys anything defamatory about Mr Karam.

TM 22 and 23

[180] These posts on 25 and 27 January said:

Seriously do Karamalites think just because they may be able to karamalise the law to fit their own agenda that it will be just the thing to reward db and karam? Apart from comments like “Robin dunnit” or “db didn’t do it” they don’t say anything about real justice. No matter how one karamalises the “law” it would not be right or just for a person that the evidence indicates committed this obscene crime be rewarded.

[181] TM 23 said:

The depth these Karamalites will sink to are disgusting and disturbing but then we know where their instructions are coming from so it is not surprising.

[182] The complaint is that these statements conveyed that Mr Karam lacks integrity, used methods that involved lies, innuendo, fabrication, smoke and mirrors. I have already discussed the use of the word “karamalise”. I consider that it, and “Karamalite” are used as pejoratives to convey the misrepresentation of facts or evidence and describe a person who does so. The use of the word in these statements carries a strong meaning that Mr Karam has not only used these methods himself, but has influenced others to do so. There is no specific or indicated basis for the opinions expressed and the defence of honest opinion fails.

TM 27 – 30

[183] These posts were all made between 1 and 4 February 2010. They said:

db’s only waiting because he is being told to wait, he has no place in the decision making. He is a commodity being used to make a profit. Did I see \$4 million mentioned before? It won’t happen but if it did he would not even get half of this amount. In the unlikely event a reward is granted he won’t even end up with \$500.000! jk should do alright though as after he has his share as agreed by db he then has his book (should sell about four copys [sic])!!! Profits which dear old db is not entitled to any of. db’s share will equate to less the \$650 per week reward. This will not be enough for him to disappear with and lead some sort of normal life. DB!!! WAKE UP!!! Your [sic] being used by people that want the money!!!

[184] TM 28 said:

db was never wrongly imprisoned. He was found guilty by a jury and sentenced. Being imprisoned for murder is part of our legal/judicial system!

Sound familiar? He has, however, been wrongfully released due to our legal/judicial system making a few mistakes e.g. not allowing the jury to hear all the evidence, allowing someone whose sole purpose for being involved was/is profit not justice etc etc ...

[185] TM 29 said:

What did the Melbourne Armourer say again?

Didn't jk ask for his opinion. Oh yeah that's right!! He said it was not suicide but jk didn't like that so did not use it.

[186] TM 30 said:

Where is db hiding anyway? If as some posters on this board DO NOT think a majority of the population believe him guilty why is he hiding from the public?? Could it be he is being held "captive" by his own "supporters"? Supporters whose only intrest [sic] is profit. david Wake up! It's only your money they are after.

[187] I accept, as alleged, that these statements meant and were understood to mean that Mr Karam lacks integrity and has misrepresented his real motive for supporting David Bain. Although expressions of opinion, I do not consider that there was any either specific or general foundation for the opinions being expressed.

TM 40

[188] This post on 23 March 2010 focused on the possibility of compensation being paid to Mr Bain. At the beginning of the post Mr Purkiss expressed the view that "Bain inc" would be "realising the commercial potential of the case" and made the observation that if supporters of Robin Bain kept the issue alive they were assisting in this process:

There's two sides to every story so don't be surprised if the other camp has something up their sleeve to counterspin anything the Bain camp comes up with. A story that deals in factual evidence instead of things that may of [sic] happened should be much easier to produce. **But then I suppose db's story [sic] have to be truthful to make a dollar and let's face it that is all it's been about from the start as far as his defence has been. SHOW ME THE MONEY!!!**

[189] As with other similar posts by Mr Purkiss the complaint is that this statement meant and would have been understood to mean that Mr Karam lacks integrity and has misrepresented his real motive for supporting Mr Bain. I am not satisfied that

the statement does have this meaning because there is no mention of Mr Karam. One would have to read the preceding reference to “Bain inc” as a reference to Mr Karam but I do not think that is the ordinary meaning of the statement.

TM 41 and 42

[190] Following a post that mentioned Mr Bain having been seen in a restaurant, Mr Purkiss referred to the use by the British during World War II of doubles, noting that “even Churchill had a double” and then went on:

So I am wondering if the barstards [sic] have done the same????

A db double!!!! While he lives the high life somewhere exotic like Beirut?
Perhaps the person with jk was Ron Hubbard?

[191] The complaint about this post is that it meant that Mr Karam lacked integrity and used methods involving lies, innuendo and fabrication.

[192] I am not satisfied that these are the meanings conveyed by this statement. The statement is almost nonsensical but I do not think it is directed towards Mr Karam with the kind of meaning that is alleged.

TM 42

[193] On 4 April 2010 Mr Purkiss posted a comment about Mr Karam not having published any new book and went on:

Of course there’s no book. He needs this last chapter, that being the compo claim, which by the way I believe has been timed to hopefully coincide with the christmas rush for books.

This whole thing between db and jk is a marketing plan based on one thing and one thing only. Money!!!! ...

[194] The complaint about this post is that it meant that Mr Karam lacked integrity, had misrepresented his real motives for supporting Mr Bain.

[195] I agree that this is the ordinary meaning of the words. The statement is an expression of opinion but there is no apparent foundation offered for it.

[196] On 7 April 2010 Mr Purkiss referred to the Counterspin website and the Facebook page and added:

Once again joe “you can fool some of the people some of the time, you can fool all of the people some of the time but joe YOU can’t fool all of the people all of the time”.

[197] Mr Karam complains that this statement meant that he lacks integrity. I agree that its ordinary meaning conveys that Mr Karam had attempted to mislead people and that inevitably that would carry with it the meaning that he lacks integrity. It is an expression of opinion without any foundation offered.

YouTube

[198] Mr Purkiss is also sued in respect of one post on YouTube that said simply:

Murdering barstard [sic] and his pimp.

[199] This statement was made in the context of a video about Mr Bain and Mr Karam. Mr Karam complained that this statement conveyed that he lacks integrity.

[200] The ordinary meaning of this statement is that Mr Karam was to be compared to a pimp. I accept that this comparison would convey that he lacks integrity. It is clearly an expression of opinion but one without any basis indicated.

Were the statements made on occasions of qualified privilege?

[201] Mr Parker raised the defence of qualified privilege, arguing that Mr Karam’s involvement in the Bain case is a matter of public interest and those who contributed to the sites had a shared interest in debating the issue. For the reasons that follow I do not accept that the circumstances of this case satisfy the requirements of the qualified privilege defence.

[202] It is in the public interest to recognise certain occasions as ones when people may express themselves freely without being exposed to suit for defamation. The

defence of qualified privilege protects those who make defamatory statements on privileged occasions, provided they are not predominantly motivated by ill-will and do not misuse the occasion. The classic statement of what constitutes a privileged occasion is that of Lord Atkinson in *Adam v Ward*:²⁷

... a privileged occasion is ... an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.

[203] In *Lange v Atkinson* the Court of Appeal summarised the requirement for a common, and corresponding, duty and interest between the maker of the statement and those who received it (the “familiar duty/interest test”) in this way: ²⁸

[20] A privileged occasion thus had to be an occasion in which the duty/interest was satisfied. If in the circumstances that test was satisfied, the occasion was capable of being regarded as one of qualified privilege. But despite a communication being made between persons who might in other circumstances have shared an interest in the subject matter it could happen that the maker and recipient of the statement did not in the particular circumstances of the publication have the necessary interest or duty to satisfy what we are calling the shared interest test.

[204] The requirements of the duty/interest test mean that general publication does not usually attract privilege and the nature of the Facebook page and Counterspin sites mean that comments posted on them are to be regarded as general publications; the sites were accessible to the public generally and even after the Facebook page was made private significant numbers of people still had access to it and new members could join.

[205] Exceptions are, however, recognised by the common law and the Defamation Act 1992. They include the fair and accurate reporting of the proceedings of Parliament and the courts. There has been a historical reluctance to accept that general publication of other matters should be protected. Nevertheless, it has also been recognised that the types of occasions that might justify protection are not closed. The truth of this was shown by the Court of Appeal’s decision in *Lange v*

²⁷ *Adam v Ward* [1917] AC 309 (HL) at 334.

²⁸ *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at 393.

Atkinson, which recognised that the general publication of political statements could be protected by qualified privilege.²⁹

[206] *Lange v Atkinson* held that the defence of qualified privilege could be available in respect of statements published generally and, further, that it was possible for the wider public to have a proper interest in statements about the actions and qualities of those currently or previously elected to Parliament or those with aspirations to such office so far as those aspects affected their capacity to meet their public responsibilities. As a result, general publication of statements directly concerning these aspects could be a privileged occasion. However, the fact that a statement addresses this subject does not, in itself, confer privilege; that still depends upon an assessment of the circumstances of a publication, including matters such as the identity of the publisher, the context in which publication occurred, the likely audience and the actual content of the information:³⁰

A statement the subject-matter of which qualifies for protection is not by dint of that fact alone always made on an occasion of privilege. Ordinarily that will be so because the shared interest test is likely to be satisfied. But there may be times when a communication within that subject-matter will not be made on an occasion of qualified privilege because there is in the particular circumstances no shared interest in the particular communication between its maker and recipients ... The requirement for the occasion to qualify as well as the subject-matter, may sometimes lead to difficulties at the margins, but in reality there is likely to be comparatively little uncertainty in this area. Any bona fide communication in the course of political discussion and within the defined subject matter is very likely to be made on an occasion of qualified privilege. The possibility of the occasion not attracting privilege is unlikely to cause difficulty for news media organisations or indeed other who are engaged in genuine political discussion. Such possibility, and the small level of uncertainty it may cause is a necessary price to pay to guard reputations against false imputations made on occasions which are outside the purpose of the privilege; albeit within its literal subject-matter.

[207] Plainly, the issue of Mr Karam's involvement in the Bain case does not fall within the parameters recognised by *Lange v Atkinson* as a subject that might attract the requisite duty and interest, in the context of a general publication, to create a privileged occasion.

²⁹ At [10], [41].
³⁰ At [21].

[208] In cases that fall outside the already established occasions in which the privilege arises it is a question for the Court, having regard to all the relevant circumstances as to whether an occasion should be regarded as privileged. In *Vickery v McLean* Tipping J observed that:³¹

When the Courts are asked to find that a particular occasion, not directly covered by authority, is one which should attract qualified privilege, the ultimate question is whether it is in the public interest to recognise the privilege and strike the balance between freedom of expression and protection of reputation accordingly.

[209] In *Vickery v McLean* (which involved statements made by the chairman of a local ratepayers association about employed officers of a district council) the Court of Appeal declined to consider whether *Lange v Atkinson* should be extended to cover political discussion in the context of local government on the ground that, even if it were so extended the circumstances of the case would not attract privilege. Similarly, in cases before this Court in which it has been suggested that the effect of *Lange v Atkinson* should be extended further,³² none has actually reached a conclusion; the issue is usually avoided because it is evident that, even if privilege existed, it would have been lost because of the predominant motivation of ill-will or improper use of the occasion through recklessness.

[210] Privilege for statements posted on websites established to facilitate the free exchange of ideas on matters that interest members of the public would go well beyond anything previously recognised in New Zealand, even including previous cases in which the possibility of an extension to the defence has been considered. *Dooley v Smith*, for example, concerned comment on issues arising in the context of local government. Lang J noted that those who were the subject of the statements in question were elected to positions in other public institutions.³³ I respectfully agree that this context is sufficiently analogous to the current protection provided for political expression that extending the defence to it could properly be considered. But local government issues are far removed from the subject-matter in this case.³⁴

³¹ *Vickery v McLean* [2006] NZAR 481 (CA) at [15].

³² See e.g. *Dooley v Smith* [2012] NZHC 529, reversed by *Smith v Dooley* [2013] NZCA 428.

³³ At [171].

³⁴ I do not include *Lee v The New Korea Herald Ltd* High Court Auckland CIV-2008-404-5072, 9 November 2010 as a case in which serious consideration was given to whether the occasion was privileged; Heath J went directly to the issue of ill-will under s 19.

[211] Further, the nature of online fora such as Facebook differs significantly from the traditional media model. In the traditional model the media, which has access to information not generally available, informs the public. In comparison, the format of the Facebook page means that the same people are both publishers and recipients; there is no reciprocal duty and interest but merely an exchange of views.

[212] In some respects the Counterspin website more closely resembles the traditional model because it was set up, in part, as a vehicle for Mr Parker and his co-host to inform readers about aspects of the case. However, even to that extent, there must be serious doubt as how this format would justify treating Mr Parker's articles as privileged. Mr Parker's work was never predicated on the basis that he had any greater knowledge or access to any more information than other members of the public. He was the host of a site on which he could express his opinions but I do not accept that he was under any duty to do so.

[213] Further, Counterspin also served as a forum similar to that of the Facebook page, where any member of the public could join and express his or her views. Indeed, most of the statements sued on were not part of Mr Parker's informative pages but from posts to online discussions. These discussions were not prompted by any duty to inform nor any interest in receiving in the sense that would create a privileged occasion for the purposes of the qualified privilege defence.

[214] In these circumstances I do not consider that statements made on either the Facebook page or Counterspin were made on occasions of qualified privilege. This defence therefore fails.

[215] I would add, however, that, even if it were arguable that the statements were made on privileged occasions, the defence would be rebutted under s 19 which provides that:³⁵

- (1) In any proceedings for defamation, a defence of qualified privilege shall fail if the plaintiff proves that, in publishing the matter that is the subject of the proceedings, the defendant was predominantly motivated by ill-will towards the plaintiff, or otherwise took improper advantage of the occasion of publication;

³⁵ Defamation Act 1992, s 19.

- (2) Subject to subsection (1) of this section, a defence of qualified privilege shall not fail because the defendant was motivated by malice.

[216] “Ill-will” captures conduct that would have been malicious at common law, being the knowledge that the subject statement was false or recklessness as to whether it was true or false.³⁶ “Improper advantage” extends the conduct beyond ill-will and is a lower threshold than knowledge of the statement being false or recklessness as to its truth or falsity. In *Lange v Atkinson* the Court of Appeal said:³⁷

Indifference to truth, is, of course, not the same conceptually as failing to take reasonable care with the truth, but in practical terms they tend to shade into each other. It is useful, when considering whether an occasion of qualified privilege has been misused, to ask whether the defendant has exercised the degree of responsibility which the occasion required ...

What amounts to a reckless statement must depend significantly on what is said and to whom and by whom. It must be accepted that to require the defendant to give such responsible consideration to the truth or falsity of the publication as is required by the allegations and the width of the intended dissemination, may in some circumstances come close to a need for the taking of reasonable care.

[217] In *Lee v The New Korea Herald Ltd* Heath J considered that, if the defence of qualified privilege had been available, it would have been defeated by the defendant’s failure to take reasonable steps to verify the information provided and the failure to make adequate attempts to contact the plaintiff before publication.³⁸ Likewise, in *Dooley v Smith*, Lang J considered that improper advantage had been taken of the opportunity to publish because the defendants had been reckless, thereby defeating any qualified privilege defence.³⁹

[218] It will be apparent from my discussions of the various statements sued on that, in respect of those I have found not to have been honest opinions, there could have been no genuine belief in the sense of a belief with any factual foundation in what was being said. I also consider that, had there been a privilege attaching to publications on these websites (which I have already rejected), improper advantage was taken of the occasion of publication.

³⁶ *Horrocks v Lowe* [1975] AC 135 (HL) at 150.

³⁷ *Lange v Atkinson* above n 28, at [46] – [48].

³⁸ *Lee v The New Korea Herald Ltd*, above n 34.

³⁹ *Dooley v Smith*, above n 32, at [207].

[219] The nature of online sites such as the Facebook page and Counterspin carry the potential for greater harm than traditional forms of publication because of the immediacy and breadth of their reach and the fact that they remain accessible indefinitely. Further, they can be manipulated so as to make them more visible to members of the public; in some of his posts on Counterspin, Mr Parker boasted of having ensured that the Counterspin website was one of the first websites thrown up in a Google search of “David Bain” or “Joe Karam”.

[220] Publishers of statements on such sites need to exhibit a degree of responsibility commensurate with the immense harm that can come from the misuse of them. In this case the power to publish to so wide an audience was undoubtedly abused through the intemperate and untrue content that Mr Parker, Mr Purkiss and others posted. Even if the subject matter and occasion had been capable of protection through qualified privilege, the defence would have failed.

Damages

My approach to fixing damages

[221] The damages claim was not quantified in the pleadings but in closing Mr Reed submitted that both compensatory and exemplary damages were warranted and sought global figures of \$1.25m and \$500,000 against Mr Parker and Mr Purkiss respectively.

[222] Mr Reed framed the claim for global figures by reference to the Court of Appeal’s emphasis in *Siemer v Stiassny* on the totality of the award rather than the individual components of it.⁴⁰ However, punitive damages are different in kind from compensatory damages and subject to a specific statutory test. I do not consider it right to adopt a global figure that reflects both compensatory and punitive damages. I therefore address the compensatory and punitive aspects separately.

[223] Mr Reed also suggested that the same figure be awarded in respect of each cause of action against Mr Parker with the intention that it be treated, using the sentencing analogy, in the same way as concurrent sentences. I do not accept that

⁴⁰ *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361.

this is the right course. First, some of the statements for which Mr Parker is liable as publisher are also ones for which Mr Purkiss is liable as author. Some adjustment is needed to avoid double-counting in respect of those statements. Secondly, slightly more than half of the statements for which Mr Parker is liable were posted by third parties (other than Mr Purkiss). In the event that the issue of Mr Parker's liability as publisher is considered on appeal it would be desirable for the damages attributable to those posts to be readily identifiable.

[224] I therefore intend to approach the assessment of damages in the following way. I consider first consider what figure is appropriate to compensate Mr Karam for the injury suffered as a result of the cumulative effect of the statements. I then apportion part of that figure to the small number of posts for which the defendants are jointly and severally liable (Mr Parker as publisher and Mr Purkiss as author). The balance will be allocated between Mr Parker and Mr Purkiss based on their conduct and the proportion of statements for which each is liable.

Compensatory damages

[225] General damages in defamation are directed towards the injury sustained as a result of the damage to the plaintiff's reputation. In *Siemer* the Court of Appeal said:⁴¹

... Losses sustained which are normal and to be anticipated when a person's reputation is impaired. When that occurs such an offence affects one's relations with others which could be in business, social, religious, familial or other contexts. The impairment of one's relations can interfere in quite unpredictable and unknowable ways for the enjoyment of life and, therefore, the common law took the view that in such an action damages may be awarded by the Judge or jury without proof by a plaintiff that there has been any impairment of reputation. To put this another way, at common law general damages are an estimate, however rough, of the probable extent of actual loss a person has suffered and will likely suffer in the future. That is so despite the fact that such loss cannot be identified in terms of, say, advantageous relationships lost, whether from a monetary or what might be termed enjoyment of life standpoint. And, since the interests served by way of protecting a good reputation are of a dignitary and peace of mind character it is relatively obvious that such damages are very difficult to measure in monetary terms.

⁴¹ At [48].

[226] The recognition of additional harm done through the defendant's manner or motive, although sometimes treated as separate head of "aggravated damages", is more usually viewed as enlarging the quantum of general damages rather than justifying a separate head of damage.⁴² This is the approach that I adopt.

[227] I find the following factors relevant in assessing the appropriate level of damages. First, Mr Karam enjoyed a significant and positive reputation before becoming involved in the Bain case. He already had a high public profile as a result of his successful sporting career. He had subsequently enjoyed success in business. Character evidence attests to the fact that he was highly regarded for his integrity, generosity and altruism.

[228] Secondly, the effect on Mr Karam of the statements posted on the Facebook page, Counterspin and other websites was significant. I accept Mr Karam's evidence of the great distress he felt about the things being said about him. He described the period during which these statements were posted as the worst four years of his life and I believe him. I accept the evidence of other witnesses, such as Richard Karam, Peter Williams QC and Lorraine Day, who described how Mr Karam became preoccupied, unsociable, and visibly distressed during this period.

[229] Thirdly, I accept Mr Reed's description of the defamation as being a full scale assault on Mr Karam's reputation. The defendants and others accused Mr Karam of, among other things, dishonesty in his motivations, lack of integrity in his dealings with expert witnesses, fraud in relation to the LSA, lack of integrity in his motivation and dealings with David Bain. Few aspects of Mr Karam's reputation were left untouched.

[230] Fourthly, the scale and persistency of Mr Parker's and Mr Purkiss' efforts to discredit and undermine Mr Karam seriously exacerbated the damage being done. Not content with merely expressing their views and indulging in online discussion about a topic that interested them, Mr Parker and Mr Purkiss took steps to raise the profile of the Facebook page and the Counterspin site by giving an interview with

⁴² *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289 (CA) at [61]; *Manga v The Attorney-General* [2000] 2 NZLR 65 (HC), discussed in *Siemer v Stiassny*, above n 40.

the Sunday Star Times newspaper about the purpose of the site. The result, inevitably, would have been a greater number of people than previously visiting the site. In addition, by his own admission, Mr Parker took steps to ensure that Counterspin's profile was raised even higher by ensuring that it appeared earlier in Google searches than other sites dealing with the Bain case.

[231] Fifthly, Mr Parker and Mr Purkiss both pleaded truth as an affirmative defence. Having pleaded it Mr Purkiss then did nothing further, leaving Mr Karam to reach the point of trial before having confirmation that Mr Purkiss would not attempt to sustain the defence. Even worse was Mr Parker's assertion of the truth defence up to and during the trial until finally, under cross-examination, he accepted that he could not prove the truth of the assertions he and others had made and abandoned the defence. By then Mr Karam had already given evidence and been subjected to cross-examination by Mr Parker.

[232] Although Mr Purkiss was responsible for some egregious remarks, I treat him as less culpable than Mr Parker for two reasons. He is liable only for his own posts and is therefore responsible for much less of the defamatory content than Mr Parker. Also, as Mr Reed accepted, Mr Purkiss largely refrained from making further defamatory remarks after the proceedings were issued.

[233] Mr Parker's conduct, on the other hand, encompasses both his own posts and those of others. Although it is evident that in many of his posts he attempted to promote a rational debate he was also responsible for some very bad defamation. In addition, he maintained his position until well into the trial. Under cross-examination Mr Parker did agree that his behaviour had been disgraceful and offered an apology. However, the lateness of the apology and Mr Parker's conduct of his defence significantly undermined the value of it.

[234] Finally, I take into account two recent awards in judge-alone cases. Comparison with other cases always requires care because of the relatively few cases that come before the courts and the variety in the circumstances of such cases.

Nevertheless I consider that the decisions in *The New Korea Herald v Lee*,⁴³ and *Siemer v Stiassny* to be of assistance.⁴⁴

[235] In *Lee* the defendants published eight articles that suggested that the plaintiff was engaging in corrupt, dishonest and immoral practices.⁴⁵ Publication was limited to the local Korean community and the newspaper had a circulation of about 3,000. The plaintiffs were awarded \$250,000 in compensatory damages. Although there is similarity in the nature of the defamatory meanings the more limited scope of both the content and reach of the publications means that the present case is to be regarded as significantly worse.

[236] In *Siemer v Stiassny*, Cooper J's total award of \$825,000 was upheld on appeal.⁴⁶ Within that total Cooper J had identified the figures of \$650,000, \$150,000 and \$25,000 for general, aggravated and punitive damages respectively. The Court of Appeal considered that, despite some difficulties in allocating separate figures in this way the total was appropriate. I proceed on the basis that compensatory damages of \$800,000 was appropriate for the defamation in that case.

[237] Mr Reed submitted that factually there were parallels between the present case and *Siemer* but that the present case was worse; although both involved a persistent online campaign with extreme allegations regarding the plaintiff's integrity, Mr Karam had to endure a week-long trial⁴⁷ (including the indignity of being cross-examined by Mr Parker),⁴⁸ Mr Karam had a higher public profile and as a result of the Sunday Star Times interview the exposure of the defamatory statements was far wider. *Siemer* involved one individual, whereas Mr Parker encouraged others. Mr Reed also pointed out that in *Siemer* the Court took into account the fact that Mr Siemer had already been punished through penalties imposed for contempt.

⁴³ *Lee v The New Korea Herald Ltd* above n 34.

⁴⁴ *Siemer v Stiassny* above at n 40.

⁴⁵ *Lee v The New Korea Herald Ltd* above n 34.

⁴⁶ *Siemer v Stiassny*, above n 40.

⁴⁷ Mr Siemer had been debarred from defending the proceeding and the matter proceeded by way of formal proof

⁴⁸ Mr Parker was unrepresented and his cross-examination was (understandably) inept.

[238] Without minimising the distress that the statements in this case have caused to Mr Karam, however, I am satisfied that this case is not as bad as *Siemer*. The statements in *Siemer* were an outright and vindictive attack on the integrity of a professional person. There was a racial aspect to some statements. The motive was vengeance. The extent of publication was wider because, in addition to a website, defamatory statements were published via a billboard that would be seen by the general public, complaints to professional bodies, complaints to the Serious Fraud Office, stickers and posters. Publication increased over time and was maintained deliberately in the face of an injunction. It had a significant impact on the plaintiff and on his professional and personal life. The effect of the defendant's actions led the plaintiff to serve trespass notices to protect his home and family.

[239] In comparison, the statements published by the defendants in this case were available mainly to those who sought out the Facebook page and Counterspin website; the Sunday Star Times article did provide a link to the Facebook page but that did not significantly extend the scope of publication. Although there were some effects on the business owned by Mr Karam's son (and previously by Mr Karam) this aspect was relatively limited and did not reach the level that, for example, would have justified a trespass notice being served.

[240] I judge the circumstances of this case to fall between *Siemer* and *Lee*, slightly more towards *Siemer*. Adjusted for inflation, the awards in *Lee* and *Siemer* would be \$260,000 and \$880,000 respectively. Taking all the factors I have discussed into account I consider that a figure of \$525,000 would fairly compensate Mr Karam for the injury caused. I turn now to consider the allocation of this figure between the defendants.

[241] I have found that there were approximately 50 defamatory statements made about Mr Karam for which there is no defence. Of these, a small number are ones that Mr Purkiss posted on the Facebook page and Counterspin and for which Mr Parker and Mr Purkiss are jointly and severally liable as joint tortfeasors (Mr Purkiss as author and Mr Parker as publisher). I allocate \$55,000 to these statements. There is no cross-claim between the defendants. In order to give a

single award for compensatory damages against each defendant I consider the most effective course is to split this figure equally between them.

[242] Of the remaining statements about two-thirds are ones for which Mr Parker alone is liable either as author or publisher. This proportion also fairly reflects the greater responsibility that Mr Parker should take for the injury to Mr Karam's reputation. This means that Mr Parker is liable for \$313,000 together with \$27,500 relating to the five statements discussed above, a total of \$340,500. I allocate a quarter of this figure to each of the first and second causes of action and half to the third cause of action. The result is that there will be judgment of \$85,125 on each of the first and second causes of action and \$170,250 on the third.

[243] This leaves the statements for which Mr Purkiss alone is liable as author. These statements represent about one-third of the defamatory statements for which the defendants are separately liable. There will be judgment against Mr Purkiss on the fourth cause of action for \$157,000 together with \$27,500 relating to the statements discussed at [241], making a total of \$184,500.

Punitive damages

[244] The purpose of punitive damages is to punish and deter. Such damages are limited by s 28 to cases where the defendant has "acted in flagrant disregard of the rights of the plaintiff". In *Siemer* the Court of Appeal said of this test:⁴⁹

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

[245] There is one aspect of Mr Parker's conduct that I consider amounted to flagrant disregard of Mr Karam's rights. Mr Parker knew defamatory comments were being published on Facebook and encouraged it to continue. Although Mr Parker did make an effort to "clean up" the sites, it is obvious from his comments that his concern was not so much to limit the damage being done to Mr Karam's reputation but rather to limit the exposure that he faced. His suggestion in a post on

⁴⁹ *Siemer v Stiassny*, above n 40, at [65].

14 January 2010 on the Facebook page that those who wished to “be controversial or defamatory” to do so on Facebook was encouragement to indulge in posts of that kind.

[246] I award a separate amount of \$10,000 as punitive damages. Because these actions related to the continued publication of defamatory material on the Facebook page this head of damages is to be allocated to the first cause of action.

Injunction

[247] Mr Karam also seeks an injunction requiring the offending material to be removed and a permanent injunction preventing the defendants from further publishing material defamatory of him. I am satisfied that this relief is necessary. In particular, it is of considerable concern to me that, following his advice in open court that the Counterspin website would be taken down, Mr Parker has since resurrected it. The terms of the injunction will not require either site to be taken down but will require all defamatory material to be removed from them. This is notwithstanding that the Facebook page is now private.

Result

[248] There is judgment against Mr Parker as follows:

- (a) On the first cause of action for \$85,125 in compensatory damages and \$10,000 punitive damages;
- (b) On the second cause of action for \$85,125;
- (c) On the third cause of action for \$170,250;

[249] There is judgment against Mr Purkiss on the fourth cause of action for \$184,500.

[250] There are orders that the defendants:

- (a) are prohibited from publishing defamatory material about Mr Karam in any forum; and
- (b) take all reasonable steps to remove defamatory material from the Facebook page and Counterspin site within one month of the date of this judgment.

[251] I come finally to the question of costs. Mr Reed sought indemnity costs on the basis of Mr Parker's defence being vexatious, frivolous, improper or unnecessary, partly as a result of the truth defence, which was abandoned during the trial.

[252] Mr Parker has behaved egregiously in advancing and maintaining defences which had no serious prospect of success. In particular, asserting the defence of truth to the point of cross-examining Mr Karam and opening his case before finally admitting under cross-examination that he was unable to prove any of the matters, in itself, justifies indemnity costs. Nor was there any prospect of the defence of qualified privilege succeeding. It is true that I found several statements to have been protected by the defence of honest opinion. However, that modest success does not outweigh the seriousness of his conduct in every other regard. There are to be indemnity costs against Mr Parker.

[253] There will also be indemnity costs against Mr Purkiss. Like Mr Parker, he asserted defences of truth and qualified privilege when neither had any prospect of success. Although Mr Purkiss did not appear at trial, the assertion of the truth defence put Mr Karam to the cost of having Mr Thomas' evidence heard prior to trial and of preparing for trial.

[254] Mr Reed may file a memorandum addressing the level of reasonable costs incurred.

P Courtney J