IN THE COURT OF APPEAL OF NEW ZEALAND CA 74/96

BETWEEN NEW ZEALAND MAGAZINES LIMITED

Appellant

AND KAREN, LADY HADLEE

Respondent

Coram Henry J
Blanchard J
Barker J

Hearing 8 October 1996

Counsel B R Latimour and J M Scott for Appellant
P M James for Respondent

Judgment 24 October 1996

JUDGMENT OF HENRY J

The issue raised in this appeal is whether an article published in a national weekly magazine is capable of bearing a meaning defamatory of the respondent. The judgments of Blanchard J and Barker J, which I have had the benefit of reading in draft, set out the relevant factual material and also traverse the legal principles which are to be applied. They need not be repeated. I am in general agreement with the analysis of Barker J, and wish to add only a brief summary of my own reasons for concluding that the appeal fails.

It is common ground that to state that the respondent was having an affair with Ms McNaught is defamatory. The article repeats what is said to be a rumour to that effect, which must also be defamatory. The real issue is whether the accompanying denial of the truth of that rumour is such that a reader of the whole article could not reasonably conclude that it had substance. The article states that the allegation has gained more credence and credibility than other rumours about Ms McNaught. The rebuttal is an averment by the writer of the article, who is not a public figure of authority, inferentially based on what she was told at interview by Ms McNaught, namely that the respondent was not having such an affair, in fact had never met the respondent, and the rumour was plainly silly.

I am not persuaded that this refutation necessarily removes the sting of the defamatory words. The author of the article professes no personal knowledge of the facts, and a denial by one party to alleged conduct with another that the conduct did not occur does not in my view as a general proposition establish that a reasonable person cannot conclude that the conduct may have taken place. There is nothing in the present case which requires that general proposition to be displaced. I would therefore hold that the words are capable of bearing the alleged defamatory meaning to which I have referred. Whether they do, remains of course for determination at trial.

As to the second of the alleged defamatory meanings, I take the view that as a matter of logic it must follow that if the words are capable of meaning that the respondent was having an affair with Ms McNaught, they are also capable of meaning that the respondent is a lesbian or bi-sexual. Contrary and with respect to the conclusion reached by Blanchard J however, I do not think this second meaning could reasonably be taken from the words once it is accepted that the "antidote" of denial was such that the "bane" of the first meaning was neutralised. It seems to me that when the article as a whole is considered, the only basis upon which this second meaning could be inferred is the existence of a relationship between the respondent and

Ms McNaught. Once the existence of that relationship is effectively negated, in my view there is no other basis emanating from the article upon which a reader could reasonably conclude that the respondent was either a lesbian or bi-sexual. The article, to my mind, could not then reasonably be read as alleging that the respondent was a person who, despite the absence of a sexual relationship with Ms McNaught, was nevertheless a person of that description. A rumour about a person which is demonstrated to be baseless cannot be the basis of a reasonable inference.

The majority of the Court being of the view that the words complained of are capable of bearing the first pleaded meaning and being unanimous they are capable of bearing the second pleaded meaning, the appeal is dismissed. The respondent is entitled to costs in the sum of $3500 together with reasonable travelling and accommodation costs as fixed by the Registrar.

Solicitors
Bell Gully Buddle Weir, Auckland, for appellant
Saunders & Co, Christchurch, for respondent

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.74/96

BETWEEN NEW ZEALAND MAGAZINES LIMITED

Appellant

AND KAREN, LADY HADLEE

Respondent

Coram: Henry J
Blanchard J
Barker J

Hearing: 8 October 1996

Counsel: B R Latimour & J M Scott for Appellant
P M James for Respondent

Judgment: 24 October 1996

JUDGMENT OF BLANCHARD J

This appeal is from a decision of Williams J holding as a preliminary question under r418 of the High Court Rules that the words of an article published by the defendant in the *New Zealand Woman's Weekly* of 9 January 1995 are capable of bearing the defamatory meanings alleged by the plaintiff, Lady Hadlee, wife of the famous cricketer and now cricket commentator, Sir Richard Hadlee.

The article took the form of an interview with the television presenter Ms Anita McNaught whose photograph adorned the cover of that issue of the magazine

accompanied by "Anita: the truth about those rumours" in large lettering. On the contents page there was another photo of Ms McNaught and a heading "Tell me it isn't true, Anita". That was also the title of the article which was spread across the top of two pages. The article's opening paragraphs were as follows:

> "*It's time to set the record straight and shut up the gossips - Anita McNaught is not having an affair with Sir Richard Hadlee's wife!* "I mean, where do these rumours come from?" laughs the petite TV star as she sits surrounded by boxes in the organised chaos of the brand spanking new house she moved into only the day before.
>
> Moving house hasn't been the only major upheaval for Anita of late - 1994 was a year of them. She changed her hair, found love with a new man, built a house and deserted TV One for a new job with TV3 as a reported on the current affairs show 20/20.
>
> *In fact, just about the only thing that didn't change was the extraordinary rumour that she had run off with Lady Hadlee.*
>
> *"I have had strangers come up to me in bars in Wellington and say, 'Tell me it isn't true, Anita - about you and Richard Hadlee's wife'.* I've had friends report that they've heard it from dinner parties. It has gained more credence and credibility than any other rumour that has ever gone around about me."
>
> For the record, Anita has never met Karen Hadlee. She has met Sir Richard. Twice. Quite a long time ago. That's it.
>
> *"I just hope the poor woman, who after all isn't in the public eye, hasn't had a year of people coming up to her saying 'Are you really having an affair with Anita McNaught?'* I mean how dreadful! What does Richard think? Poor Richard!" [Italics not in the original]

There follows a statement that not all the rumours about Ms McNaught "can plainly be quite so silly" and the article goes on to mention two of them: that she is anorexic (denied by Ms McNaught as "ridiculous" and "preposterous") and that her belly button is pierced with a diamond (said to be wrong in respect of the diamond: "Jewels are tacky").

The man in Ms McNaught's life is then mentioned again and after dealing with unrelated and unremarkable matters the article concludes:

> "Tucked safely away at home she is far from the anorexic jibes, the jewelled belly button rumblings and the Rumour That Wouldn't Go Away. "Poor Richard Hadlee's wife," Anita laughs. "She doesn't even get her own name!"

The statement of claim alleges that the article is defamatory in its entirety and, inter alia, in the passages italicised in the extracts quoted above. In essence the ordinary and natural meanings allegedly inferred or implied which are put forward by the respondent boil down to the following:

(a) that the plaintiff is or was having an affair with Ms McNaught;

(b) that the plaintiff is a lesbian or, alternatively, bi-sexual.

From the position adopted by counsel it can be taken that there is an acceptance that statements to this effect, if made, are both capable of bearing a defamatory meaning.

After reviewing the relevant principles of law and some authorities Williams J turned to the first of the allegations, observing that he had no evidence before him and that in the article Ms McNaught firmly asserted that she had never met Lady Hadlee. The Judge thought that the defendant's submission that accordingly no reasonable person reading the article could possibly believe Ms McNaught and the plaintiff had had an affair in light of that denial begged the question. If the matter proceeded to trial it might be that the plaintiff would give evidence asserting that Ms McNaught's denial of their ever having met was untrue. As well, the Court had no evidence that at a trial Ms McNaught would maintain her denial of meeting Lady Hadlee.

With respect to the Judge, such speculations on the future course of evidence, and they can be no more that that, are inappropriate. Any such evidence could not be relevant since whether particular words are capable, as a matter of law, of bearing a defamatory meaning is to be determined exclusively by an examination of the words themselves and where an ordinary meaning goes to a jury it will be without further evidence of whether the words would reasonably be understood in a defamatory meaning: Gatley on Libel and Slander, 8ed para 1316. In deciding whether words are

capable of bearing a defamatory meaning the Court examines what meaning is expressly stated therein or can reasonably be inferred without looking at any surrounding material and without knowledge of further facts. We are not concerned here with true innuendo - with the meaning words may have to someone who knows facts not contained in the article. The pleadings do not allege any such innuendo in the words used.

The Judge then briefly noted what he called Ms McNaught's acknowledgement in the article that other rumours about her are correct but, as Mr Latimour points out, that is not an accurate observation. Ms McNaught is quoted as vehemently denying the anorexia rumour and as admitting only to having a pierced navel, something which is neither uncommon nor likely to cast a shadow over her character.

Williams J thought that it followed from these matters that it would be open for an ordinary person reading the article as a whole to infer that Ms McNaught's denials of having ever met Lady Hadlee were untrue. He thought that this might have been the impression which some readers might, without straining, have taken from the article "reading it in the whole of the context of the publication."

The Judge then appears to have moved on to the second allegation which, of course, he had to consider separately. He said that to allege that a woman has had an affair with another woman is plainly capable of carrying the imputation that she is a lesbian or bi-sexual. He thought that even if the reasonable person reading the article as a whole were to accept that the two women had never met, the article was nonetheless plainly open to the inference that Lady Hadlee is the sort of person who might have had an affair with another woman.

The Judge then gave another reason for reaching "the same conclusion". At this point he appears to have been speaking of both allegations. He said that it was not enough for the defendant to publish the defamatory rumours and then print Ms McNaught's denial: "The defendant must be able to prove the truth of the imputations in the printed interview."

As Mr Latimour submitted and Mr James appeared to accept, that cannot be correct. The issue before the Court on the preliminary question of whether the words are capable of bearing a defamatory meaning is not directed to their truth. A statement made about someone may be quite wrong and a defendant may accept as much, but the defendant can still say that its statement was not defamatory of the plaintiff because the words used were incapable in their natural and ordinary meaning of being defamatory. Nor, I would add, is a defendant's intention relevant to this question. Even if a defendant intended to stigmatise a plaintiff there will be no defamation if the words used did not bear any defamatory meaning :***Slim v Daily Telegraph Ltd*** [1968] 2 QB 157, 172.

It is worth stating some relevant principles of the law of defamation which were helpfully assembled for the Court by Mr Latimour. In determining whether words are capable of bearing an alleged defamatory meaning:

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. I add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them: ***Charleston v News Group Newspapers Limited*** [1995] 2 AC 65, 72.

Mr Latimour referred the Court to what has been said about the qualities of the notional ordinary reader: someone "not avid for scandal" and "fair minded" (***Lewis v Daily Telegraph Limited*** [1964] AC 234, 260 and 268: ***Morgan v Odhams Press Limited*** [1971] 2 All ER 1156, 1177), not "unduly suspicious" (***Morgan*** at p.1177) and "not prone to fasten on one derogatory meaning when other innocent or at least less suspicious meanings could apply" (***Mitchell v Faber & Faber Limited,*** English Court of Appeal (Civil Division), 24 March 1994, p.3).

It is for the Judge to determine what meaning or meanings the words are capable of bearing (which is treated as a question of law). The jury then has the task of determining what particular defamatory meaning (if any) within that category the words did actually bear (which is treated as a matter of fact): ***Slim v Daily Telegraph Ltd*** at p.174. The jury may of course decide that none of the defamatory meanings was used in the particular case.

It is also to be remembered that whilst words which do not convey more than mere suspicion, even strong suspicion, are not capable of bearing a defamatory meaning (***Simmons v Mitchell*** (1880) 6 App Cas 156 (PC)), more may be expressly stated or may reasonably be inferred than that there is some suspicion about the conduct of the plaintiff. If a newspaper prints that X is under investigation by the police an ordinary and fair minded reader will not conclude that X is guilty of something but will proceed on the basis that the investigation will reveal no criminal conduct: ***Lewis v Daily Telegraph Ltd*** [1964] AC 234. But the world being what it is, if a newspaper says that there is a rumour to the effect that X has committed a crime and is under investigation, the same reader may reasonably draw the inference that whoever started the rumour believes that X has committed the crime and so does the newspaper. It must be the same with rumours of other unbecoming conduct.

One who publishes any such rumour runs the risk of being found to have published something capable of being defamatory unless a complete refutation is also made.

The following passage from the speech of Lord Hodson in ***Lewis*** at p.274-5 is apposite:

> "Rumour and suspicion do, however, essentially differ from one another. To say that something is rumoured to be the fact is, if the words are defamatory, a republication of the libel. One cannot defend an action for libel by saying that one has been told the libel by someone else, for this might be only to make the libel worse. The principle, as stated by Blackburn J in ***Watkin v Hall*** [(1868) LR 3 QB 396,401], is that a party is not the less entitled to recover damages from a court of law for injurious matter published concerning him because another person previously published it. It is wholly different with suspicion. It may be defamatory to say that someone is suspected of an offence, but it does not carry with it that that person has committed the offence, for this must surely offend against the ideas of justice, which reasonable persons are supposed to entertain. If one repeats a rumour one adds one's own authority to it and implies that it is well founded, that is to say, that it is true. It is otherwise when one says or implies that a person is under suspicion of guilt. This does not imply that he is in fact guilty, but only that there are reasonable grounds for suspicion, which is a different matter."

And Lord Devlin had this to say at p.284-5:

> "If it is said of a man - "I do not believe that he is guilty of fraud but I cannot deny that he has given grounds for suspicion", it seems to me to be wrong to say that in no circumstances can they be justified except by the speaker proving the truth of that which he has expressly said that he did not believe. It must depend on whether the impression conveyed by the speaker is one of frankness or one of insinuation. Equally in my opinion it is wrong to say that, if in truth the person spoken of never gave any cause for suspicion at all, he has no remedy because he was expressly exonerated of fraud. A man's reputation can suffer if it can truly be said of him that although innocent he behaved in a suspicious way; but it will suffer much more if it is said that he is not innocent.
>
> It is not therefore correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully, if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the

> words convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded."

What is involved where someone has repeated a rumour, whilst at the same time saying that it is not so, is a weighing up or comparison of "bane" and "antidote", to adopt Alderson B's expressions in ***Chalmers v Payne*** (1835) 2 Cr M & R 156; 150 ER 67. It is a question of degree and competing emphasis but it may be easier to arrive at an answer where the publication contains an express disclaimer or "where the antidote consists in a statement of fact destructive of the ingredients from which the bane has been brewed": ***Morosi v Broadcasting Station 2GB Pty Limited*** [1980] 2 NSWLR 418n, 420 (Samuels JA).

What then are the ingredients of the bane or poison in this case? The article suggests that there is a persistent and widespread rumour that Lady Hadlee and Ms McNaught have been in a sexual relationship. If that were true the ordinary reader must surely take it to be the case that both are bi-sexual. From the outset the article makes it clear that the rumour of the existence of that relationship is not true; that Ms McNaught denies that the two have ever met. A reader of the whole article would understand that the magazine accepts Ms McNaught's denial. Mr James argued that the article undermines the credibility of the denial, so that readers are left with the impression that there remains something credible in the rumour about the existence of the relationship. He based this submission on the very fact of the repetition of the rumour in a magazine such as *New Zealand Woman's Weekly*, the statement in the article that the rumour has gained "credence and credibility" and the fact that the article contained no denial from Lady Hadlee. (She is not quoted at all and a reader would be left with the impression that she had not been approached by the writer of the article.)

However these supposed indications of subversion can be of very slight, if any, significance for an ordinary and reasonable reader who will have seen the positive statement that "For the record, Anita has never met Karen Hadlee." Taken at face value that is an acceptance *by the magazine* of the truthfulness of Ms McNaught's

statement that she has never met the plaintiff, preceded as it is by an opening sentence which also speaks of setting the record straight and shutting up the gossips. Whatever one might think about the ethics of the journalism, the article read as a whole pours cold water on the idea of any involvement between Ms McNaught and Lady Hadlee. In my view it cannot bear the first alleged defamatory meaning.

But that is not an end of the matter if the antidote is nevertheless incomplete. Any suggestion of a relationship having existed between the two women is dispelled. Mr Latimour argues that with it goes any suggestion that Lady Hadlee is a lesbian or bi-sexual. Not so, I think. To say of someone that they have been conducting themselves on a particular occasion or with a particular person in a way which is regarded by many people as improper may in the circumstances carry an inference that the person is the kind of man or woman who would indulge in such behaviour on other occasions or with other people.

It was open to the notional reader to conclude that there would not have been a rumour about two women of the kind re-published by the defendant unless they were bi-sexual (no smoke without fire). The article takes the form of an interview of Ms McNaught by the magazine and so will be read as such. The article makes it appear that she has been asked whether she has had a lesbian relationship with the plaintiff. Her denial is of the particular with no mention of the general. The record of her reaction may be incomplete or she may have thought it unnecessary to go further, such being the foolishness, to her mind, of the rumour. But the lack of a report by the defendant of a general denial on her part of conduct of that character leaves it open for the article to be taken by an ordinary reader to bear the second of the defamatory meanings alleged in Lady Hadlee's statement of claim. The writer of the article makes no comment on this wider question. The medicine has therefore not counteracted all the effects of the poison.

I would therefore permit the second alleged meaning of the article to be put before a jury so that it can decide whether or not the words actually did bear that meaning. I would thus allow the appeal in part.

Solicitors

Bell Gully Buddle Weir, Auckland for Appellants
Saunders & Co, Christchurch for Respondent

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.74/96

BETWEEN NEW ZEALAND MAGAZINES LIMITED

Appellant

AND KAREN, LADY HADLEE

Respondent

Coram: Henry J
Blanchard J
Barker J

Hearing: 8 October 1996

Counsel: B.R. Latimour and J.M. Scott for appellant
B.M. James for respondent

Judgment: 24 October 1996

JUDGMENT OF BARKER J

On 5 March 1996, Williams J made a pre-trial determination in the High Court pursuant to R.418 that words complained of by the respondent in a magazine published by the appellant were capable of the defamatory meanings ascribed to them in the statement of claim. The appellant now appeals against that decision.

In the 9 January 1995 issue of the "New Zealand Woman's Weekly", a weekly magazine published by the appellant, there appeared on the front page a photograph of a Ms Anita McNaught, a well-known television personality.

The caption in bold type stated "Anita: the truth about those rumours". In the table of contents was another photo of Ms McNaught. Referring the reader to page 12 was the entry: "Tell me it isn't true, Anita": She's been talked about a lot more than she's been talked to, so Anita McNaught talked to us".

In the article itself on pages 12 and 13, is the banner headline "Tell me it isn't true, Anita". There are two further photographs of Ms McNaught seated with a cat on her lap. The article commences: "It's time to set the record straight and shut up the gossips - Anita McNaught is not having an affair with Sir Richard Hadlee's wife!" "I mean, where do these rumours come from?" laughs the petite TV star as she sits surrounded by boxes in the organised chaos of the brand spanking new house she moved into only the day before.

After describing various changes to Ms McNaught's life, the article goes on -

> "In fact, just about the only thing that didn't change was the extraordinary rumour that she had run off with Lady Hadlee.
>
> I have had strangers come up to me in bars in Wellington and say, "Tell me it isn't true, Anita - about you and Richard Hadlee's wife". I've had friends report that they've heard it from dinner parties. It has gained more credence and credibility than any other rumour that has ever gone around about me.
>
> For the record, Anita has never met Karen Hadlee. She has met Sir Richard. Twice. Quite a long time ago. That's it.
>
> I just hope the poor woman, who after all isn't in the public eye, hasn't had a year of people coming up to her saying "Are you really having an affair with

> Anita McNaught?" I mean how dreadful! What does Richard think? Poor Richard!"

The article then discussed a rumour that Ms McNaught was anorexic, a suggestion which she denied in some detail; this section of the article, ends with the paragraph: "No-one, she points out, ever asks her about the anorexia thing to her face. "Only the Richard Hadlee thing," she says with a wry smile."

The article then proceeds to deal with another rumour of a personal kind and then with various changes in Ms McNaught's life. It ends with the paragraph -

> "Tucked safely away at home she is far from the anorexic jibes, the jewelled belly button rumblings and the Rumour That Wouldn't Go Away. "Poor Richard Hadlee's wife," Anita laughs. "She doesn't even get her own name."

The respondent alleged that the above statements infer: (a) that in the minds of large sections of the public she is or was having a lesbian affair with Ms McNaught or could have been; and (b) that the statement implies that she is a lesbian or alternatively bisexual. She alleges that the article, taken as a whole, is defamatory of her, notwithstanding its denial of the rumours concerning herself.

After setting out the principles to be applied in determining whether statements are capable of being understood by reasonable people in a defamatory sense,

the Judge reproduced quotations from textbooks and referred to certain authorities. He concluded that -

(a) It would be open for an ordinary, reasonable person, reading the article as a whole, to infer that Ms McNaught's denials of never having met the respondent were untrue; the impression that some readers, without straining, might have taken from the article as a whole, could be as alleged by the respondent.

(b) In the alternative, from the ordinary and natural meaning of the words, there could be an inference that the respondent was either lesbian or bisexual.

(c) It is not enough for a defendant to publish defamatory rumours and then print a denial of the rumours plus a statement that Ms McNaught had never met the respondent; the defendant must be able to prove the truth of the imputations in the printed interview. The Judge approved a statement in Professor Burrows' text to the effect that the fact the rumours may have been generated and repeated on social occasions does not free a publisher from liability. Printing "a contradiction of the assertion published does not limit the reader to the refutation" (See **Savige v News Ltd** [1932] SASR, 240,

250). The Judge quoted again from Professor Burrows that it is "...dangerous to use such common devices as "Mr X today denied rumours that"".

The appellant submitted that the Judge was wrong in coming to these conclusions; that the article could not reasonably contain the defamatory meanings alleged to be inferred.

There was no dispute as to the principles to be applied in determining whether words are capable of bearing a defamatory meaning. These principles can be summarised as follows -

(a) The test is objective. In the circumstances in which the words are published, what would the ordinary, reasonable person understand or infer from them as a matter of impression?

(b) The stereotype of the ordinary, reasonable person is one of ordinary intelligence, general knowledge and experience of the world, with a capacity for reading between the lines; but not one who would indulge in strained or forced interpretation or groundless speculation. This hypothetical person must also be fair-minded, not avid for scandal, not unduly suspicious, nor one prone to fasten on to one

derogatory meaning when other innocent or at least less serious meanings could apply.

(c) The words complained of must be read in context; in other words, the article as a whole must be construed with appropriate regard to the mode of publication and surrounding circumstances. See **Charleston v New Group Newspapers Limited** [1995] 2 AC 65, 71, **Mitchell v Faber & Faber Ltd** (English Court of Appeal, Civil Division, 24 March 1994), **Morgan v Odhams Press Ltd** [1971] 2 All ER 1156, 1177, and **Lewis v Daily Telegraph Ltd** [1964] AC 234, 260, 268.

The appellant's submissions proceeded on the basis that the ordinary, reasonable, fair-minded reader could not take the inference that the respondent was having an affair with Ms McNaught; not only because of Ms McNaught's reported denial of the affair, but also because of her denial that she had ever met the plaintiff.

The answer to these submissions is not as simple as the appellant would have it. When an article states a defamatory rumour, coupled with a denial of a rumour, authority suggests that there can remain matter capable of a defamatory meaning.

There are two aspects on which the appellant must be correct when criticising the judgment under appeal. First, one of Williams J's reasons why the issue that the words could not be defamatory should not be decided pre-trial; he ruled that, at trial, the respondent might testify that Ms McNaught's denial of ever having met her was untrue. There would then, in the Judge's view, be a conflict of evidence between Ms McNaught and the respondent; that the tribunal of fact (Judge or jury) would then have to make a decision on credibility.

Where, as here, a plaintiff claims a false innuendo, no further evidence is permitted on the meaning of the statement. Once the publication of the words is proved or admitted, the only relevant evidence at trial can be that directed to the question of damages. Accordingly, on the way in which this case is pleaded, the Judge was wrong to say that evidence as to whether Ms McNaught had or had not met the respondent would be admissible.

Secondly, the Judge was wrong to hold that it was not enough for a defendant to publish defamatory rumours and then print a denial and then he said: "the defendant must be able to prove the truth of the imputations in the printed interview". Williams J relied on Professor Burrows' text for the proposition that the fact that rumours had been generated and repeated on social

occasions did not free a publisher from liability: "a contradiction of the assertion published does not limit the reader to the refutation". The learned Judge was stating the situation too broadly. The quotation from **Savige v News Ltd** (supra) was merely stating the "bane and antidote" principle which I shall now discuss.

The starting point, when the evocative formula on "bane and antidote" was coined is the statement of Baron Alderson in **Chalmers v Payne** (1835), 150 ER 67 -

> "In one part of this publication something disreputable to the plaintiff is stated but that is removed with the conclusion that the bane and antidote must be taken together."

In **Truth (NZ) Ltd v Bowles** [1966] NZLR 303, the appellant weekly newspaper had published a statement that the plaintiff had denied in Court she was a drug addict, a prostitute and an abortionist. These questions were allegedly asked of her in a sensational murder trial by unspecified questioners. In the following week's issue, the appellant referred to the respondent's denial of various activities; it stated that the questions were never put to her and that the answers quoted were never made by her. She was awarded £3,000 by Woodhouse J in a Judge Alone trial.

The learned Judge held that the sting of the libel was to be found in the fact that -

> "unnamed questioners (and it is not clear whether the questions came from the Crown Prosecutor or in cross-examination) felt in the environment of this notorious trial that this young woman should be challenged as a drug addict, as a prostitute and as an abortionist. The whole implication of the passage complained of is gross moral turpitude and criminal activities. Many readers would actually know and others would sense that aspersions of this gravity are never flung about in Court by responsible counsel without some foundation. To such readers whom I believe are reasonable in general the questions alone would carry the inference that the plaintiff's background and conduct had provoked them. In my opinion these words carry so high a level of suspicion they would convey to normal fair-minded readers an impression indistinguishable from guilt. In my view they are defamatory in themselves and no plea of innuendo was required or necessary to support the plaintiff's case."

On appeal, the Court of Appeal held Woodhouse J was right in finding that the article carried grave defamatory implications; for a variety of reasons, it reduced the damages to £750. At 308, North P said -

> "First we think the learned Judge went a little too far in the opinion he expressed that the words carried so high a level of suspicion that they would convey to normal fair-minded readers an impression indistinguishable from guilt. We agree that fair-minded readers of the paper might well say there is seldom smoke without fire but we do not think that they would necessarily conclude that she was guilty in respect of the various allegations made against her in view of her denials."

In **Bik v Mirror Newspapers Ltd** [1979] 2 NSWLR 679(n), a newspaper had published a report about the plaintiff, a

professional engineer; in this report a Minister of the Crown had cleared the plaintiff of allegations that: (a) he had designed a faulty crane which had led to a fatality; and (b) had given inadequate instructions in relation to the temporary repair of the crane. In the Court of Appeal of New South Wales, Herron, CJ considered that the hypothetical, ordinary reader would discern that, in the opening words, a Minister of the Crown had cleared a man who had endured 8 years of mental anguish and slurs on his professional competence.

Herron, CJ held that the whole tenor of the article was to inform the reader that the plaintiff was wholly cleared; that no fair-minded reader could imply the plaintiff bore any responsibility for the fatality; that an injustice had been done to him for 8 years by having wrongful acts attributed to him over that period. The Judge concluded that far from being more defamatory, the article was laudatory of the plaintiff.

In **Savige v News Ltd** (supra) (cited by Williams J) the plaintiff was an Australian Army officer. Along with others, he had been named by a Major-General in a newspaper article about a book written by a Turkish official on alleged actions of Australian officers during the First World War. The book, originally written in German, had been translated into English. Neither the

plaintiff nor his fellow officers had been mentioned by name in the book. However, the Major-General, in a vigorous refutation of the truth of the book, named the officers and went into considerable detail to refute the allegations in it. His comments included details which, if believed by readers, would have shown there was no truth in the original text.

The newspaper argued that the article was not defamatory as it contained both "bane and antidote". However, Angas Parsons J held it was not unreasonable that some readers might believe the statement of the original author in preference to that of the Major-General. After referring to authority, the Judge stated at 245 -

> "A contradiction of the assertion published, whether made by the newspaper on its own account, or on the authority of anyone else, does not limit the reader to the refutation and oblige him to disregard the assertion if, interpreting the document as a whole, the defamatory meaning charged could be made out as a reasonable, natural, or necessary inference from the words used."

Savige's case was distinguished by Taylor AJA in **Bik's** case because what was said of the plaintiff in **Bik's** case was that the untrue allegations were an injustice; moreover, a Minister of the Crown had so stated publicly, after due investigation.

Professor Burrows in his work cited by Williams J, i.e. **News Media Law in New Zealand** (3rd ed), 31 refers to **Breasley v Odhams Press Ltd** (The Times, 15 November 1963). The plaintiff jockey had successfully sued a magazine which repeated rumours he had deliberately not won on a favourite horse; the article then offered its view that there was no truth in the allegation and then went on to praise the plaintiff's tactical skill. There is only a brief newspaper report of this case which shows that Havers J had held that the words were capable of a defamatory meaning; the "bane and antidote" had to be taken together.

However, as Professor Burrows opines, everything depends on the overall impression created by the publication. It could be that, in a case like **Breasley** (as it did in **Bik**) the denial could so negate the allegations so that no defamatory imputation would remain.

A further Australian case is **Morosi v Broadcasting Station 2GB Pty Ltd** [1980] 2 NSWLR 418(n). There, a well-known news commentator, employed by the defendant radio station, broadcast a commentary on a television interview with the plaintiff the preceding night. In this interview, it was implied that the plaintiff had been sleeping with a well-known politician. The commentary went on to deny there was even the faintest

suggestion that she had any such relationship. The interviewer praised the plaintiff for being an intelligent, courageous, sensitive and, "of course, very handsome woman".

At the conclusion of the hearing of her claim before a jury, counsel for the radio station moved for judgment on the basis that the publication was incapable of conveying any defamatory meaning. It was submitted that the ordinary, reasonable, stereotypical listener, considering the broadcast as a whole, could not have regarded it as bearing any discreditable imputation on the plaintiff. Counsel conceded that one quotation "her's is the most notorious women's name in the country", regarded independently, was capable of a defamatory meaning. Counsel submitted, however, that the "bane" inherent in those words was entirely cured by the "antidote" provided by the context of the statement as a whole, which was described as eulogistic and not pejorative of the plaintiff. The discreditable assertions were made only for the purpose of refuting them vigorously; it was only in this sense that the listener, with the qualities which the law imputes, could reasonably have understood the broadcast.

Samuels JA said at 419 -

> "I do not doubt that there are occasions when a publication which seeks to refute a calumny which it expressly states may be held incapable of conveying any defamatory meaning. **Bik v Mirror Newspapers Ltd** (supra) is an example. But such cases must be comparatively rare. The enquiry upon which the Court must embark differs from that involved in the threshold of the question which commonly arises." (emphasis added)

Stressing the necessity to weigh up and compare the bane and the antidote, Samuels JA did not find other cases of much value; he was unable to be satisfied that it was not open to the ordinary, reasonable listener to understand the words of the publication in a sense defamatory of the plaintiff. The decision of the trial Judge that the publication was capable of defamatory meaning was upheld.

Finally, **Mitchell v Faber & Faber Ltd** (supra); the plaintiff had been a professional drummer in a popular group led by the late Afro-American guitarist, Jimmy Hendrix; he claimed that he had been defamed in a biography of Hendrix, set in the world of pop music. The plaintiff alleged that a number of extracts in the book published by the defendant claimed he was a racist who had held Hendrix in contempt because of his colour; that he had shown insensitivity in using racial abuse in his conversations with Hendrix which had deeply offended Hendrix and caused racial tension. The article went on to state that the plaintiff did not intend harm, had no malice and could have used the words casually, unaware of

what a black American would find offensive. Drake J considered that the words were not capable of being understood by the ordinary reader in the meaning complained of, given the "antidote" element.

The Court of Appeal after quoting Samuels JA in **Morosi**, disagreed. Hirst LJ at p.7 of the unreported judgment said -

> "So far as the "antidote" is concerned, it seems to me that only in the clearest of cases could it be proper for a Judge to rule that the sting of the words, which are ex hypothesi capable of a defamatory meaning in themselves, is drawn by the surrounding context, so that in the result these words cease to be capable of a defamatory meaning.
>
> In my judgment, the general though perhaps not universal rule should be that this is a matter for the jury and not the Judge to decide.
>
> In the present case, although no doubt the "antidote" argument is viable, I am by no means satisfied that it is anything like conclusive or bound to succeed and with great respect to the Judge, I think he was wrong to come to the contrary conclusion."

In the light of the above authorities, I consider that the words complained of by the respondent are capable of a defamatory meaning; a jury could think that the notional, reasonable reader could feel that there was "no smoke without fire". It may be that a jury would consider that the "antidote" of Ms McNaught's denials was

sufficient; but as Hirst LJ pointed out in **Mitchell**, that decision is essentially a matter for a jury.

The same view is apparent in **Morosi** and in **Savige**. **Bik's** case is clearly distinguishable; that was a report of an official investigation clearing a professional man of negligence or incompetence after 8 years of uncertainty on his part. Samuels JA in **Morosi** spoke of the **Bik** situation being comparatively rare.

In my view, Williams J was also correct in holding that even the "antidote" or refutation contained in the article could not be enough to refute the imputation that the plaintiff was lesbian or bisexual. Accordingly, this implication was capable of a defamatory meaning.

In summary, the statement in the 8th (ed) of **Gatley on Libel and Slander** (1991) para 264 is appropriate -

> "The fact that the defendant expressed a doubt or disbelief as to the truth of the slander at the time will make no difference to his liability. "No character or reputation would be safe, if a mere statement of a person's disbelief of a rumour which the speaker was engaged in circulating could be made to defeat the right of recovery for the slander."

Accordingly, I would dismiss the appeal with costs in favour of the respondent.

Solicitors	Bell Gully Buddle Weir, Auckland, for appellant Saunders & Co, Christchurch, for respondent