[redacted]

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY **CP 139/98**

BETWEEN	**MILTON CHARLES WEIR**	
	First Plaintiff	
A N D	**KEVIN WAYNE ANDERSON**	
	Second Plaintiff	
A N D	**JOSEPH FRANCIS KARAM**	
	First Defendant	
A N D	**REED PUBLISHING (NZ) LIMITED**	
	Second Defendant	

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Hearing: 25 August 2000

Counsel: D L Mathieson QC for Plaintiffs
J G Miles QC and P A Robertson for Defendants

Judgment: 20 September 2000

JUDGMENT OF ANDERSON J

SOLICITORS

Tripe Matthews & Feist (Wellington) for Plaintiffs

[1] In June 1994 five members of the Bain family died of gunshot wounds in their home at 65 Every Street, Anderson's Bay, Dunedin. The plaintiffs, who were then serving police officers, were members of the police team investigating the homicides. Within days of the investigation commencing David Bain, the elder son of Mr and Mrs Bain, and the sole survivor of the Bain household, was arrested and charged with the murder of his parents and three siblings. He was subsequently convicted on his trial before a High Court Judge and jury.

[2] In 1997 the first defendant wrote and the second defendant published a controversial book about the police investigation of the homicides and the trial and conviction of David Bain. In support of his opinion that David Bain was wrongly convicted, Mr Karam wrote about aspects of the investigation and evidence at trial with which Mr Weir and Mr Anderson were concerned. That led the plaintiffs to sue the defendants for alleged defamation. The proceeding was tried for two weeks before me and a jury of 12 in May and June this year. The jury's findings on the issues were entirely in favour of the defendants. Judgment was entered for the defendants on Mr Anderson's claim. In respect of Mr Weir the proceeding was adjourned for legal argument on an issue relating to the defence of honest opinion which had been specifically reserved.

[3] Each plaintiff now applies for an order for new trial. In the case of Mr Weir the grounds are that in respect of a certain alleged meaning, which the jury considered was defamatory, the defence of honest opinion, which the jury also found, was not available to the defendants. In respect of Mr Anderson the grounds are that the jury's findings that certain words are not defamatory are against the weight of evidence.

Mr Weir's Application

[4] An element of the Crown's case against David Bain related to a spectacle lens which was found in the bedroom of Robin and Maureen Bain's younger son, Stephen. A pair of spectacle frames containing only one lens was found on a chair in David's room. The Crown argued at trial that the lens found in Stephen's room had

been dislodged from its frame in the course of a mortal struggle by Stephen with his killer before he was murdered. The lens and incomplete spectacles were important matters.

[5] When preparing for trial Mr Weir selected a police photograph as a potential exhibit for the purpose of showing the dislodged lens and he gave evidence that it did show the position of the lens. By an extraordinary coincidence the photograph he selected had captured a reflection from plastic in Stephen's room, such reflection having virtually the exact size, shape, and transparency of the spectacle lens, and occurring only a couple of centimetres away from the actual position of the lens. The lens itself, although so close to the apparent position of the reflection, was occluded by part of a boot on the floor.

[6] On an objective assessment of Mr Weir's error it is not difficult to appreciate how easily he may have been misled by the extraordinary specular phenomenon and been honestly mistaken in his interpretation of the particular photograph. After all, the optical phenomenon was only recognised as such years later when Mr Karam commissioned scientific tests in this respect. Mr Karam, however, formed the opinion that Mr Weir perjured himself when giving evidence about the photograph. The jury found that such meaning was expressed in the book. They affirmatively answered Issue 2, which was in the following terms:-

> Do the words complained of in their natural and ordinary meaning, when read together and in the context of *David and Goliath* as a whole, mean that Mr Weir committed perjury at the High Court trial of David Bain for the murders?

[7] Mr Karam, wisely, did not seek to justify the defamatory imputation on the basis of truth, but he did invoke the defence of honest opinion. Issues 3, 4 and 5 in the Statement of Issues answered by the jury dealt with that defence of honest opinion, which I ruled could be put to the jury, although reserving argument as to whether that defence was legally available in respect of the meaning alleged.

[8] The particular issues and the jury's answers are set out below:-

> **Issue 3** Is such meaning an expression in the book of "opinion" in the legal sense?

Answer: Yes

Issue 4 If the answer to Issue 3 is "yes", is such expression of opinion based on facts alleged in the book?

Answer: Yes

Issue 5 If the answer to Issue 4 is "yes", are such facts proved to be true or not materially different from the truth?

Answer: Yes

[9] In the course of my directions to the jury on the matter of honest opinion, I directed that:-

> ... one may express an honest opinion and not be liable in defamation, even if one is wrong, provided that it is an opinion in the sense that it is an expression of belief or conclusion or deduction from facts which are stated in the context of that opinion.

[10] Although Mr Weir's application is not specifically founded on a misdirection on a material point of law, Mr Mathieson submitted, with his usual courtesy, that there was a misdirection. It is quite appropriate for counsel to examine the directions because the essential ground on which a new trial may be ordered, in terms of s 494, is that there has been a miscarriage of justice that justifies a new trial. Whether the defence was available and whether the directions indicating how it might be applicable were correct are merely facets of the same question. My view as to whether and how the defence might be available was expressed to the jury in the following directions:-

> What is defamation? Defamation is classically described as an untrue imputation against a person's character. In short, it's a slur on someone's character which is not true. In this case if it were said, and this is an issue which you will have to decide, but assume for the sake of argument it were said that Mr Weir didn't find the lens but planted it in the bedroom. If that were untrue that's obviously a slur on his character, so it's defamatory. If it's true a defendant can plead truth, but doesn't have to because there are defences, perfectly valid defences, including honest opinion, which don't require a defendant affirmatively to prove the truth of the defamatory statement. So it's a slur on character. It's a slur on reputation.
>
> That's not a difficult concept but the concept of honest opinion is. It's difficult for juries, it's difficult for lawyers, and it's difficult for Judges. The fact that it's difficult doesn't mean it's not important. It's very important to come to grips with it and that's what we have to do in this case.

And coming to grips with it requires one to bear in mind what I mentioned earlier that there can be a difference between a fact and a true fact. Let's examine it, for example, in relation to Issues 3, 4 and 5. Just use that as a framework for this discussion. You will be aware that the law says that if you make an untrue imputation against someone's character they can sue for compensation for that damage to their reputation. Reputation, the right to one's good name, as counsel observed yesterday, is an essential and valuable right in our society. But so too is the right of free speech. That's a fundamental freedom of our community. It's for the benefit of the community and it's vested in individuals. In the law of defamation these two great principles often meet head to head, and how do you resolve such a conflict whilst preserving the integrity of each principle? One of the ways is to allow a defendant to prove that what was said was true, because if something is actually true then there is not a reputation in that behalf to be damaged. It's not an issue here. That's just an example. But another way of resolving that conflict of principle is the defence of honest opinion, and one may express an honest opinion and not be liable in defamation, even if one is wrong, provided that it is an opinion in the sense that it is an expression of belief or conclusion or deduction from facts which are stated in the context of that opinion. But of course no-one can have a valid opinion for this purpose if it's based on something which is not a true fact. The opinion might be wrong but so long as it's based on true facts it will be protected. It will not be protected if the facts on which it is said to be based or alleged to be based are simply not true. It can have no greater validity than the untruth of its basis.

Now that still leaves us grappling with the question of "well what is an opinion in the legal sense? The issue says "legal sense". What is that actually getting at?" One way of understanding it is to look at the explanation for allowing a defence of honest opinion to defeat a defamatory statement. The key to understanding the idea is that if there is an opinion in this legal sense, the person who hears the opinion or the person who reads it can see the basis of it and make a judgment. A person might say "I am of the opinion that X is a thief". On its own that is a statement of fact, not opinion at all, in the legal sense. Someone might say "X is a thief" and yet that may occur in a context where it actually becomes an opinion because it may be the deduction from other things that that person has said. "Because of A and because of B and because of C (that type of context), I say X is a thief". Now of course a defendant doesn't have the right to say "because of A and because of B and because of C, I conclude". What a jury has to look at is whether that actually is the context in which a statement is made. If you bear in mind the rationale you will be able to understand what is really meant in law by "opinion" as incorporated in the defence of honest opinion.

You will see these ideas addressed in Issues 3, 4, and 5, for example. Is such meaning, assuming you have found the meaning, an expression in the book, I stress that, in the book, of opinion in the legal sense? To some extent you may have to consider Issue 4 at the same time. They tend to merge. They are separate but they do tend to merge. If the answer to 3 is "yes", is such expression of opinion based on facts alleged in the book? Now there may be in a case something which looks as though it's an opinion because it's in the context of something that looks like fact, but it might be so disjoined from those facts that you say "well it couldn't, even if the facts are true, really be an opinion". It's a matter of degree. This is where the difficulty arises for juries. You have to make a judgment in terms of degree.

> Suppose you thought "we are not satisfied that on the balance of probabilities that meaning is an opinion". You would answer "no". It couldn't then be an honest opinion in the legal sense. But suppose you were satisfied on the balance of probabilities that it was. Then you would have to be satisfied that it was based on facts alleged in the book. I keep coming back to "in the book" because Mr Karam has said "in my opinion this" or "I believe this". It's accepted for the purpose of this case by the plaintiffs that any opinion expressed by Mr Karam in the book is his genuine opinion, but what we are talking about is the book. There are some cases where a plaintiff might say "well it's not actually your genuine opinion at all". This isn't such a case. The plaintiffs say "any opinion in the book we accept is a genuine opinion", but they say "we don't accept it's an honest opinion in the legal sense".
>
> So is such expression of opinion based on facts alleged in the book? Both counsel used expressions like "is it underpinned by it?" Is it a situation where someone reading the book can say "ah, he thinks this because of this". So that they can then evaluate the process and judge for themselves what weight to put on the opinion. It's that sort of process.
>
> Well suppose you answer "yes" and "yes" to 3 and 4. The next question is "are the facts underpinning the opinion true facts?" It may be written as facts and that would be sufficient for the purposes of 3 and 4, but then the last inquiry is "well are those facts true facts?" That's the process you go through. It is difficult but I think if you bear in mind those pointers, there is a conflict of two great principles. They have to be reconciled. They will be reconciled by truth or by an honest opinion which is supported by true facts. That's the approach.

First Plaintiff's Argument

[11] Essentially, the argument for Mr Weir is that a meaning asserted as a fact cannot be an opinion for the purposes of the defence of honest opinion. It was submitted that what Mr Karam had written about Mr Weir and his evidence in the Bain trial was presented as a statement of fact and not as an evaluation or a personal assessment or a commentary on facts.

[12] Mr Mathieson submitted that presentation is crucial to the question whether a statement is or is not an expression of opinion, and he referred to authorities in support of that submission. The principle is well established and is supported by counsel for the defendants who cited the following from the judgment of Field J in *O'Brien v Marquis of Salisbury* (1889) 54 J.P. 215 at 216 column 3:-

> ... comment may sometimes consist in the statement of a fact, and may be held to be comment if the fact so stated appears to be a deduction or conclusion come to by the speaker from other facts

> stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed, and from which his conclusion may be reasonably inferred.

[13] Mr Mathieson submitted that as well as being presented as fact the words complained of were intended to be read as factual. He submitted that what an author believes to be a fact and intends to be understood as a fact must always be classified as a fact. I do not accept that submission. It moves from presentation, which is an appropriately objective criterion, to antecedent belief, which is subjective. Just as words which are published as facts cannot be translated into opinion by the publisher's unexpressed subjective view, so also words which are presented as opinion cannot lose that character by reason of the publisher honestly believing them to be true facts.

[14] Mr Mathieson next submitted that the statements were not capable of being regarded as opinion in the legal sense because the statements are capable of the quality of truth or falsity. The authority for that submission was a passage from **Harper and James** *The Law of Torts* (Volume 1) 1956 which asserts that a statement of fact is one capable of the quality of truth or falsity. I do not accept this submission. The defence of honest opinion, which is justified by the public and private interest in freedom of speech, is not to be confined to non factual value judgments. I accept as correct the statement in **Gatley on Libel and Slander**, 9th Edition, 1998, para 12.10 that:-

> ... a comment may consist of an inference or deduction of fact; that is, an author can assert, as his comment on facts stated or referred to in what he publishes, some other fact the existence of which he infers or deduces from those facts.

[15] Whether a statement is or is not an opinion for the purposes of the defence of honest opinion is not a semantic question. It requires an assessment which has regard to the rationale of the defence. That is founded on freedom of speech which it protects by permitting honest statements which are presented as factually based deductions or conclusions or remarks, the worth of which can be assessed by those to whom it is published.

[16] It is not helpful to examine the applicability of the defence in terms of a fact/opinion dichotomy. The correct question to ask is whether the defence of honest opinion applies. It will apply when the words complained of appear conclusionary, the conclusion is based on apparent facts which are true or not materially different from the truth, and the conclusion is honestly believed by the maker of the comment. The law is still correctly stated in the words of Field J in *O'Brien v Marquis of Salisbury* (supra). The principle was adequately explained to the jury in my full directions set out earlier in this judgment.

[17] In the present case it was open to the jury to find each of those elements present and the defence of honest opinion was accordingly available. There is no basis for granting a new trial to Mr Weir.

Mr Anderson's Application

[18] Mr Anderson's cause of action against the defendants concerned Mr Karam's treatment in his book of police inquiries and evidence in respect of a computer at the Bain residence. Early in their investigation of the homicide scene the police discovered a typed message on the computer reading:-

> Sorry, you are the only one who deserved to stay.

[19] That message must have been typed by the killer and if the time at which the computer was used for that purpose could be established David Bain might or might not be excluded as the murderer. There was some evidence at the trial to suggest that David Bain was at the street gate of the Bain residence at approximately 6.45 a.m. on the morning of the homicides.

[20] The police sought the assistance of a Mr Cox, a computing advisor at the University of Otago. Shortly after 2 p.m. on the first day of the police inquiry Mr Cox, accompanied by Mr Anderson who kept notes of the procedure, attempted to ascertain when the computer message may have been created. He undertook a procedure which saved the message and then switched off and re-booted the computer. By inspecting the details of a temporary file created when the word processor was last started, and by examining the history of the message file that had

been saved, Mr Cox determined that the computer was originally switched on 31 hours and 32 minutes before he saved the message file, in terms of the computer's internal clock. On the basis that the message file had been saved at 2.16 p.m., according to Mr Anderson's watch, Mr Cox deduced that the computer had been turned on at 6.44 a.m. that day.

[21] Plainly the actual time the computer had been switched on that morning depended on the accuracy of the information about the time the message file was saved by Mr Cox. One factor affecting accuracy was the relationship of Mr Anderson's watch setting to actual time. Realising this, Mr Cox left a message with the police, recorded by Detective Sergeant A B Roberts, which said, amongst other things:-

> Check real time on watch: Detective Anderson.

[22] A subsequent check of Detective Anderson's watch showed that it was reading approximately two minutes fast in relation to real time, with the result that if the message file had actually been saved at 2.16 p.m. according to Mr Anderson's watch, the computer must have been switched on at 6.42 a.m. that day.

[23] When giving evidence at the trial of David Bain, Mr Anderson said:-

> Mr Cox examined the computer in the alcove. The message was still on the computer screen and the computer was in its original condition from the time we first arrived at the scene. It had not been switched off at all. At approximately 2.16 p.m. Mr Cox carried out a number of functions and he will tell you about that.

[24] In his book Mr Karam assumes that the effect of Mr Anderson's watch being two minutes fast is that the computer was actually switched on at 6.42 a.m. real time, and therefore, in the light of evidence evidence suggesting David Bain may have been at the roadside gate at 6.45 a.m., David Bain could not be the killer. Having regard to the way the Crown evidence in relation to the computer was constructed, that view of Mr Karam's has some plausibility. In fact, however, the evidence shows that the message file was not saved at 2.16 p.m. according to Mr Anderson's watch but very likely some minutes later. At 2.16 p.m., according to Mr Anderson's watch, Mr Cox commenced a procedure which continued for six minutes. At some

stage in the course of that procedure the file was saved so that, in reality, the two minute error in Mr Anderson's watch would not have the significance which Mr Karam attaches to it.

[25] Mr Karam criticises David Bain's counsel for not picking up the point that Mr Anderson's watch was two minutes fast and consequently not challenging Mr Cox's evidence concerning the time the computer was switched on. He criticises the police generally for failing to establish an accurate calibrated time base and for using Mr Anderson's watch which did not measure seconds. He then states at p137 of his book:-

> It seems to me that, had the jury known that the computer was in fact turned on at 6.42, they could not have sustained a guilty verdict.
>
> I am not trained in law, and so I am not qualified to comment on whether or not the people responsible for misleading the jury as to this most critical piece of evidence, *which they knew to be false*, and therefore fudged by the use of the word 'approximately', committed an act of perjury. I do know, as we all do, that when taking the oath, police along with other members of our society, swear 'to tell the *whole* truth and nothing but the truth'.
>
> The people responsible for bringing the evidence about the time of 2.16 (and the deduced time of 6.44 a.m.) before the court knew very well that it was false and, more importantly, critical and misleading. Even from Clark's evidence of seeing David at 6.40, it was impossible for David to have turned the computer on at 6.42 that morning.
>
> I feel great pity for the jurors who sat to pronounce verdict on David Bain. I am sure they were perplexed as to why this perfectly normal young man committed this atrocity. They had to base their judgement on the evidence presented to them, not their feelings or emotions. And the evidence was palpably false and misleading.

[26] In his statement of claim Mr Anderson referred to the passages cited above as well as other portions of the book and alleged that those words, in their natural and ordinary meaning, when read together and in the context of the book as a whole meant and would be taken by the ordinary reader to mean that:-

> [1] Mr Anderson had committed perjury at the High Court trial of David Bain.

[2] Mr Anderson knew that the evidence as to timing which he gave was both critical and highly misleading, but culpably did not qualify or correct it.

[3] Mr Anderson was a party to a conspiracy, the other parties being all or some of the police officers involved in the investigation, designed to secure the conviction of David Bain.

[27] The jury found that the words complained of, when read together and in the context of the book as a whole, carried none of those meanings alleged by Mr Anderson. Mr Anderson seeks an order for new trial on the grounds that the verdicts on those issues as to meaning are against the weight of evidence.

[28] The defendants take a technical objection to that application for new trial on the grounds, stated in their notice of opposition, that the second plaintiff consented to the entry of judgment. I do not recall any such consent. When the jury had delivered its verdicts on the issues counsel for the defendants moved for judgment thereon. My recollection is that Mr Mathieson indicated there was nothing he could usefully say and judgment was entered accordingly. I do not construe that as an entry of judgment by consent, and even if it were capable of such a character it would have to be regarded as without prejudice to a right to apply under R494. I would not contemplate the defeasance of a meritorious application by an extempore acceptance of inevitability by counsel at the end of a long and difficult trial.

[29] In fact, however, the application cannot succeed on its merits.

[30] Mr Anderson alleged certain meanings in terms not merely of cited passages from the book but on the basis of their being read together and in the context of the book as a whole. Mr Karam criticises the evidence of Mr Cox as misleading and having regard to the way the Crown interpreted the evidence that description is appropriate. But it is less clear that Mr Karam was targeting Mr Anderson. Immediately after that criticism the book diverts to a report Mr Karam commissioned of a former CIB Superintendent and examines alleged major deficiencies identified by that former police officer in relation to the failure to establish a time base. There is criticism of incidental police inquiries and then a comment that Mr Anderson's watch was not being checked for accuracy and indicated only whole minutes. The

author then diverts to jury questions about certain matters and the chapter eventually ends with a criticism of the defence's failure to pick up on the timing point at trial.

[31] The passages identified in the statement of claim certainly convey the meaning that people were responsible for misleading the jury by knowingly presenting false evidence on a critical issue, but the jury was not bound to conclude that Mr Anderson was one of those people. It was certainly open to the jury to conclude from the style of the writing that Mr Karam was asserting misconduct by people in connection with the formulation and presentation of the Crown case on the issue of timing, without being satisfied that Mr Anderson himself was being categorised as a conspirator and perjurer. In short, although the jury may have found for Mr Anderson on all or some of the alleged meanings, it could just as rationally find as it did.

[32] It has long been the case that on a verdict for a defendant in a defamation action the Court will not interfere unless the grounds for interference are overwhelmingly strong – see *Massey v NZ Times* (1911) 30 NZLR 929. This approach is endorsed, for example, in *Gwynne & Small v Wairarapa Times–Age Company Ltd* [1972] NZLR 586 where Roper J said at p590:-

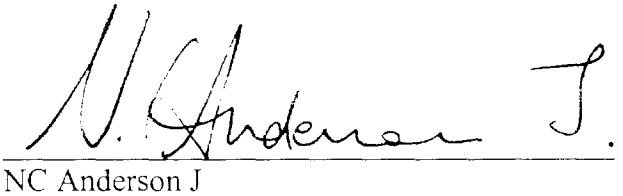
> If one thing is clear from the authorities it is that only on very strong grounds will the Court in an action of defamation grant a new trial on the ground that the verdict is unreasonable and against the weight of evidence. In the absence of any misdirection ... it will only do so if the verdict was one which a jury viewing the whole of the evidence reasonably could not properly find.

[33] There is nothing unusual in the approach indicated by Roper J, whether it be a civil or a criminal jury verdict. It recognises the proper areas of responsibility between a Judge and jury where such a trial process is employed.

[34] Mr Anderson's grounds for interference with the jury's verdict are far from overwhelmingly strong. It was properly open to the jury to find as it did. Furthermore, the Court has a discretion under R494 and relevant to the exercise of a discretion in this case is the high probability of a successful defence of honest opinion if the jury had found any of the meanings to be as alleged..

[35] For the above reasons both Mr Weir's and Mr Anderson's applications fail. There will be judgment for the defendants on Mr Weir's claim and the judgment in respect of Mr Anderson's claim will not be disturbed.

[36] As indicated at the hearing of the applications, I am content to deal with issues of costs, at least in the first instance, on the basis of memoranda.



NC Anderson J

Signed at 4:26 ~~**am**~~**/pm on the** 20th **day of September 2000**