

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

M 852/00



BETWEEN JAMES AH KOY

Plaintiff

A N D TELEVISION NEW ZEALAND LIMITED

First Defendant

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A N D EWART BARNESLEY

Second Defendant

Hearing: 9 November 2000

Counsel: R Harrison QC and J B Murray for Plaintiff  
W Akel and J W S Baigent for Defendants

Judgment: 15 March 2001

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**JUDGMENT OF ANDERSON J**

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SOLICITORS

Vallant Hooker & Partners (Auckland) for Plaintiff  
Simpson Grierson (Auckland) for Defendants

[1] The plaintiff sues the defendants for alleged defamation published in a television broadcast by Television One on Friday 26 May 2000. On an interlocutory application for determination as a preliminary issue whether the words published by the defendants were reasonably capable of bearing certain meanings, I delivered a judgment on 12 July 2000. In consequence of that judgment the plaintiff filed and served an amended statement of claim on 13 July. The defendants re-pleaded on 3 August and the plaintiff filed an interlocutory application for an order striking out the defendants' pleadings in support of defences of truth and mitigation of damages. On 1 November 2000 the defendants filed an amended statement of defence to the amended statement of claim, and because of the transposition and amalgamation of certain paragraphs therein the plaintiff's application to strike out now relates to paragraphs 12 and 15 of that amended statement of defence.

[2] The alleged defamation is contained in the comments made by Mr Barnsley in the course of a Television One news programme about developments concerning the notorious conduct of George Speight and his henchmen in Fiji. The plaintiff alleges that the publication was defamatory of him in five respects. The present interlocutory application is concerned with two of the alleged defamatory meanings described in paragraph 8(4) and (5) as follows:-

- (4) The police authorities in Fiji had good reason to believe or suspect that the plaintiff had committed such a crime or crimes; and/or
- (5) The plaintiff was under investigation by the police authorities in Fiji for committing such a crime or crimes.

[3] A consideration of paragraphs 8(1), (2) and (3) shows that the words "such a crime or crimes" refer to the crimes of treason and kidnapping. The same meanings are alleged as innuendoes in paragraph 9(4) and (5) of the amended statement of claim.

[4] In paragraph 12 of the amended statement of defence to the amended statement of claim the defendants invoke s 8(3)(a) of the Defamation Act 1992 which provides as follows:-

In proceedings for defamation, a defence of truth shall succeed if—

- (a) The defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth;

[5] They say that if the identity of the plaintiff is proved (which they deny), then the meanings pleaded by the plaintiff at the relevant paragraphs are true or not materially different from the truth in the following respects:-

- Paragraphs 8(4) and 9(4) of the amended statement of claim, insofar as the police authorities in Fiji had grounds to believe or suspect that the plaintiff had bankrolled the attempted coup.
- Paragraphs 8(5) and 9(5) of the amended statement of claim, insofar as the plaintiff was under investigation by the police authorities in Fiji for bankrolling the attempted coup.

[6] The defendants then set out a number of matters under the heading “particulars”. Sub-paragraphs 12.1 and 12.2 state that George Speight was the face of and major spokesman for the group which staged the coup of 19 May 2000 and that the actions of that group were unlawful, giving grounds for the police to investigate who might be involved in supporting the group. Sub-paragraph 12.3 states that the police were investigating some businessmen suspected of providing financial and/or other support to the group who staged the coup, one of whom was the plaintiff.

[7] Sub-paragraph 12.4 sets out 12 further sub-paragraphs, many of these being further subdivided, under the general description:-

Matters giving rise to grounds to believe or suspect that the plaintiff may be bankrolling the coup which in the circumstances warranted investigation by the police included:

[8] The particulars refer to the plaintiff having a known close and longstanding relationship with George Speight and his family and reference is made to aspects of the family association. Other particulars state that during the period of the coup the

plaintiff visited Speight at the parliamentary buildings where the hostages of the coup were being held; that the plaintiff was present when Speight was introduced to the Commonwealth Secretary-General in the parliamentary buildings where the hostages were being held; and that the plaintiff was a wealthy businessman in Fiji who would have the means to provide support for the coup. Further particulars refer to the plaintiff's alleged strong opposition to the policies of the then Prime Minister, Mr Chaudhry, and sympathy for George Speight's views regarding the protection of the rights of indigenous Fijians. Some published statements attributed to the plaintiff indicating certain views about indigenous rights and interests are also invoked as particulars.

[9] Most of the particulars given relate, however, to rumours and publications of rumours about the plaintiff's association with Speight and speculation about possible involvement in or association with the coup. Some of the published material about rumours, invoked by the defendants, includes the plaintiff's public acknowledgement that there are rumours. His acknowledgement is coupled with a denial of complicity.

#### **Stated grounds of the plaintiff's application**

[10] The grounds of objection to the particulars in paragraph 12 of the amended statement of defence are that the alleged particulars are not particulars of fact contained in the whole of the publication, or alternatively are not particulars of the truth of the publication taken as a whole.

[11] Counsel for the plaintiff submitted that each of the four categories of particulars contained in sub-paragraphs 12.1, 12.2, 12.3, and 12.4 were not particulars of the defence of truth and were either irrelevant to the defence or repetitions of the substantive grounds of defence.

#### **Defendants' submissions in respect of paragraph 12, amended statement of defence**

[12] Counsel for the defendants submitted that the objection that the particulars were not confined to particulars of fact is misconceived because s 38 of the

Defamation Act 1992 contemplates the giving of particulars of circumstances as well as facts.

[13] Section 38 provides as follows:-

In any proceedings for defamation, where the defendant alleges that, in so far as the matter that is the subject of the proceedings consists of statements of fact, it is true in substance and in fact, and, so far as it consists of an expression of opinion, it is honest opinion, the defendant shall give particulars specifying—

- (a) The statements that the defendant alleges are statements of fact; and
- (b) The facts and circumstances on which the defendant relies in support of the allegation that those statements are true.

[14] Counsel for the defendants submitted that individual particulars must be considered as part of an overall picture. Mr Akel submitted in oral submissions that the defendants will assert that the impugned programme carries the meaning set out in paragraph 8(5) of the amended statement of claim and that such meaning was the truth, namely that businessmen, one of them being the plaintiff, was under investigation by the police authorities in Fiji for the alleged crime or crimes. He further submitted that if the meaning of the publication went higher than that then the higher meaning would be that set out in paragraph 8(4) of the amended statement of claim and truth would be asserted in respect of such meaning also. He posited the question as whether a jury could properly find that the particulars support the pleaded defences, and implicit in his submission is that a jury could. He further submitted that the question whether the police authorities in Fiji had “grounds to believe or suspect” the plaintiff imported an objective test and that the facts and circumstances listed under paragraph 12.4 of the amended statement of defence were all matters which together provided, objectively, reasonable grounds to suspect the plaintiff, which warranted an investigation.

### **Decision on paragraph 12**

[15] The defendants’ pleading to paragraphs 8(4) and 9(4) of the amended statement of claim is prestidigital. The plaintiff asserts a certain meaning in those

paragraphs but the defendants plead a different meaning, assert that such is the truth, and then annex their particulars to that reconfiguration.

[16] Paragraphs 8(4) and 9(4) of the amended statement of claim, when read in context, assert that the police authorities in Fiji had good reason to believe or suspect. The defendants re-cast this as “the police authorities in Fiji had grounds to believe or suspect”. The quality and connotations of the phrase “good reason to believe or suspect” are not the same as the quality and connotations of “grounds to believe or suspect”.

[17] Next, the plaintiff alleges that the meaning of “good reason to believe or suspect” relates to the commission by the plaintiff of “such a crime or crimes” which are identified by reference to paragraph 8(1), (2), (3) and 9(1), (2), (3) as the crimes of treason and kidnapping. The defendants seek to elude that meaning by asserting that “the plaintiff had bankrolled the attempted coup”.

[18] Similarly in respect of paragraphs 8(5) and 9(5) of the amended statement of claim, the defendants ignore the alleged meaning of “investigation for committing the crimes of treason and/or kidnapping” by themselves imputing a meaning not relied on by the plaintiff, namely “bankrolling the attempted coup”.

[19] The plaintiff alleges, and of course carries the burden of proving, the following meanings:-

- The police authorities in Fiji had good reason to believe or suspect that the plaintiff had committed such a crime or crimes (i.e. treason and/or kidnapping); and/or
- The plaintiff was under investigation by the police authorities in Fiji for committing such a crime or crimes (i.e. treason and/or kidnapping).

[20] The defendants must meet the meanings alleged by the plaintiff. They cannot substitute a meaning more convenient to themselves and then expediently treat that as if it was the plaintiff’s allegation. Nor do they need to. If the plaintiff chooses to

sue on the basis of a more damaging alleged meaning than “bankrolling the coup”, the truth of a lesser alleged meaning is irrelevant.

[21] If the defendants are prepared to assert that either of the pleaded meanings is true or not materially different from the truth, they should make that plain and give particulars. The amended statement of defence to amended statement of claim does not go that far. It purports to defend what is not alleged, and the result is a confusion of issues.

[22] But even if “grounds to believe or suspect” were regarded as synonymous with “good reason to believe or suspect”; and even if “the crimes of treason and/or kidnapping” were taken as synonymous with “bankrolled the attempted coup” or “bankrolling the attempted coup”; many of the stated “particulars” in support of those substituted meanings cannot be regarded as adequate or satisfactory particulars for the purposes of pleading.

[23] Particulars 12.1 and 12.2 are unexceptionable, being contextual circumstances which could not realistically be ignored. 12.3 is an assertion of fact which the defendants would have to prove. The difficulties relate to the contents of 12.4. The plaintiff alleges a meaning that the police authorities in Fiji had good reason to believe or suspect he had committed certain specified crimes. He does not allege a meaning of matters generally which might on an objective assessment constitute good reason to believe or suspect him, but rather that the police authorities in Fiji themselves actually had good reason to believe or suspect him. The connotations of specific intelligence in the possession of the Fiji police authorities is inescapable. This perception must be reinforced by the next alleged meaning which is, in reality, that the police in Fiji were actually investigating the plaintiff in respect of the crimes of treason and kidnapping. The defence of truth must relate to those meanings and not some other meaning more convenient to the defendants and particulars of truth must be particulars of the truth of the alleged meanings.

[24] In relation to paragraph 8(4) of the amended statement of claim, particulars will not be satisfactory or adequate unless they are particulars of the facts or circumstances on which the defendants rely in support of the allegation that it is true

or not materially different from the truth that the police authorities in Fiji had good reason to believe or suspect that the plaintiff had committed the crime or crimes of treason and/or kidnapping. None of the particulars given by the defendants specifies what information was actually in the possession of the police authorities in Fiji which was capable of amounting to good reason to believe or suspect the plaintiff guilty of such crimes. Instead the particulars advanced by the defendants amount to no more than allegations of longstanding friendly relations between George Speight and his family, on the one hand, and the plaintiff, on the other; allegations of what was known about the plaintiff's views regarding the protection of the rights of indigenous Fijians; recognition by the plaintiff that numerous rumours were circulating, together with his denial of their truth; and a compendium of writings and internet publications by sundry journalists. Such particulars, if accepted as true, could not reasonably support a defence of truth to what the plaintiff actually alleges.

[25] As to paragraph 8(5) of the amended statement of claim, none of the particulars alone or in any combination could rationally support a plea of truth to a meaning that the plaintiff was under investigation by the police authorities in Fiji for committing the crime or crimes of treason and/or kidnapping.

[26] Similar considerations apply to the analogous sub-paragraphs, 9(4) and 9(5).

[27] In conclusion, because –

[a] paragraph 12 of the amended statement of claim, as a whole, purports to raise the defence of truth to the meanings alleged by the plaintiff but in reality traverses meanings not alleged by the plaintiff; and

[b] even if the defence of truth fairly confronts the meanings alleged by the plaintiff, the particulars if accepted are not rationally capable of supporting such a plea;

the whole of paragraph 12 of the amended statement of defence to amended statement of claim ought be struck out.



## **The defence of mitigation of damages**

[28] In paragraph 15 of their amended statement of defence, the defendants preface several pages of particulars with the following general defence:-

Any loss or damage to the plaintiff's reputation (which is denied) has been subsumed or reduced or mitigated by damage to his reputation arising independently of the broadcast sued upon.

[29] In paragraph 15.1, the defendants identify several dozen publications said to relate to "the plaintiff's connection to George Speight and/or the plaintiff's possible involvement in the coup [which] has received widespread publicity ..." These particulars refer to publications by Reuters News Service, articles in various New Zealand, Australian, and Fijian newspapers and on web sites, radio broadcasts and "emails circulated on the Internet and/or published on Internet chat-rooms or bulletin boards."

[30] The defendants state as a further category in paragraph 15.2:-

The plaintiff's name is or has been on several "blacklists" of people who are said to be or suspected of supporting the coup.

[31] As a further category in paragraph 15.3 the defendants say that the plaintiff has admitted that there have been rumours and media reports other than the broadcast in question in which it is alleged that the plaintiff was or is involved in the coup, including a statement by the plaintiff published in the Fiji Sun and Fiji Times on 24 May 2000.

[32] In 15.4 the defendants refer to defamation proceedings brought by the plaintiff in the High Court at Auckland under CP 272/00 against the Radio Network and Mr Leighton Smith for an alleged defamatory broadcast relating to the coup in Fiji.

[33] The fifth category specified in paragraph 15.5 is that:-

Since the broadcast, the defendants have twice invited the plaintiff to give an interview on the coup and/or issues arising from the broadcast, but the plaintiff has declined both invitations.

[34] The plaintiff submits by counsel that all but paragraph 15 and paragraph 15.4 should be struck out. It is acknowledged on his behalf that by virtue of s 31 of the Defamation Act 1992 the particulars in paragraph 15.4 may be proved in mitigation of damage. As for the other matters, the plaintiff submits that even if proved they could not as a matter of law operate to reduce damages otherwise properly payable. Paragraphs 15.1, 15.2, and 15.3 are all facets of the same principle that it will not be a defence or mitigation for a defendant to show that a defamatory publication was copied from another source or was published when other defamatory material was already in circulation. The principle is expressed in *Associated Newspapers Limited v Dingle* [1964] AC 371 per Lord Radcliffe at 396 in the following terms:-

It is, I think, a well understood rule of law that a defendant who has not justified his defamatory statements cannot mitigate the damages for which he is liable by producing evidence of other publications to the same effect as his.

[35] In that same case, Lord Denning elucidated the principle in these terms at p410:-

At one time in our law it was permissible for a defendant to prove, in mitigation of damages, that, previously to his publication, there were reports and rumours in circulation to the same effect as the libel. That has long since ceased to be allowed and for a good reason. Our English law does not love tale-bearers. If the report or rumour was true let him justify it. If it was not true, he ought not to have repeated it or aided its circulation. He must answer for it just as if he had started it himself.

**Defendants' response in relation to paragraphs 15.1, 15.2 and 15.3 of the amended statement of defence**

[36] The defendants respond with a submission that the present case is unusual by reason of the extent of publications which have occurred relating to the coup and referring to the plaintiff's connection to George Speight and his possible involvement in the coup. They submit that they should not be barred from saying that those other matters are the real cause of any loss of reputation suffered by the plaintiff, and that in the assessment of loss or damage to the plaintiff's reputation the broadcast sued upon must be seen in the context of those other publications.

[37] The defendants submit that the conventional principle elucidated, for example, in *Associates Newspapers Limited v Dingle* (supra) must, in New Zealand, must be considered with reference to certain judgments in the case of *Quinn v TVNZ*. In trial ruling 2 of the proceedings in the High Court under CP 1097-8/90, the Court said:-

There may well be cases where damages could properly be mitigated on the basis that the damage to reputation by the defamatory publication complained of has been in fact overtaken or ameliorated by a reputation arising quite disjunctively of the matters causing the damage complained of such that the sting of the defamation has been lost.

[38] In a later ruling in the same case, the Court said:-

It is, however, a matter of fact and common sense assessment in any particular case whether the damage to reputation caused by a libel is mitigated or aggravated by transient damage to reputation caused by independent factors.

[39] In a Court of Appeal judgment in the same case, *TVNZ v Quinn* [1996] 3 NZLR 24 at 66, McGechan J stated:-

I accept a defendant may plead the windfall of post-defamation damage by extraneous causes to a plaintiff's reputation as a factor in mitigation of compensatory damage. The authorities are mixed, but it is a matter of common sense. The damage caused, an otherwise ongoing state, is not so extreme.

### **Decision on the issue of other defamatory material**

[40] In my judgment, nothing said by the High Court or Court of Appeal in *Quinn v TVNZ* derogates from the longstanding principle that a defamer cannot seek to mitigate damages which he ought pay by pointing to similar unjustified defamations by others. The observations in *Quinn* related to independent or extraneous causes validly diminishing a reputation, not unlawful damage to the reputation to which a defamed person is entitled.

[41] It is not a modern principle that if the world is awash with lies about a person, the injured party may have only a pittance from each who spreads the lie.

The fallacy of the defendants' approach is to treat relevant reputation as undeserved notoriety rather than reputation to which a plaintiff is entitled. If in the present case the plaintiff shall be entitled to damages, then the same will fall to be assessed with reference to traditional criteria which include compensation for the personal distress of a particular publication, vindication of a plaintiff's reputation, and compensation for the damage to that reputation caused by the impugned publication. There must be assumed a reputation untarnished by the multiplicity of unjustified rumours and then an assessment made of the damage to such assumed reputation by the nature and extent of any proved defamatory publication by the defendants.

[42] It is the case that s 31 of the Defamation Act 1992 allows a defendant to prove, in mitigation of damages, that the plaintiff:-

- (a) Has already recovered damages; or
- (b) Has brought proceedings to recover damages; or
- (c) Has received or agreed to receive compensation –

in respect of any other publication by the defendant or by any other person of matter that is the same or substantially the same as the matter that is the subject of the proceedings.

[43] The statutory provision discloses a seeming incongruity in that whereas steps taken by a plaintiff in connection with compensation from other defamers may be proved in mitigation, the fact of other defamations, under the conventional principle, would not serve to mitigate damages if a plaintiff took no steps to pursue those other tortfeasors. Yet the incongruity is resolved by an appreciation that just as a defamer cannot seek to satisfy damage to rightful reputation with a pittance on the grounds that so many people are saying the same falsehood, that the damage each might pay should be divided up at the outset, so a plaintiff cannot expect riches beyond the limits of just compensation by successively suing a multitude in respect of the same or substantially the same defamatory material. The scope for unjust speculation is reduced in situations where a plaintiff has already recovered or has brought proceedings to recover damages, or has actually received or agreed to receive compensation.

[44] The injustice to rightful reputation if a particular defamer could point in mitigation to a swamp of baseless rumour and speculation is exemplified by the wide scope of publications facilitated by modern methods of communication such as the defendants identify in paragraph 15.1. Potential injustice is further indicated in this case by the reference in paragraph 15.2 to sinister “blacklists” whose provenance is as unstated as their authority. As to the matters mentioned in 15.3, I do not see how an acknowledgement by the plaintiff of the existence of rumours coupled with his denial of their truth could logically serve to mitigate the defamatory publication or republication of such rumours.

[45] Paragraph 15.5 of the amended statement of defence pleads, in mitigation of damages, the fact that since the broadcast the defendants have twice invited the plaintiff to give an interview on the coup and/or issues arising from the broadcast, but the plaintiff has declined both invitations. I accept that if a plaintiff sought from a defendant an opportunity to explain his position but was met by a refusal on the part of the defamer, that refusal might be relevant to issues of aggravation of damages as indicating an intransigent and continuing hurtful attitude. But this does not mean that damages for defamation may be mitigated by the defamer offering the injured party an opportunity to use the same medium to defend themselves from an unjustified attack. Such conduct, so amenable to exploitation as a tactic to obtain further copy in the wake of defamatory publications, is not akin to a correction, retraction, or apology which can, by virtue of s 29 of the Defamation Act and antecedent common law, serve to mitigate damages. Of course a correction, retraction, or apology is capable of actually limiting damage to reputation caused by the prior defamation, but it is quite a different thing to adhere to one’s defamatory stance and simply offer the injured party one’s own forum to appeal to the same audience. Such a tactic is at best entirely neutral in the matter of assessment of damages.

[46] For the above reasons I find that paragraphs 15.1, 15.2, 15.3 and 15.5 of the amended statement of defence are not legally sustainable even if proved in fact and that they should be struck out.

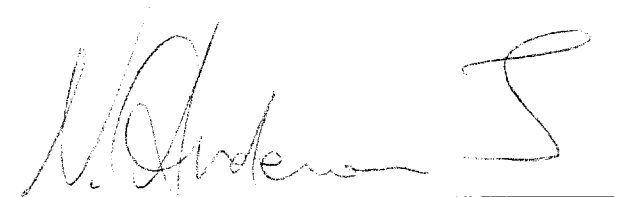
## Conclusion

[47] It may be that the defendants should wish, in the light of the observations made in this judgment, to plead truth to the actual meanings alleged by the plaintiff in paragraphs 8(4), 8(5), 9(4), and 9(5) of his amended statement of claim and to give proper particulars in that behalf. Accordingly the orders made hereunder, striking out portions of the amended statement of defence, cannot serve to prevent the defendants from a timely re-pleading in a manner not inconsistent with the rulings and reasons herein.

[48] I make an order striking out the following portions of the defendants' amended statement of defence to the plaintiff's amended statement of claim, namely paragraph 12, 12.1, 12.2, 12.3, 12.4, 15.1, 15.2, 15.3, and 15.5.

[49] I make a further order directing that any further amended statement of defence by the defendants is to be filed and served by 4 p.m. on Friday 6 April 2001.

[50] The plaintiff is entitled to costs on a scale of 2B and an allowance for second counsel on the hearing of the application.



NC Anderson J

Signed at 2:01 am/pm this 15<sup>th</sup> day of March 2001