IN THE COURT OF APPEAL OF NEW ZEALAND CA64/01

	BETWEEN	TELEVISION NEW ZEALAND LIMITED
		First Appellant
	AND	EWART BARNSLEY
		Second Appellant
	AND	JAMES AH KOY
		Respondent

Hearing:	31 October 2001
Coram:	Tipping J McGrath J William Young J
Appearances:	W Akel and J W S Baigent for Appellants R Harrison QC and J B Murray for Respondent J G Miles QC for Interveners
Judgment:	26 November 2001

JUDGMENT OF THE COURT DELIVERED BY TIPPING J

Introduction

[1] This appeal from a judgment of Anderson J concerns issues which have arisen at the interlocutory stage of these defamation proceedings. There are four questions:

(1) whether a defendant may plead and seek to justify a lesser defamatory meaning than that alleged by the plaintiff;

(2) whether certain particulars of truth are adequate;

(3) whether damages may be mitigated by reference to other publications apt to diminish the plaintiff's reputation in the same respect as the publication in suit; and

(4) whether TVNZ's offer to the plaintiff of a broadcast interview can be referred to in mitigation of damages.

[2] The plaintiff, Mr Ah Koy (who is the respondent in this Court), asserts in his statement of claim that he is a former Cabinet Minister in the Fiji Government and a well known businessman in Fiji and New Zealand. He is a resident of Auckland where he has carried on business for many years. The first defendant, Television New Zealand Limited (TVNZ), which is the first appellant in this Court, is a television broadcaster, and the second defendant/second appellant, Mr Barnsley, is a journalist employed by TVNZ. As there is, for present purposes, no material difference between the two, we will refer to them both as TVNZ.

[3] In the presently relevant paragraphs of his statement of claim, Mr Ah Koy asserts:

> 5. AT about 6.00 pm on Friday 26 May 2000, in the course of presenting the leading item featured on Television One prime time news broadcast by the first defendant throughout New Zealand, the presenter asked the second defendant a question about what is known as the Fijian Coup in these terms:
>
> > *"Now George Speight is very much the face of the rebel cause but who's actually behind it?"*
>
> 6. IN answer the second defendant falsely and maliciously stated and the first defendant falsely and maliciously broadcast these words:
>
> > *"The Police are trying to find out right now. One Network News has been told that the Police have five well known businessmen in their sights. These are the people they suspect or are under investigation for bankrolling this attempted coup but the interesting thing about it is that one of these people is* ***a well known Chinese businessman who is also a former***

politician. *Surprisingly two other names on the list are both Indians".* [original emphasis]

7. THE words *"is a well known Chinese businessman who is also a former politician"* referred to and were understood to refer to the plaintiff. Particulars are as follows:

   (1) The plaintiff repeats paragraphs 1 and 2 above;

   (2) The plaintiff is the only person who would fit the description of *"a well known Chinese businessman who is also a former politician"* in Fiji;

   (3) Shortly after broadcasting the words, the first defendant displayed in the same news bulletin a film clip of the plaintiff shaking hands with the Commonwealth Secretary General, Mr Donald McKinnon, who was then visiting Fiji in an official capacity.

8. IN their natural and ordinary meaning the words cited in paragraph 6 meant and were understood to mean:

   (1) The plaintiff may well have aided and abetted or conspired with George Speight and others to commit the crime of treason by financing their operations and in particular their acquisition of weapons used to forcefully overthrow the duly elected government of Fiji; and/or

   (2) The plaintiff may well have aided and abetted or conspired with George Speight and others to commit the crime of kidnapping by financing their operations and in particular their acquisition of weapons used to detain the Prime Minister of Fiji, members of his cabinet and members of Parliament against their will within the Parliament Buildings in Suva; and/or

   (3) There was a real likelihood of the police authorities in Fiji arresting the plaintiff for the crimes of treason and/or kidnapping; and/or

   (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.

9. ALTERNATIVELY by way of innuendo the same words meant and were understood to mean that:

(1) The plaintiff may well have aided and abetted or conspired with George Speight and others to commit the crime of treason by financing their operations and in particular their acquisition of weapons used to forcefully overthrow the duly elected government of Fiji; and/or

(2) The plaintiff may well have aided and abetted or conspired with George Speight and others to commit the crime of kidnapping by financing their operations and in particular their acquisition of weapons used to detain the Prime Minister of Fiji, members of his cabinet and members of Parliament against their will within the Parliament Buildings in Suva; and/or

(3) There was a real likelihood of the police authorities in Fiji arresting the plaintiff for the crimes of treason and/or kidnapping; and/or

(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.

[4] TVNZ's statement of defence, as revised during the course of an adjournment in this Court, admits paragraph 5 and admits that TVNZ stated and Mr Barnsley broadcast the words set out in paragraph 6, but otherwise denies paragraph 6. The remaining paragraphs are denied. By way of further or alternative defence, TVNZ states that if identity is proved (it being denied that the publication would have been understood to refer to Mr Ah Koy) the broadcast had the two meanings then set out, which meanings were true or not materially different from the truth. The first alternative meaning asserted by TVNZ is that "[Mr Ah Koy] was under investigation by the police authorities in Fiji for bankrolling the attempted coup". The second is that "the police authorities in Fiji had grounds to believe or suspect that [Mr Ah Koy] had bankrolled the attempted coup". These meanings were asserted by TVNZ to be different and lesser defamatory meanings.

[5] TVNZ also pleads qualified privilege and that any loss or damage to Mr Ah Koy's reputation as a result of the broadcast complained of (which is

denied) has been subsumed or reduced or mitigated by damage to his reputation arising independently of the broadcast sued upon. Particulars are then given of various independent publications to similar effect as that in issue, ranging from articles in the New Zealand Herald, the Sydney Morning Herald, the Fiji Sun, Reuters News Service, the BBC, and a variety of other publications in both the print and the electronic media.

Lesser defamatory meaning

[6] TVNZ asks this Court to review its previous decision in *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234, essentially on the basis of arguments relying on changes said to have been brought about in the law of defamation by the Defamation Act 1992 (s8 in particular) and the New Zealand Bill of Rights Act 1990 (ss6 and 14 in particular). *Crush* decided that alternative and lesser defamatory meanings asserted by the defendant, in a case which is not a "pick and choose" case, cannot be the subject of a plea of truth. The truth or otherwise of such alternative meanings is irrelevant because the plaintiff stands or falls on the meaning or meanings which he asserts.

[7] We do not find it necessary to embark upon any review of *Crush* because we are satisfied, as Mr Harrison QC contended for Mr Ah Koy, that in the present case the pleadings do not genuinely raise the point. The so called lesser defamatory meanings asserted by TVNZ are in reality meanings which are not materially different from the meanings asserted by Mr Ah Koy. In England, where a plea of truth of a lesser defamatory meaning is permitted, it is clear that the lesser meaning must be materially different from that alleged by the plaintiff: see *Gatley on Libel and Slander*, 9th edition (1998) at paragraph 27.7.

[8] The words admittedly published, in response to the presenter's question who was actually behind the coup, were:

> *"The Police are trying to find out right now. One Network News has been told that the Police have five well known businessmen in their*

sights. These are the people they suspect or are under investigation for bankrolling this attempted coup but the interesting thing about it is that one of these people is ***a well known Chinese businessman who is also a former politician.*** *Surprisingly two other names on the list are both Indians".* [original emphasis]

[9] On the assumption that Mr Ah Koy proves he was one of the businessmen referred to, the words published expressly stated that he was suspected of or was under investigation for "bankrolling this attempted coup". Mr Ah Koy pleads that either in their natural or ordinary meaning, or by what is conventionally called a false innuendo, the words meant that he may well have committed the crimes of treason or kidnapping by financing the operations of George Speight and others. TVNZ denies that the words have that meaning, yet says that they meant and were true in its first alternative meaning that Mr Ah Koy was under investigation by the police authorities in Fiji for bankrolling the attempted coup. We will deal with this first alternative meaning before turning to the second alternative meaning alleged.

[10] There seem to be three possible differences between the plaintiff's first asserted meaning and the so called lesser defamatory meaning asserted by TVNZ. The first is that the meaning asserted by TVNZ makes no express reference to the crimes of treason or kidnapping. But bankrolling the attempted coup must so obviously involve those crimes, in the understandable absence of any suggestion that those involved in the attempted coup were acting lawfully, that we cannot see any material difference in the asserted meanings in this respect. The second possible difference is the difference between Mr Ah Koy's "may well have" and TVNZ's "was under investigation for". The effect of those two ways of putting the matter is, however, in our view materially the same. The concept of being under investigation for something must necessarily include the implication that the person concerned may well have done it. The third possible difference lies in the greater elaboration of Mr Ah Koy's asserted meaning as against that of TVNZ. But the sting of the two meanings is exactly the same, namely that Mr Ah Koy was a financial backer of the coup and that was behaviour amounting to complicity in treason and kidnapping.

[11] We note also that Mr Ah Koy's fifth asserted meaning is identical to TVNZ's first alternative meaning except that in TVNZ's case the investigation is said to have been "for bankrolling the attempted coup" rather than Mr Ah Koy's "for committing such a crime or crimes", meaning treason or kidnapping. As we have already observed, there is, in context, no material difference between these ways of pleading the meaning of the words complained of. Bankrolling an attempted coup necessarily carries with it the implication of being complicit in treason and kidnapping.

[12] It follows that there can be no question of TVNZ seeking to prove the truth of a *lesser* defamatory meaning. Its pleaded meaning is not materially different from the meanings pleaded by Mr Ah Koy, which it denies. If TVNZ is not prepared to plead truth in respect of Mr Ah Koy's claimed meanings, if he establishes them, it cannot be right to allow TVNZ to plead truth to meanings which are not materially different. Similarly, it is confusing, embarrassing and inconsistent for TVNZ to deny Mr Ah Koy's meanings, yet at the same time to assert meanings which are not materially different from those denied. Mr Akel argued that to take this view would amount to an improper and unreasonable intrusion by the Court on the function of the jury. We disagree. Whether particular words are capable of bearing an asserted meaning has always been a matter for the Judge: see *Gatley* at 34.3. There can be no logical difference if the issue is whether one asserted meaning is capable of being materially different from another.

[13] If a properly directed jury could not reasonably take the view that there was a material difference, the case should not be allowed to go to the jury on that basis. To allow it to be pleaded in that way and then to go to the jury in counsel's addresses would simply be a recipe for confusion and embarrassment, if, in the end, the Judge would be obliged to direct the jury that in law there was no material difference. That is conceptually the same as the Judge ruling that certain words are incapable of having their claimed meaning. On the assumption, upon which we do not express a view either way, that in New Zealand the defendant may, contrary to *Crush*, plead and seek to justify a lesser defamatory meaning, that should only be permitted if

the alternative meaning asserted by the defendant is one which is reasonably capable of material distinction from that asserted by the plaintiff. For the reasons given we do not consider TVNZ's first suggested alternative meaning is reasonably capable of material distinction from the meanings asserted by Mr Ah Koy.

[14] The same must apply to the second allegedly lesser defamatory meaning pleaded by TVNZ in paragraph 12 of its defence. That meaning is that the police authorities in Fiji had grounds to believe or suspect that the plaintiff had bankrolled the attempted coup. Mr Ah Koy in his fourth meaning alleges the words meant that the police authorities in Fiji had good reason to believe or suspect he had committed such a crime or crimes, meaning the crimes of treason and/or kidnapping. There is, in the present context, for reasons already discussed, no material difference between these two suggested meanings. Equally, we can see no material difference between the expressions "grounds" and "good reason". For these reasons paragraph 12 of the amended statement of claim filed in this Court on 23 October 2001 is struck out and with it the particulars, some of which are the subject of the next issue.

Particulars

[15] In case this issue reappears under another guise, we will express our view on the adequacy of the particulars in issue. A defendant must provide particulars of the facts and circumstances on which it relies in support of an allegation that the statements in issue are true. The meaning of the statement in which TVNZ alleges it to be true (not materially different from Mr Ah Koy's meaning as we have held above) is that Mr Ah Koy was under investigation by the police authorities in Fiji for bankrolling the attempted coup. The particulars provided in support of the assertion that the words complained of are true in that meaning are:

(1) the investigation was undertaken by the police authorities in Suva, Fiji;

(2) the investigation was undertaken by a special unit within the Crimes Department,

(3) the investigation commenced shortly prior to 26 May 2001.

[16] We agree with Mr Harrison that these purported particulars, to the extent they can be called particulars at all, are inadequate. Each of them refers to "the investigation" without giving any particulars of the officer or officers in the Fiji police who were conducting the investigation nor upon whose complaint or instructions, or upon what other basis the investigation was being carried out. Neither is there any reference to the date the investigation commenced, or the offences alleged to have been committed by those under investigation. All the purported particulars add to the allegation, the truth of which is in issue, is that the investigation was being conducted by a special unit within the Crimes Department of the police authorities in Suva and commenced 'shortly' prior to 26 May 2001.

[17] One of the purposes of particulars is to enable the plaintiff to check the veracity of what is alleged; another is to inform the plaintiff fully and fairly of the facts and circumstances which are to be relied on by the defendant in support of the defence of truth; yet another is to require the defendant to vouch for the sincerity of its contention that the words complained of are true by providing full details of the facts and circumstances relied on. It can be seen that against each of these three purposes the particulars provided by TVNZ fall well short of being sufficient. It should be mentioned that a further purpose of particulars is that a defendant at trial is not usually permitted to lead evidence of facts and circumstances beyond those referred to in the particulars. In *Zierenberg v Labouchere* [1893] 2 Q.B. 183, 186 Lord Esher MR said that a plea of justification (now of truth) without sufficient particulars was invalid and that this had been the law "from the earliest times". As *Gatley* says at 27.10, it is arguable that in these circumstances there is no plea of justification on the record. On that basis a plea of truth without sufficient particulars would be at risk of being struck out.

Mitigation by similar imputations in other publications

[18] The crucial issue here is whether the defendant can plead, and seek to prove at trial, that the plaintiff's reputation has been damaged by other allegations of the same kind as that or those claimed in the proceedings to be defamatory. Mr Ah Koy claims he has been defamed by the allegation that he bankrolled the attempted coup. TVNZ wishes to prove that a number of other publications also made the same or similar allegations against Mr Ah Koy. TVNZ's purpose is to seek to demonstrate that its contribution to the whole of the damage to Mr Ah Koy's reputation is small and the jury should be able to view the matter in that light.

[19] Both Mr Akel, and Mr Miles QC for the intervening parties (the Radio Network Limited and Mr Leighton-Smith), who had broadcast similar material, accepted that what they were seeking to do was not the approach traditionally taken by the law; but for various reasons they argued that the law should develop in this way. Mr Akel's essential contention was that the defendant should not be prohibited from putting before a jury all the facts and circumstances which impacted on the plaintiff's reputation. Rather, he argued, a jury should be presented with a complete picture both as to issues of liability and as to the extent of damage for which a defendant can truly be held responsible.

[20] He argued that the difficulty with what he described as a rigid application of the principle in *Associated Newspapers Ltd v Dingle* [1964] AC 371 (the leading authority on the present point) was that it failed to take into account the reality of modern communication in the sense that people nowadays have access to a huge array of information outlets whether by the media or by others, and that we are now in an age of instant communication via the internet and websites in particular. Mr Akel argued that there was no longer any reality in taking a territorial view of publications in view of the global nature of communication via the internet. He contended that the end result of the rule in *Dingle*'s case was that the jury was sheltered from the reality of what had taken place. It would be left with the false impression that the

damage to Mr Ah Koy's reputation had been caused solely by TVNZ. Mr Akel addressed the way in which Anderson J had approached the matter in the High Court, and raised various criticisms of that approach. In other respects Mr Akel adopted Mr Miles' arguments to which we will turn after examining the current state of the law. The nature of the pleading which has raised the present issue has been set out earlier – see paragraph [4] above.

[21] *Gatley* deals with this subject from paragraphs 33.25 to 33.55. The learned author's summary of the categories of evidence admissible in mitigation of damages is:

(1) the plaintiff's generally bad reputation

(2) evidence properly before the Court on some other issue

(3) facts which tend to disprove malice

(4) the plaintiff's own conduct

(5) apologies or other amends

(6) damages already recovered for the same defamatory material.

Gatley's category (2) may not be correct in a totally absolute sense and needs to be read consistently with *Dingle* – see the discussion about malice in that case.

[22] The material particulars of what TVNZ seeks to use in mitigation do not fall into any of *Gatley*'s categories. Neither do they fall into any of the statutory categories to be found in sections 29, 30 & 31 of the Defamation Act 1992:

> **29 Matters to be taken into account in mitigation of damages**
>
> In assessing damages in any proceedings for defamation, the following matters shall be taken into account in mitigation of damages:
>
> > (a) In respect of the publication of any correction, retraction, or apology published by the defendant, the nature, extent, form, manner, and time of that publication:

(b) In respect of the publication, by the defendant, of any statement of explanation or rebuttal, or of both explanation and rebuttal, in relation to the matter that is the subject of the proceedings, the nature, extent, form, manner, and time of that publication:

(c) The terms of any injunction or declaration that the Court proposes to make or grant:

(d) Any delay between the publication of the matter in respect of which the proceedings are brought and the decision of the Court in those proceedings, being delay for which the plaintiff was responsible.

30 Misconduct of plaintiff in mitigation of damages

In any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate.

31 Other evidence in mitigation of damages

In any proceedings for defamation, the defendant may 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.

[23] Section 32, to which we will refer again below, preserves the common law categories of matters which can be taken into account in mitigation of damages.

[24] *Dingle*'s case was applied in New Zealand at first instance by Pritchard J in *Jensen v Clark* [1982] 2 NZLR 268, 278-279. *Gatley* explains the law as established by *Dingle* in this way at 33.33:

Other publications to the same effect as the words complained of, or relating to the same incident as is referred to in the words, are

> inadmissible. Nor is it permissible to avoid this rule by alleging that such publications have already tarnished the plaintiff's reputation.

The editors' use of the word 'already' suggests that the primary focus of the rule is on publications which have preceded the publication in suit. If anything, the position should be a fortiori with publications subsequent to that in suit: see *Gatley* at 33.31; *Rochfort v John Fairfax Ltd* [1972] 1 NSWLR 16 at 22-23; *Hughes v Mirror Newspapers* [1985] 3 NSWLR 504 and the early English case of *Thompson v Nye* (1850) 16 QB 175.

[25] The authorities to this effect have recently been reinforced by the decision of the English Court of Appeal in *Bennett v Guardian Newspapers Ltd* [1997] EMLR 301 noted by *Gatley* at para 33.33. The Court upheld the trial Judge who had excluded evidence of, and cross examination about, matters subsequent to the publication in issue. The defendants had wished to rely on this material as having contributed to the plaintiff's distress. The Court held the evidence was irrelevant. The editors of *Gatley* cite this case as part of their discussion of the inadmissibility of other publications in mitigation of damages and in support of the second sentence of the text cited in the preceding paragraph.

[26] In *Dingle*, the Daily Mail and other newspapers had published on 17 May 1958 a report of a Select Committee of Parliament containing matter defamatory of Mr Dingle. On 16 June 1958 the Daily Mail published an article relating to the same matter in unprivileged form. On 26 June 1958 it published a further article stating that all interested parties had been cleared of any deliberate intent to defraud. In assessing the damages for the libel contained in the article of 16 June, the Judge, who was trying the case without a jury, mitigated the amount to be awarded by taking into consideration the effect on Mr Dingle's reputation of the same libel appearing in its privileged form previously to, or contemporaneously with, the publication of the libel in suit, and which had been put in evidence by the newspaper to refute malice. In the result Mr Dingle was awarded £1,100. On his appeal, the Court of Appeal set aside that judgment and increased the damages to £4,000 on the basis that the Judge should not have used the prior

publication as a matter of mitigation. On the newspaper's further appeal, the House of Lords held that the Court of Appeal had been right, and that the trial Judge had wrongly taken into account the effect of the other publications of the libel by the other newspapers. The publication of the same libel by other persons on other occasions was held to be irrelevant on the question of mitigation of general damages.

[27] In his speech Lord Radcliffe said that what the trial Judge had done was:

> to mitigate the damages he was to award to the respondent by the consideration that, though the "Daily Mail" had defamed him on 16 June the person it was defaming already possessed at that date a reputation tarnished to some extent by what had been said about him in the report and in its reproduction and, for all I know, embellishment in other newspapers. To do this is not merely to ascertain and isolate the actionable matter: it is to fix the damages arising from that matter by reference to similar (I do not say identical) allegations made by other persons in other publications.
>
> In my opinion this is an inadmissible proceeding. There is more than one reason why it should not have been followed.

[28] His Lordship then referred to reasons particular to the specific case and then added at 396:

> There is, however, another and more general ground on which all this material (and in that I include both the report itself and whatever may have been published or said about the respondent arising out of the incident dealt with in the report) should have been excluded from consideration as matter of mitigation tending to show that the respondent suffered from a "tarnished" reputation. Whatever may be the qualifications or requirements as to evidence led on the issue of reputation by way of mitigation of damages for libel, I do not believe that it has ever yet been regarded as permissible to base such evidence on statements made by other persons about the same incident or subject as is embraced by the libel itself. In my opinion it would be directly contrary to principle to allow such an introduction. A libel action is fundamentally an action to vindicate a man's reputation on some point as to which he has been falsely defamed and the damages awarded have to be regarded as the demonstrative mark of that vindication. If they could be whittled away by a defendant calling attention to the fact that other people had already been saying the same thing as he had said and pleading that for this reason alone the plaintiff had the less reputation to lose, the libelled man would never get his full vindication. 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; and it seems to me that it would involve an impossible conflict between this rule and the suggested proof of tarnished reputation to admit into consideration other contemporary publications about the same incident. A defamed man would only qualify for his full damages if he managed to sue the first defamer who set the ball rolling: and that, I think, is not and ought not to be the law.

[29] Lord Cohen spoke to the same effect at 406. At 410 Lord Denning said:

> Now comes the difficult point which I may state in this way: The "Daily Mail" are only responsible for the damage done to the plaintiff's reputation by the circulation of the libel in their own newspaper. They are not responsible for the damage done to the plaintiff's reputation by the report of the select committee or by the publication of extracts from it in other newspapers. If the judge isolated the damage for which the "Daily Mail" were responsible from the damage for which they were not responsible, he would have been quite right, see *Harrison v Pearce* (1858) 1 F.&F. 567. But it is said that he did not isolate the damage. He reduced the damages because the plaintiff's reputation had already been tarnished by reason of the publication of the report of the select committee and of the privileged extracts from it in the "Daily Mail" and other newspapers. I think that he did do this and I think that he was wrong in so doing.

[30] The principle is therefore that it is appropriate, indeed necessary, to isolate the damage caused by the publication in suit in the sense of confining the damages to the words published by the defendant. Damages are of course awarded only for the effect on the plaintiff's reputation of the words published by the defendant. It is not, as the law has consistently held, permissible to approach the matter from the other end by proving the existence of other like publications and then saying that the plaintiff's reputation has been so tarnished by the combined effect of all the publications that the damage done by the defendant's particular publication is minimal, or at least small, in comparison with the whole. Further useful discussions of why the law has taken this stance can be found in the judgments of the Court of Appeal in *Dingle* [1961] 2 QB 162, particularly those of Holroyd Pearce LJ and Devlin LJ. It may be helpful to add that the principle of isolation, as it is convenient to call it, does not imply a need to distinguish the consequences of the publication in issue from those of other

like publications. That would presuppose the existence of evidence which is inadmissible. What the principle of isolation does require is that evidence not relevant to the damage caused by the defendant's publication be excluded.

[31] The principle of isolation of damages is also consistent with the fact that when various publications are made independently of each other, and each is defamatory of the plaintiff, the publishers are several rather than joint tortfeasors and liable only for the damage done by their own publication. This is the rule in *Harrison v Pearce* (1858) 1 F.&F. 567; 175 E.R. 855 affirmed in *Dingle* and mentioned in *Jensen v Clark*. The position becomes more complicated if the publications are to the same or similar defamatory effect. In such circumstances isolation of the damage caused by each publication becomes difficult: see *Dingle* in the Court of Appeal per Devlin LJ at 186-7. Some, perhaps most, of the harm will in these circumstances have been caused as the joint consequence of all or a number of the similar publications. The conventional approach to this situation is that if isolation is not reasonably possible, the tortfeasors are deemed together to have caused indivisible damage. They are then classified as concurrent tortfeasors and are each responsible for the whole of the indivisible harm; see for example Gummow J's judgment in *Thompson v ACTV* (1996) 186 CLR 578 at 599-600.

[32] The danger of over compensation which arises from this rule is addressed by s31 of the Defamation Act which has its own difficulties in some respects. This problem arose in *Lewis v Daily Telegraph Ltd* [1964] AC 234. Lord Reid gave the following explanation of the operation of the United Kingdom equivalent provision, at 261:

> Here there were similar libels published in two national newspapers on the same day and each has to be dealt with by a different jury. If each jury were to award damages without regard to the fact that the plaintiffs are also entitled to damages against the other newspaper, the aggregate of the damages in the two actions would almost certainly be too large. Section 12 of the *Defamation Act,* 1952, is intended to deal with that. In effect it requires that each jury shall be told about the other action, but the question is what each jury should be told. I do not think it is sufficient merely to tell each jury to make such

> allowance as they may think fit. They ought, in my view, to be directed that in considering the evidence submitted to them they should consider how far the damage suffered by the plaintiffs can reasonably be attributed solely to the libel with which they are concerned and how far it ought to be regarded as the joint result of the two libels. If they think that some part of the damage is the joint result of the two libels they should bear in mind that the plaintiffs ought not to be compensated twice for the same loss. They can only deal with this matter on very broad lines and they must take it that the other jury will be given a similar direction. They must do the best they can to ensure that the sum which they award will fully compensate the plaintiffs for the damage caused by the libel with which they are concerned, but will not take into account that part of the total damage suffered by the plaintiffs which ought to enter into the other jury's assessment.

A year later the New South Wales equivalent was described by Herron J in *Uren v John Fairfax Ltd* (1965) 66 S.R. (NSW) 223, 229 as not easy of application even by a lawyer.

[33] We return to the immediate point which is that to accede to the arguments advanced by Mr Akel and Mr Miles would be to depart from the premise that where indivisible harm is caused by concurrent tortfeasors each is liable for all the harm. The present s31 is a reflection of this approach. If the harm is divisible, ie. able to be isolated, there is then no reason to introduce other similar publications in mitigation because, ex hypothesi, they cannot mitigate the isolated harm caused by the defendant's publication.

[34] Brief mention should now be made of the decision of the House of Lords in *Plato Films Ltd v Speidel* [1961] AC 1090. This case was decided in the period between the judgment of the Court of Appeal in *Dingle* and that of the House of Lords. By a majority their Lordships adhered to the common law rule that bad reputation may be proved only by general evidence and that particular instances of relevant misconduct may not be asserted or proved. Lord Radcliffe was of the contrary view and would have permitted reference to specific instances; so too was Salmon LJ in *Goody v Odhams Press Ltd* [1967] 1 QB 333. Their views were adopted by our Parliament and can now be found in s30 of the Defamation Act 1992.

[35] Mr Harrison submitted that we should uphold Anderson J when, in reliance on the *Dingle* line of authority, he ordered that TVNZ's pleadings seeking to rely on other publications to similar effect should be struck out. Mr Harrison argued that the Judge had been correct in approaching the matter in that way, particularly as there was already a decision of the High Court (*Jensen v Clark* (supra)) applying *Dingle*, albeit neither decision is binding on us.

[36] We turn now to consider the arguments presented by Mr Miles who urged us to take a contrary view. He referred first to s30 which, as he rightly said, now distinguished New Zealand law from the law of England as confirmed in *Plato Films*. He argued that this shift of approach in New Zealand ought to lead to a similar change in relation to the other publications rule. We do not, however, accept that the change brought about by s30 leads logically to the change in the law for which Mr Miles contends. Ability to prove specific instances in aid of proving a generally bad reputation does not in itself support the view that other publications to the same effect as that in suit should be admissible to prove a generally bad reputation, or indeed an already tarnished reputation.

[37] The more is this so when the other publications, as here, largely follow the publication in suit. In *Dingle* the privileged publications said to have damaged the plaintiff's reputation preceded the actionable publication, yet they could not be referred to in mitigation of damages. If anything we see s30, to which we will return later, as being against Mr Miles' argument in that Parliament has been prepared to liberalise the law to some extent in favour of defendants but was not prepared to allow mitigation to be founded on other publications of like nature. It should also be noted that the Defamation Act 1992 was enacted after the New Zealand Bill of Rights Act 1990.

[38] Mr Miles' next submission was based on the decision of this Court in *TVNZ v Quinn* [1996] 3 NZLR 24. His submission was that in *Quinn*'s case this Court held that damages could be mitigated by reference to other publications showing the plaintiff in a bad light in respect of matters different from the

aspect of his reputation which was in issue in the proceedings. Hence, on this view, Mr Miles contended that the plaintiff's reputation could be shown to be tarnished already for extraneous reasons. It would therefore be anomalous, so Mr Miles argued, not to allow the defendant to demonstrate that the plaintiff's reputation was already tarnished by publications on the same subject matter as that complained of in the proceedings, even if those publications took place between the date of the publication in suit and the trial.

[39] It is true that Anderson J gave pre-trial rulings in *Quinn* which allowed evidence of this kind to be led by the defendant. At issue on appeal was whether the Judge had directed the jury appropriately in the light of his admission of this kind of evidence. The validity of the Judge's original ruling does not appear to have been directly in issue. The issue was whether his rulings were correctly reflected in the summing up. The only member of the five Judge Court which heard the appeal who mentioned the matter was McGechan J. He said at 66:

> Counsel acknowledged no appeal had been brought from Anderson J's ruling on the post-defamation publication point.
>
> 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.

[40] The Judge did not mention the authorities said to be mixed. It is, with respect, doubtful whether that was an accurate description of the state of the authorities. It is in our view more correct to say that the authorities on this precise point did not support the view which McGechan J took, on the basis of what he called common-sense. It is interesting that His Honour described the availability of this sort of evidence as being, from the defendant's point of view, a windfall. Post defamation damage to the plaintiff's reputation cannot, ex hypothesi, bear on the reputation which the plaintiff had at the time the cause of action arose. If the plaintiff's reputation suffers between that time and the time of trial it is in a sense a windfall for the defendant to be

able to invoke this factor in mitigation of the damage its defamation has caused, particularly if the defamation in suit has promoted or encouraged other like publications. There is, we agree, some inconsistency in allowing evidence to be given of post defamation extraneous harm to the plaintiff's reputation caused by publications for which others are responsible while not allowing in similar circumstances proof of post defamation harm arising out of the same subject matter. The answer may not lie so much in extending *Quinn* but rather in revisiting the correctness of Anderson J's rulings, and McGechan J's apparent endorsement of them in obiter dicta. They are contrary to the tenor and trend of the authorities to which we have already referred.

[41] Although Mr Miles invoked sections 30 and 32 of the Defamation Act 1992 in support of his argument, we consider, as noted earlier, that, if anything, s30 is against the argument not only for the reason already mentioned but also because sections 29, 30 and 31 are statutory grounds upon which damages in defamation may be mitigated. Section 32 preserves other common law rules. They do not include the approach for which Mr Miles contended. Section 32 obviously leaves room for the common law to develop but that development should be in harmony with the statutory regime and with existing common law rules. Section 30 allows specific instances of misconduct to be proved in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate. The terms of the section are significant in the present context. Specific instances are able to be proved in order to prove a generally bad reputation in the relevant aspect, not a generally bad reputation in a wider sense. This preserves the focus on a generally bad reputation, albeit for s30 purposes only in respect of the aspect in issue.

[42] Before leaving the topic of proof of bad reputation, we should mention the leading case of *Scott v Sampson* (1882) 8 QBD 491 which was referred to by counsel. Cave J delivered the principal judgment with the concurrence of Mathew J. The case has been regarded as authoritative ever since. Evidence tending to show bad reputation was analysed by the Court in three categories:

(1) evidence from witnesses speaking of the plaintiff's generally bad reputation,

(2) evidence of rumours equivalent to the publication in issue, and

(3) evidence of particular acts of misconduct.

[43] The first category was held to be admissible, and the second and third inadmissible. That remains the position at common law, albeit s30 has, as noted above, reversed the common law rule. As to rumours which have some analogy with other publications to like effect, Cave J said at 504:

> It would seem that on principle such evidence is not admissible as only indirectly tending to affect the plaintiff's reputation. If these rumours and suspicions have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it they are not relevant to the issue … Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence; for all that those who know him best can say is that they have not heard anything of these rumours. Moreover, it may be that it is the defendant himself who started them … Both the weight of authority and principle seem against the admission of such evidence.

[44] There are now, in the light of s30, two ways of proving a generally bad reputation. The first, as was the position before 1992, is by calling witnesses to speak of the plaintiff's generally bad reputation: see Lord Denning in *Plato Films* at 1140. The second, introduced by s30, is to prove specific instances of misconduct which, if shown to be generally known, will found an available inference that the plaintiff has a generally bad reputation in the relevant aspect. None of this provides or even suggests any foundation for permitting in mitigation of damages evidence of other publications from which the jury is asked to draw an inference of generally bad reputation, whether in the aspect to which the proceedings relate or otherwise. Such other publications do not amount to evidence from a witness speaking of the plaintiff's bad reputation, nor do they provide admissible evidence of specific instances of misconduct.

[45] There is a further difficulty with Mr Miles' argument which rests on what Anderson J, in his pre-trial rulings in *Quinn*, described as an anomaly. The point derives from s31 which allows a defendant to prove in mitigation of damages that the plaintiff has already recovered damages or is seeking damages or has received or agreed to receive compensation in respect of any other publication by the defendant or by any other person, in relation to matters the same or substantially the same as the subject matter of the proceedings. The anomaly is said to be that the defendant can make mitigating use of other publications damaging to the plaintiff's reputation in the circumstances described in s31 but cannot make use of other publications of a similar kind if the plaintiff has not taken any action in respect of them.

[46] This statutory rule, whether anomalous or not, tends to suggest that unless the statutory circumstances are established, other publications may not be invoked by way of mitigation of damages; a fortiori if they do not relate to the same or substantially the same subject matter. It cannot be that Parliament was unaware of the distinction which it was setting up, and it must, we think, be inferred that the continuation of the earlier law which s31 represents, after an exhaustive examination of the subject by the McKay Committee, was a deliberate policy decision to allow reference to other publications only to the limited extent which s31 permits. As at present advised we think the point favours Mr Harrison's argument rather than that of Mr Miles. We acknowledge that by choosing upon which publications to sue, the plaintiff has the ability to determine the ambit of the evidence in mitigation open to the defendant. If this represents the major injustice to which Mr Miles referred, we consider it is for Parliament to address the ambit of s31 rather than for the courts to outflank its designedly limited scope. We do not consider it appropriate in the present circumstances to develop the common law on a basis which would sit uneasily with the careful focus of the current statutory regime. Furthermore, as far as we are aware, *Dingle* still stands as good law in the United Kingdom, and we can discern no principled basis for differing from the reasoning in that case, a fortiori in the light of our current statutory scheme which itself goes further in favour of defendants

than that in the United Kingdom. Technological developments do not persuade us that the principles involved have ceased to be valid.

[47] We also note that the position in Australia is the same as that in the United Kingdom; see *Carson v John Fairfax & Sons* (1993) 178 CLR 44. At 99 McHugh J summarised the position in this way:

> The common law is clear, rightly or wrongly, that the defendant cannot mitigate damages by tendering evidence of other defamatory publications concerning the plaintiff (*Creevy v Carr* (1835) 7 Car.&P. 64; *Dingle v Associated Newspapers Ltd* [1964] AC 371). A fortiori, at common law evidence is not admissible that the plaintiff has recovered damages in respect of other defamatory publications. A defendant must answer for the effect of its own circulation without regard to what others have published (ibid., at 411). If a defendant wishes to contend that the plaintiff's reputation was already damaged at the time of publication, it can do so by calling witnesses to prove the nature of the plaintiff's reputation at that time (ibid., at 412). But it cannot tender other publications for that purpose. They may or may not have damaged the plaintiff's reputation.

[48] In the *Law of Defamation in Australia and New Zealand* by Michael Gillooly (Federation Press – 1998) the learned author says that the common law rule in relation to other publications, as described by McHugh J, continues to apply throughout Australia. He adds that in New Zealand a more generous approach to the admission of evidence of other publications "appears to have developed". He compares *Quinn*'s case with *Jensen v Clark* in which he says the traditional common law rule was applied and then says of *Quinn* that the defendant was permitted to lead evidence of other adverse publicity given to the plaintiff, both before and after the publications sued upon, in order to establish that the plaintiff's reputation was already tarnished. We do not, however, consider that *Quinn* in this Court can safely be regarded as extending the law in this way and we ourselves are not convinced, for the reasons already given, that it is appropriate to do so. We are therefore of the view that TVNZ should not succeed on this issue.

[49] It is of some moment to note that whereas Anderson J in the High Court in *Quinn* allowed evidence of the kind now in issue to be called by the defendant, he ruled against TVNZ as defendant in the present case on a

similar issue. He said that nothing said by himself in the High Court or by the Court of Appeal in *Quinn* derogated from the longstanding principle that a defamer cannot seek to mitigate damages which he ought to pay by pointing to similar unjustified defamation by others. While there may be certain difficulties in the way the Judge described the underpinning of this rule, we consider His Honour was correct in stepping back from what TVNZ was endeavouring to take out of *Quinn*'s case. His Honour also said:

> 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 'blacklist' 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.

[50] The Judge thereby identified one of the traditional grounds, as discussed in *Dingle*, for not permitting evidence of the kind under discussion. Baseless rumour and speculation can have an insidious effect on reputation. There is a distinct risk of injustice to a plaintiff to allow it to be argued that an accumulation of defamatory publications had an effect on the plaintiff's reputation which an individual defamer can use to its advantage. In saying this we accept that reputation and character are not the same thing. Character is the reality; reputation is the perception. Character reflects a person's true qualities; reputation reflects the qualities which others perceive the person to have: see Salmon LJ in *Goody v Odhams Press Ltd*; Lord Denning in *Plato Films* at 1138 and Gillolly (op cit) at 291.

[51] Thus the law of defamation protects the plaintiff's reputation, not his character and then only the reputation which the plaintiff actually has, rather than the reputation he or she deserves. Usually the two will coincide but not necessarily. Nevertheless, for the reasons already traversed, it does not seem to us to be just that a defendant should be allowed to mitigate on the basis that the plaintiff's reputation has been diminished by the publication by

others of the same or similar defamatory material as that complained of in the proceedings. The principle of isolation seems to us to be the correct way to balance the competing interests of the parties.

The offer of an interview

[52] TVNZ's pleading in this respect is that:

> Since the broadcast [TVNZ has] twice invited [Mr Ah Koy] to give an interview on the coup and/or issues arising from the broadcast, but [Mr Ah Koy] has declined both invitations.

[53] Mr Akel did not offer any principled or juridical basis for the contention that this matter should be allowed to be proved in mitigation of damages. It is reasonable to conclude from this that TVNZ was unable to think of any such basis upon which this proposition could be advanced. TVNZ's argument was summarised as being that its offer to Mr Ah Koy "to use the same medium to defend himself or give an interview on the issues arising" should be a matter properly put in mitigation of damages. We note the suggestion that Mr Ah Koy was being given an opportunity to "defend" himself. This neatly reverses the onus of proof in defamation cases, and is hardly a promising start to the argument.

[54] Anderson J's conclusion on this point was:

> … 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 s29 Defamation Act and antecedent common law, serve to mitigate damages … 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.

[55] Although it hardly behoves the Court to strain to find a principled basis for TVNZ's contention, when it has advanced none itself, the only such basis which might be available is the doctrine that a plaintiff must act reasonably

so as to mitigate his loss. This proposition can equally be put that a plaintiff must not act unreasonably so as to increase the loss. Either way, and assuming for the moment without deciding that such a duty can apply to a plaintiff in a defamation case, we do not consider it arguable that by declining TVNZ's invitation Mr Ah Koy breached any such duty. No authority, direct or indirect, was cited in support of TVNZ's argument. We can see no possible analogy from the decision of this Court on qualified privilege in *Lange v Atkinson* [2000] 3 NZLR 385, referred to by Mr Akel.

[56] Mr Akel accepted Mr Ah Koy had no obligation to talk to TVNZ, and rightly so. But he then went on to submit that if Mr Ah Koy had done so he could have denied any involvement in the coup and thereby "immediately' mitigated the damages. That proposition does not overcome the simple point already acknowledged that Mr Ah Koy had no obligation to accept TVNZ's invitations. Mr Akel also referred to a full page advertisement which Mr Ah Koy had published in the Fiji Times and on television in Fiji in response to rumours he acknowledged were circulating about his involvement in the actions of George Speight and his supporters. But that voluntary action on Mr Ah Koy's part provides no foundation for saying that he was under some obligation to avail himself of TVNZ's invitations or had unreasonably failed to mitigate his damages by failing to do so.

[57] What is more, the concept of an interview is not the same as an offer of television time for Mr Ah Koy to make such explanatory statement as he wished to make, free of any interruption or editorial control by TVNZ. It is a reasonable inference, as Anderson J suggested, that the form of the invitations was influenced to a material degree by the attraction for TVNZ of keeping a good story running. It would have been a great coup for TVNZ to have screened an interview with an alleged participant in the Fiji coup. It was certainly reasonably open to Mr Ah Koy to take the view that this was the essential purpose of the invitations rather than any wish on TVNZ's part to mitigate the damage its original publication caused him.

[58] After all, TVNZ now denies that the original publication identified Mr Ah Koy and further denies his asserted meanings. While to a legal mind mitigation can logically be an alternative to those stances, it must be said that if and to the extent they were at that time made evident to Mr Ah Koy, they would hardly have provided a particularly attractive context for his so-called opportunity to mitigate the harm done to him. In short, as noted earlier, we do not consider that in principle it is arguable that Mr Ah Koy acted unreasonably by declining TVNZ's invitations. The plea asserting that his conduct in this respect was available in mitigation of damages was rightly struck out.

Conclusion/formal orders

[59] It follows that we reject TVNZ's arguments on all issues, and those of the intervening parties on the third issue. We consider that Anderson J was correct in the rulings he made. On the first issue of lesser defamatory meaning, which we have of necessity had to look at afresh in the light of the amendments to the pleadings which took place while the case was in this Court, we have, for the reasons given, concluded that the plea should not be allowed to stand. The appeal is accordingly dismissed. Costs were awarded to Mr Ah Koy on the adjournment. TVNZ is to pay further costs to Mr Ah Koy in relation to the appeal in the sum of $5000.00 plus disbursements including the reasonable travel and accommodation expenses of both counsel, to be fixed if necessary by the registrar.

Solicitors
Simpson Grierson, Auckland, for Appellants
Vallant Hooker, Auckland, for Respondent
Jones Fee, Auckland, for Intervening Parties