

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA221/02**

BETWEEN                      PHILIP RUSSELL KING  
   Appellant

AND                              TV3 NETWORK SERVICES LIMITED  
   First Respondent

AND                              TOP SHELF PRODUCTIONS LIMITED  
   Second Respondent

Hearing:            29 September 2003

Coram:            Keith J  
                         Tipping J  
                         Anderson J

Appearances: R J Cullen and D G Dewar for Appellant  
                  T J G Allan for First Respondent  
                  N J Russell for Second Respondent (leave to withdraw)

Judgment:        14 October 2003

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**JUDGMENT OF THE COURT DELIVERED BY TIPPING J**

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[1]     The appellant, Mr King, was the subject of a “Target” Consumer Affairs Programme produced by the second respondent, Top Shelf Productions Limited (Top Shelf) and screened by the first respondent, TV3 Network Services Limited (TV3) on 25 April 1999. Mr King was then operating a motor repair business which traded as Capital Auto Repair Services or CARS. The programme, which included segments on other businesses of a like nature, generally portrayed Mr King’s business in a poor light.

[2]     Top Shelf had arranged for Mr King to service a vehicle which it provided. The work done was covertly filmed. The details of the programme and the criticisms

made of the workmanship of Mr King's employee are of no present moment. He (Mr King) was given the opportunity to comment on the programme before it went to air. He did so and disputed the various criticisms which the programme made of the work which his business had done on the car. Mr King contends that as a result of the screening of the programme his business suffered a major financial downturn.

[3] On 6 April 2001 Mr King commenced proceedings against TV3 and Top Shelf in the High Court at Wellington. His statement of claim was long and discursive. The claim was for financial loss which it was said the business had suffered and also for damage to its reputation. There were four causes of action. The first was entitled breach of economic freedom; the second was for defamation; the third for breach of the Fair Trading Act 1986; and the fourth was for negligence.

[4] TV3 applied to strike out the three causes of action other than defamation. Master Thompson struck them all out. On review Wild J reinstated the negligence cause of action but upheld the striking out of the other two. On further appeal and cross appeal to this Court, Mr King seeks to reinstate the so-called breach of economic freedom cause of action, albeit in a somewhat different form. He also seeks the reinstatement of the Fair Trading Act cause of action. TV3 seeks to have the negligence cause of action struck out again, following its reinstatement by Wild J.

[5] Between the hearing in front of the Master and the hearing before Wild J, a draft amended statement of claim was lodged by Mr King. It is convenient to concentrate, as did Wild J, on the allegations made in that document. The discussion which follows is against the background that the primary and most natural cause of action in the circumstances must be regarded as the cause of action in defamation. There is no challenge to that pleading as a cause of action, albeit TV3 denies liability and pleads, as well as a general denial, lack of defamatory meaning, honest opinion and qualified privilege.

[6] Mr King's first cause of action in his draft amended statement of claim is entitled "Interference with plaintiff's business by unlawful means". This allegedly single cause of action actually amounts to an attempt to raise two separate causes of action. The first (para 43) comprises an allegation that TV3 and Top Shelf, acting together and by agreement with each other, conspired with intent to injure and damage Mr King's business by making and broadcasting the Target programme. That is followed by an allegation that the making and broadcasting of the programme did injure and cause damage to Mr King's business. The second aspect of this suggested cause of action (para 44) is that each of them, TV3 and Top Shelf, used "other" unlawful means to damage the plaintiff's business. The suggested "other" unlawful means are the other three causes of action, namely negligence, breach of the Fair Trading Act and defamation.

[7] As pleaded, each of these other three causes of action is a necessary ingredient in the cause of action purportedly called interference with Mr King's business by unlawful means (para 44). If any of the other three causes of action are available and established, the asserted cause of action becomes unnecessary. If they are not available in law they can hardly constitute unlawful means. There is in this respect an inappropriate and potentially very awkward overlap. The pleading (para 44) cannot stand and must remain struck out. The other pleading, raising a conspiracy to injure (para 43), is tenable as a cause of action in itself but, in our view, it is not a satisfactory substitute for the pleading which was quite rightly struck out by the Master.

[8] We therefore agree that Wild J was correct in his decision not to allow this cause of action to be pleaded. Our essential reason is that the allegation is not supported by satisfactory particulars. The matters to which Mr Cullen referred do not, in our view, suffice. This is not a case where there is a sufficient inference from the nature of the programme itself that those responsible for its production and publication were in a conspiracy to injure Mr King's business. Nor do we consider that publication following Mr King's letter provides a sufficient particularisation to justify the allegation as framed.

[9] We are of the view that this aspect of the statement of claim should remain struck out but that Mr King should have a period of 14 days from the date of delivery of this judgment to plead the alleged conspiracy with intent to injure on a basis supported by sufficient particulars, if he responsibly can. He will be entitled within that period to file an amended pleading to this effect, if he is so advised. We point out, however, that the practical utility of such a pleading, when viewed in the light of the extant defamation cause of action, must be rather doubtful. If the programme as broadcast has no defamatory meaning, then it seems very difficult to suggest that it was deliberately designed to injure the plaintiff's business. If there was a conspiracy to injure, any opinion contained in the programme could hardly be honest opinion. Similarly, if there was a conspiracy to injure, the defence of qualified privilege, if otherwise available, must, so it would seem, be defeated by the occasion being used for an improper purpose. All this suggests that Mr King's apparent wish to complicate the case by this additional cause of action has little practical utility. Of course in the end it is Mr King and his advisers who must decide whether this cause of action should be pursued.

[10] The cause of action in negligence must overcome a line of authority in this Court rejecting attempts to plead what is essentially a cause of action in defamation alternatively or solely in negligence. The most recent case is *Midland Metals Overseas Pte Ltd v The Christchurch Press Company* [2002] 2 NZLR 289. Earlier cases are there reviewed and followed. The Court also considered and confined the decision of the House of Lords in *Spring v Guardian Assurance Plc and Ors* [1995] 2 AC 296, upon which Mr Cullen relied. The rationale for keeping negligence out of this field is the distorting effect it would have as a stand-alone cause of action on the careful balance which has been struck by the law of defamation on the competing interests involved. In that field, where damage has allegedly been caused by the written or spoken word, the Court is required to balance freedom of expression with reputational and other allied interests. Different considerations apply of course if the words in issue cannot or do not bear a defamatory meaning. If a duty of care is found to exist in that situation there can be no dissonance between the negligence cause of action and a cause of action in defamation, because the latter will not exist.

[11] We are not persuaded that the one-off encroachment on the unavailability of negligence as a cause of action when defamation can be alleged made by the House of Lords in *Spring*, the facts of which are clearly distinguishable, justifies our allowing the present cause of action in negligence to be mounted alongside or in substitution for defamation. If negligence is viewed in isolation of defamation, as Wild J appears to have done by his comment that Mr King could have a cause of action in negligence if his defamation cause of action failed, we consider there are insuperable problems in framing the nature of the duty of care without interfering too much with freedom of expression. In causative terms it is the publication of the Target programme which has caused Mr King the damage he asserts. Without publication there could have been no damage of the kind in issue. The duty of care owed by TV3 would have to be a duty not to publish a programme in respect of which the research or other preparation had been done carelessly.

[12] The argument Mr Cullen mounted to support the imposition of such a duty of care in this case was that as the filming had been done covertly, TV3 should not be allowed to “get away” with negligence. It would not in our view be a logical or a fair incremental development of the law in this area to hold that the covertness of the filming gave rise to a duty to take care which would not, ex hypothesi, have been present if the filming had not been covert.

[13] As we pointed out during the hearing, the circumstance that the filming was done covertly and, as Mr Cullen put it, Mr King thereby felt entrapped by TV3, is a matter which could (we say no more than that) have relevance to qualified privilege in the defamation area of the case. It could also be relevant to damages in the sense of the amount necessary to compensate for the hurt, if that point in the case is reached.

[14] In short, we consider the negligence cause of action was rightly struck out by the Master. On a stand-alone basis there is no duty of care. When the negligence cause of action is viewed alongside the cause of action in defamation, the circumstances are not such as to justify a departure from the line of authority culminating in *Midland Metals*. In either situation the covert nature of the filming and the so-called entrapment of Mr King are not sufficient factors to support a duty

of care or to weigh against the policy factors which have driven the *Midland Metals* line of authority. Hence we propose to allow the cross appeal from Wild J's reinstatement of the negligence cause of action.

[15] We agree with both the Master and Wild J that the Fair Trading Act claim cannot succeed in law. The cause of action seeking to invoke ss9 and 11 of the Fair Trading Act is precluded by s15(2) of that Act which provides:

**15 Limited application of sections 9 to 14 of this Act to news media**

(2) Nothing in sections 9 to 14 of this Act applies to the broadcasting of any information or matter by a broadcasting body, not being—

(a) The broadcasting of an advertisement; or

(b) The broadcasting of any information or matter relating to the supply or possible supply or the promotion of the supply or use of goods or services or the sale or grant or the possible sale or grant or the promotion of the sale or grant of an interest in land by—

(i) That broadcasting body, or where that broadcasting body is a body corporate, by any interconnected body corporate; or

(ii) Any person who is a party to any contract, arrangement, or understanding with that broadcasting body relating to the content, nature or tenor of the information or matter.

[16] TV3 is a broadcasting body. It broadcast information or matter which was not within either paragraph (a) or paragraph (b) of s15(2). Specifically what was broadcast did not relate to the supply of services by a person who was party to a contract with TV3 which related to the content, nature or tenor of the information or matter in question.

[17] The exclusion from the protection otherwise given to broadcasting bodies for what they broadcast does not apply when there is a contract, arrangement or understanding between the broadcaster and the other party relating to the content, nature or tenor of the information or matter to be broadcast. But here there was no relevant contract, arrangement or understanding between TV3 and Mr King because, as he has been at pains to point out, he had no idea there was to be any broadcast about him and his business. The contract between these parties related to the work

to be done on the car. It did not, as is required, have anything to do with a proposed or anticipated broadcast. The Master and Wild J were therefore correct in their reading of s15(2). On this basis the Fair Trading Act cause of action must be struck out as it is not exempted from the protection given by the introductory words of s15(2).

[18] For the reasons given the appeal is dismissed and the cross appeal is allowed. All the present causes of action, apart from defamation, are or remain struck out. If he responsibly can, and is so advised, Mr King can plead a conspiracy to cause economic injury provided he gives proper particulars thereof specifically focused on this cause of action and files his pleading in the High Court within 14 days of the delivery of this judgment. Mr King would do well to examine carefully the adequacy of his pleading in defamation and amend it too if so advised. We hope this long and protracted litigation can now proceed promptly to determination. Mr King has essentially failed in this Court and but for the legal aid dimension would have been ordered to pay TV3 costs of the appeal and cross appeal in the sum of \$5000.00 plus disbursements, including the reasonable travel and accommodation expenses of counsel, to be fixed if necessary by the Registrar. If anything more than that intimation is sought in relation to costs, counsel may file memoranda.

Solicitors:  
Thomas Dewar Sziranyi Druce, Lower Hutt for Appellant  
Grove Darlow & Partners, Auckland for Respondent