ORDER PROHIBITING PUBLICATION OF THE CONTENTS OF THIS RULING UNTIL TRIAL

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2001-409-000801
CP 51/01

BETWEEN	DAVID MATTHEW HOLDEN TIPPLE Plaintiff
AND	GRANT BLAIR BUCHANAN First Defendant
AND	THE ATTORNEY GENERAL OF NEW ZEALAND Second Defendant

Ruling: 20 July 2005

Counsel: G K Riach for Plaintiff
A J Forbes QC and S McKenzie for Defendants

PRE-TRIAL RULING OF PANCKHURST J

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[1] This defamation case was to have proceeded to trial before a jury on Monday, 18 July 2005. In the event it was adjourned to enable an appeal to be brought against this pre-trial ruling. The ruling concerns whether evidence of bad character which occurred subsequent to the relevant publication is admissible in order to show that the plaintiff's reputation is generally bad in the aspect to which the proceedings relate. Obviously any damages awarded are liable to be diminished on account of such evidence.

[2] Regrettably the point was not the subject of argument until the Friday afternoon before trial. After hearing submissions it became clear that the question was one of real substance and one which, in the context of this case, had the potential to impact significantly on the outcome. So much so that whichever way the ruling

went an appeal by the disappointed party was inevitable. In these circumstances and at the request of counsel the jury panel was discharged and the trial adjourned.

Background to the plaintiff's case

[3] Mr David Tipple is the managing director of a company Gun City Limited (Gun City) which sells firearms. Its business premises are on Barbadoes Street, Christchurch.

[4] On 25 May 1999 the police implemented a decision to revoke Mr Tipple's dealer's licence on the grounds that he was not a fit and proper person to hold it. Formal notice of the revocation was given to Mr Tipple at the business premises. In case he would not agree to close down the business, police and a small detachment of army personnel went to the premises ready to remove and place the firearms in safe storage, if necessary. One lane of Barbadoes Street was closed off.

[5] In the event the police did not remove the firearms from the premises. Mr Tipple agreed to cease trading until such time as his brother could assume responsibility for the business pursuant to a dealer's licence held by him. On this basis the business resumed trading in due course, pending an appeal against the revocation decision.

[6] Also on 25 May the first defendant, then Inspector G B Buchanan, released a statement to the media:

> **POLICE REVOKE ARMS LICENCE**
>
> Christchurch Police this morning have revoked the arms licence of a business reputed to have the largest trade in firearms (in volume) in the country.
>
> Inspector Grant Buchanan says that there are 23 reasons outlined why the firearms licence has been revoked.
>
> "I must emphasise that these are not charged as offences. We are not seeking the cancellation of the owner's personal firearms licence. This relates to the operation of the business."
>
> The 23 reasons to revoke the licence relate to the manner of operating the shop which is contrary to the requirements of the Arms Act, says Mr Buchanan. This relates in particular to the administrative nature of recording

> the details of purchases and dealing with MSSA's and other restricted weapons.
>
> "The Police have over the last two years expressed concern over this side of the business but no improvements have been noticed and Police are forced to take considered and serious action."
>
> Ten City Beat staff assisted by some civilians have started removing the firearms, ammunition and restricted weapons from the premises on Barbadoes Street. Inspector Buchanan expects that it will take two days to empty the premises. He will not comment where the weapons will be taken to and stored.

[7] The Inspector also participated in a number of interviews conducted on behalf of various television channels, TVNZ, TV3 and Prime. It is the combination of the media release and comments made in the respective interviews which is said to be defamatory of Mr Tipple. I shall refer to the alleged imputations shortly.

[8] Finally, following a four day hearing in the District Court at Christchurch Judge Doherty, on 10 October 1999, gave a decision which overturned the police revocation decision. Mr Tipple's firearms dealer's licence was reinstated. He was also awarded costs of $25,000.

The defamatory meanings

[9] This proceeding was issued in May 2001. In the second amended statement of defence dated 1 July 2005 nine defamatory imputations are alleged based on the ordinary and natural meaning of the words used in the media release and, more particularly, on what was said by Inspector Buchanan to the various television channels, each of which ran news programmes that evening.

[10] The imputations alleged are that:

> (a) the plaintiff was unfit to be the holder of a firearms dealer's licence
>
> (b) 23 separate and valid reasons existed enabling the police to revoke the plaintiff's firearms dealer's licence
>
> (c) the plaintiff did not have proper administrative controls of his business in relation to the completion of necessary paper work regarding sale of firearms

(d) the plaintiff permitted or caused the sale of firearms, namely military style semi-automatic weapons, to persons without completing the required paper work

(e) the plaintiff permitted or caused the sale of firearms, namely military style semi-automatic weapons, to persons who may not have been licensed to possess them

(f) the plaintiff had failed to record the details of customers buying military-style semi-automatic weapons

(g) the plaintiff had breached the Arms Act and/or Arms Regulations consistently

(h) the plaintiff had breached the Arms Act and Regulations consistently over a period since the previous revocation by police in 1981 and that the previous revocation was valid

(i) the plaintiff was not prepared to comply with the legislative requirements and had little regard for these requirements

It would seem to me that the sting of the words which were published is essentially contained in imputation (a) and perhaps imputation (i). Whether the further allegations add anything of substance, is I think debatable.

[11] The statement of defence to the most recent statement of claim raises five grounds of defence. The first is a denial that the words complained of in fact bear the defamatory meanings which are alleged by the plaintiff. This is of course a jury question. Second, s71 of the Arms Act 1983 is pleaded as a bar to the claim. That section provides:

> **Protection of persons acting under authority of this Act**
>
> No action, claim, or demand whatsoever shall lie or be made or allowed by or in favour of any person against the Crown, or any Minister of the Crown, or any person acting in good faith in the execution or intended execution of this Act, save only in respect of any compensation that is payable in accordance with the express provisions of this Act.

The issue of good faith is likewise a jury question.

[12] The third defence is one of partial denial of publication. The defendants maintain that they did not publish or cause TVNZ, TV3 or Prime TV to publish certain of the words which appeared in the relevant news broadcasts and which are relied upon by the plaintiff. Next is a defence of qualified privilege. The fifth and final defence is referable to damages, being a notice pursuant to s42 of the

Defamation Act 1992 of specific instances of misconduct by Mr Tipple, which are relied upon to establish that his reputation is generally bad in relation to his fitness and competence as a firearms dealer. It is these particulars of instances of alleged misconduct which give rise to the need for this ruling.

Misconduct in mitigation of damages

[13] Paragraph 18(1) of the statement of defence details 15 matters which are said to bear adversely on the plaintiff's general reputation with respect to compliance with his obligations and duties as a licensed firearms dealer. Ten of these matters were challenged by Mr Riach on the grounds that they were relevant to character, not reputation, and should therefore be struck out. He further submitted that such matters were not within the ambit of s30 because, while they may be specific instances of misconduct, they did not establish that Mr Tipple's reputation was generally bad in relation to the relevant sector of his reputation. As I understood it, the gist of the submission was that while such matters were known to the police (particularly members of the Arms Office), they were not known publicly and were not, therefore, relevant to Mr Tipple's general reputation.

[14] The challenged particulars covered a range of matters. The first was an importation at Auckland on 16 August 1995 of firearms, pistol grips, flick knives and canisters of repellant spray otherwise than pursuant to an import permit. This importation was said to give rise to breaches of the Customs Act 1966, the Arms Act 1983 and the Crimes Act 1961 (particulars (c) and (d)).

[15] Related particulars (e), (f) and (g) concern a sale to a constable of a canister of the repellant spray on 21 December 1995 and a further similar sale on 19 January 1996 to a civilian employee of the police.

[16] Particular (h), concerns a letter written by the police on 7 June 1997 advising Mr Tipple that stocks of the repellant spray which had been seized on 29 January 1996 would be destroyed because the canisters constituted a restricted weapon.

[17] The next matter, particular (i), concerns an inspection of Gun City's premises on 11 April 1999 when various alleged breaches of regulations pertaining to the security and storage of firearms and their sale to persons not holding the required licence, were said to have been discovered. Likewise, particular (j) identifies seven instances of breaches of regulations or Acts in the period April 1996 to October 1998. These concerned the safe storage of firearms, their sale to unlicensed persons or alleged failures to keep sales records as required by regulation. Other particulars in (j) concerned operating a display at a gun show outside the terms of the requisite consent, importing firearms without a permit and failing to obtain permits to procure other firearms.

[18] Particular (k) concerns an occasion on 17 August 2000 when Mr Tipple endeavoured to fly goods from Auckland to Christchurch with Ansett Airlines, which items were dangerous goods (ammunition etc) and was only able to be transported subject to compliance with the relevant Civil Aviation regulations. A charge followed, upon which Mr Tipple was diverted. This matter, since it occurred after the publicity said to be defamatory of the plaintiff, is also challenged on the further grounds that it is evidence of subsequent conduct which is inadmissible on that ground as well.

[19] Finally, particular (o) refers to eight letters and two interviews between the police and Mr Tipple, in which he was warned, or concerns were expressed, concerning Gun City's non-compliance with relevant regulations. These communications or exchanges occurred between 1993 and early 1999. All, of course, were between individual police officers or staff and Mr Tipple, and were not openly in the public domain.

The arguments

[20] Mr Riach's argument was predicated on the distinction between reputation and character, as explained in *Plato Films Limited v Speidel* [1961] AC 1090 (HL). Lord Denning at p 1937-8 in referring to the leading case of *Scott v Sampson* (1882)

8 QBD 491 said this:

> … the words "character" and "reputation" have various meanings … . A man's "character", it is sometimes said, is what he in fact is, whereas his "reputation" is what other people think he is. If this be the sense in which you are using the words, then a libel action is concerned only of the man's reputation, that is, with what people think of him; and it is for damage to his reputation, that is, to his esteem in the eyes of others, that he can sue, and not for damage to his personality or disposition.

Although doubting that in common use there was such a clear distinction between reputation and character, Lord Denning accepted that evidence may only be led as to the former. Hence, as he went on to explain, it was permissible for a plaintiff to call evidence of good character from reputable persons who knew him and, equally, for a defendant to call evidence of bad character from persons similarly qualified. At common law such evidence may not extend to illustrative acts of good or bad character, since it is the general reputation of the plaintiff which is relevant and in issue. Further, general character evidence must be directed to that sector of a man's reputation which is relevant in the particular defamation proceeding.

[21] While accepting that s30 of the Defamation Act has effected a significant shift in the New Zealand position, in that "specific instances" of misconduct which relevantly bear on the plaintiff's general reputation may be established in evidence, Mr Riach maintained that the common law distinction between reputation and character was preserved. Hence, events which did not occur in the public domain, which were private in nature, could not affect general reputation, although they were relevant to character. This dividing line should continue to be observed, with the result that the challenged particulars should be struck out.

[22] A comment in the chapter on defamation in *The Law of Torts in New Zealand* (3rd ed) written by Professor Burrows QC (p 836) concerning s 30 is relevant:

> It may be possible to argue that this imports a requirement that the misconduct in question be known, either generally, or at least to those to whom the publication was made.

[23] Mr Forbes resisted the essential contention that because matters were known only to the police they were not relevant to general reputation. Counsel stressed that s30 has effected a fundamental shift. The common law prohibition on evidence

designed to show general bad reputation (with the exception of evidence of serious convictions bearing on the relevant sector of reputation), was no longer relevant. Police witnesses were able to give evidence of bad character in the relevant sector, including evidence of the instances which supported that conclusion. Counsel asked rhetorically, who was better placed to assess a man's reputation in relation to his fitness as an arms dealer, than policemen whose responsibility it was to administer the Arms Act?

Discussion

[24] In my view the challenged evidence is properly admissible, subject to consideration of the subsequent conduct argument with reference to particular (k). Section 30 has indeed effected a significant shift in the law. Evidence of specific instances of misconduct is now admissible in New Zealand. The section does not seek to identify the limits upon such evidence, save for preserving the common law requirement that the evidence relate to that aspect of the plaintiff's reputation which is at stake in the proceeding. Otherwise, what evidence may be admitted is not identified. The common law, of course, affords no guidance, given that evidence of specific instances of conduct remains inadmissible.

[25] What then are the limits? To my mind misconduct evidence will be admissible when it is relevant to establish that the plaintiff's "reputation is generally bad" in the relevant aspect. This imports a requirement that the evidence demonstrates general reputation. But this does not translate into a requirement that the evidence be of events which occurred in the public domain. Hence I do not accept the distinction for which Mr Riach contended. That is, a distinction between events which occurred in open court, for example, as compared to a dealing between Mr Tipple and members of the Arms Office, or even a charge which became the subject of diversion, which counsel argued were not relevant to general reputation.

[26] A reputation is not only forged by reference to events which occur strictly in the public domain. Rather, reputation is established over time and by virtue of conduct which may be routine in nature. Commonly a person's reputation will be built on the basis of his or her contacts with others in the course of work and other

day to day activities. Although not private in nature, such transactions may be witnessed by only those who are party to them. Nonetheless, over time reputation is forged. It is the product of impression, based not only upon what a person's colleagues and friends directly observe for themselves, but also the qualities (or absence of them) for which a person comes to be known.

[27] The essential requirement is that evidence of specific instances of misconduct must be relevant to that sector of the plaintiff's general reputation to which the proceedings relate. Whether particular evidence is capable of establishing general reputation is a matter of assessment, in the first instance by the trial Judge. Ultimately, whether an instance of misconduct does bear on the general relevant reputation of the plaintiff is a jury question. To that end the jury will need to be directed of the need to focus on actual reputation, that is the way the plaintiff is generally regarded, not what his reputation should be.

[28] Although not material to the above decision, I note that some of the challenged evidence may be relevant to the second ground of defence in any event. Section 71 of the Arms Act would seem to provide an answer to the claim if Mr Buchanan's comments to the media were made in the execution of the Act and provided he was also acting in good faith. At least the course of conduct evidence relating to the history of dealings between the Christchurch Arms Office and Mr Tipple, would appear to be relevant and admissible in relation to the issue of good faith.

Evidence of subsequent misconduct

[29] In August 2002 Mr Tipple was charged in California with carrying firearms at Los Angeles International Airport in violation of the relevant criminal code. He was subsequently sentenced to 12 months imprisonment and banned from exporting firearms from the United States. Then, in February 2004 Mr Tipple was charged in the State of Georgia in relation to offences pertaining to providing false information for a firearms licence and with reference to the sale of firearms in that state.

[30] The defendant seeks to adduce evidence of these matters and of the 17 August 2000 events (para [18]), as specific instances of misconduct which bear upon the plaintiff's general reputation as a firearms dealer. Mr Riach challenges such evidence on the basis of common law principles. *Gatley on Libel and Slander* (10th ed) states at para 33.33:

> **Evidence of subsequent bad character.** The evidence must be confined to the general bad character of the claimant prior to, or at the time of, the publication of the libel. Evidence of bad character subsequent to that time is not admissible in mitigation of damages, otherwise "a person might slander another and then call some of the neighbours to say that they had heard imputations which he had himself set afloat".

Although s30 has altered the position in New Zealand, it remains appropriate to limit evidence of specific instances of misconduct to events which occurred up to the date of the publication relied upon. In principle it remains the position that it is the plaintiff's reputation at the time of publication which is harmed, and for which he is entitled to compensatory damages.

[31] Mr Forbes on the other hand advanced an argument based upon various of the amendments contained in the Defamation Act and upon a number of recent authorities. He contended that in New Zealand at any rate, it was no longer appropriate to approach subsequent misconduct evidence on the basis described in *Gatley*.

Some relevant authorities

[32] The case which is principally cited in support of the position as outlined in *Gatley*, is *Associated Newspapers Limited v Dingle* [1964] AC 371 (HL). Mr Dingle was defamed in a newspaper article. At trial the damages which he received were reduced to take account of the circumstance that other newspapers published similar material to the article sued upon. Both the Court of Appeal and the House of Lords held that this was wrong in principle. Lord Radcliffe at 396 said in relation to damages:

> 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 less reputation to lose, the libelled man would never get his full vindication.

And at 399 His Lordship added:

> Where one speaks of a plaintiff's "actual" reputation or "current" reputation one means his reputation as accumulated from one source or another over a period of time that precedes the occasion of the libel that is in suit.

Building, it seems, on the latter observation, *Dingle* is taken as authority for the proposition that evidence of subsequent conduct is irrelevant.

[33] The other case cited in *Gatley* is *Rochfort v John Fairfax & Sons* [1972] 1 NSWLR 16. The appeal was against a decision of a Judge to adjourn a defamation trial because a criminal charge against the plaintiff was pending. The Judge accepted that since a conviction on the charge would impact in relation to the relevant sector of the plaintiff's reputation, and because convictions could be relied upon to establish bad reputation, an adjournment to await the outcome of the trial was appropriate. The Court of Appeal disagreed. Sugarman ACJ at 22 said:

> Nor, finally, can the last matter relied upon, namely admissibility of a conviction, should it occur, as going to the plaintiff's reputation, be regarded as of any account. The case to which we have been referred of *Goody v Oldham's Press Limited* ([1967] 1 QB 333) itself illustrates that the admissibility of convictions for this purpose is limited to convictions which have occurred prior to the publication of the defamatory matter sued for. They are referred to throughout that case as "previous convictions"; and that they were previous convictions in the sense mentioned is the very ground on which their admissibility was claimed by the defendant in that case.

[34] The first indication of a new approach was in *Quinn v TVNZ* where Anderson J, in a pre-trial ruling, allowed in evidence of subsequent conduct. Mr Quinn was defamed in two television programs. These alleged impropriety in relation to his management of a company, through supplying performance enhancing drugs for use in doping race horses. Shortly after the relevant television programs were broadcast, Mr Quinn was charged in his capacity as president of a trotting club with involvement in corrupt practices. These allegations were different in kind. Nonetheless the Judge accepted that evidence surrounding the corrupt practice

charges was material to reputation and should, therefore, be admitted at the defamation trial.

[35] Despite introduction of the misconduct evidence Mr Quinn secured substantial awards for each of the defamatory programs. Anderson J set one award aside but not the other. TVNZ appealed against the refusal to set the lesser verdict aside. The case was heard by a full court : *TVNZ v Quinn* [1996] 3 NZLR 24 (CA). The focus of the appeal was whether the jury had been given adequate guidance with reference to the assessment of damages and whether in any event the awards were clearly excessive. Given that TVNZ had enjoyed the benefit of the pre-trial ruling letting in subsequent misconduct evidence, there could be no challenge to that ruling by the appellant (and it was not challenged by the plaintiff prior to trial).

[36] Only one of the five Judges, McGechan J, mentioned the pre-trial ruling. While considering a submission that the extant award was excessive and could not be justified on the facts of the case, McGechan J referred to the subsequent misconduct evidence at 52:

> It is true that extraneous publicity in itself subsequently caused considerable damage to Mr Quinn's reputation. For my own part, I am not attracted to any rigid rule under which the quantum clock stops at the moment of defamatory publication. Reputation is an ongoing state. In assessing compensatory elements in damages, there seems room logically for allowance for damage which hindsight tells us would have occurred in any event.

[37] And later at 66 the Judge added:

> I accept the 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.

Hence the judgment of McGechan J affords some support for a more expansive approach than that described in *Gatley*. However, the Judge's comments were obiter in that the subject ruling was not under direct challenge.

[38] The next case is *Middendorp Electric Co Pty Limited v Sonneveld* [2001] VSC 312. Following a Judge alone trial the plaintiff was awarded damages of $10

for slander. Mr Sonneveld alleged he was defamed in the context of a trade dispute between himself and the company. He was an electrical contractor and the company a wholesale supplier of electrical parts. The issue was whether Mr Sonneveld was slandered in relation to his credit-worthiness. In that connection the trial Judge, Gillard J, allowed in evidence of post-publication convictions as relevant to the claimant's reputation and therefore to damages. The Judge did so after considering each of the above authorities. He viewed *Dingle* as relevant to contemporaneous publications on the same subject-matter, rather than to subsequent misconduct. *Goody*, he accepted, related to prior convictions but the Judge saw no reason to restrict its application and exclude subsequent convictions. The Judge disagreed with the decision in *Rochfort*, because he considered the reasoning in that case was based on the assumption that because *Goody* concerned prior convictions, as a matter of principle subsequent convictions were irrelevant. Gillard J considered this did not "logically follow".

[39] The Judge, after he noted and approved the reasoning of McGechan J in *Quinn*, continued at para [298]:

> When one considers the objectives of an award of damages which are assessed at trial, logic and common sense points to the conclusion that any convictions of a serious nature, which clearly adversely affect the plaintiff's reputation or indeed destroy it, should be admissible on the question of damages. On what basis can the law allow a sum of damages to a man who, at the date of trial, had no reputation at all?

Later he set out his conclusions in these terms:

> [338] In my opinion, to exclude evidence of relevant convictions, which affect the reputation of the plaintiff, prior to the assessment of damages, is to deprive the tribunal of fact of a material matter relevant to the vindication of the plaintiff's reputation. In my view, it is logical to extend what was said in Goody's case to pre-trial convictions, and to do otherwise would fail to take into account one of the objects of damages, which is to restore the plaintiff's reputation in the eyes of those who know him and the public generally.
>
> [339] This happens at the time judgment is delivered, and it seems incongruous to award substantial damages to a plaintiff whose reputation, by reason of the commission of a relatively serious offence, has been destroyed prior to the judgment being pronounced. The Court is telling the world the plaintiff has a good reputation at the date of judgment, yet the truth is that he has no reputation. Such a result defies logic and common sense, and brings the law into contempt.

[40] The next case is *Australian Broadcasting Corporation v McBride* [2001] NSWCA 430. The appeal concerned a pre-trial ruling in which particulars pleaded in mitigation of damages were struck out in part. Mr McBride was formerly a doctor. He alleged that the ABC had defamed him in his former professional capacity, by imputing that he deliberately exposed women patients to danger. Included in the particulars relied upon in mitigation of damages, were matters relating to a subsequent investigation and committee of inquiry conducted by Sir Harry Gibbs, which resulted in findings that Mr McBride had been involved in scientific fraud in relation to the testing of drugs used in the treatment of pregnant women. The pre-trial ruling to strike out the particulars was based in part on reasoning that it was contrary to principle to have regard to matters which occurred after the defamation occurred. The Court of Appeal held that the particulars should not be reinstated because they related to a sector of the plaintiff's reputation, other than that in relation to which he sued. Accordingly the ruling was upheld.

[41] Nonetheless, Ipp A-JA added that, although it was unnecessary to do so, he wished to make some brief comments concerning the admissibility of matters which occurred after publication of the alleged defamatory material. The Judge referred to the decision of the Court in *Rochfort*, but, after reference to other authorities, acknowledged at p 443 "that a powerful argument could be mounted" in favour of admitting subsequent conduct evidence. He referred to the judgment of McHugh JA in *John Fairfax & Sons Limited v Kelly* (1987) 8 NSWLR 131, 143 that in relation to damages for defamation:

> The award will reflect an amount for continuing injury to feelings and reputation to the date of verdict. Hence the amount awarded may, and usually will, be higher than the amount which would have been awarded as at the date of publication or even as at the date of the writ.

[42] After noting that a defendant's conduct after publication may influence damages (eg repetition of the defamation may increase damages, while an apology may reduce them), the Judge observed that:

> It should follow that evidence referring to a change in the reputation of a plaintiff after the publication date would (also) be relevant.

In that context he referred to *Quinn* and in particular to the judgment of McGechan J with whom he thought Cooke P appeared to agree. Finally, Ipp A-JA referred to *Sonneveld* and indicated his inclination to follow the reasoning of Gillard J, although it was desirable for a final decision on the point to be left for another day.

[43] Fitzgerald A-JA also referred to *Quinn* and *Sonneveld* and continued at 448:

> The issue is one of causation. Continuing harm to reputation between publication and trial is analogous to continuing physical pain and suffering from a personal injury caused by a tort between injury and trial. Events or circumstances which intervene between defamation or physical injury and trial can affect the damages recoverable for the harm caused by the wrong. The consequences of intervening events or circumstances upon the damages recoverable for the harm to reputation or physical pain and suffering fall to be decided on the same principles.

These observations were also obiter, since the Judge likewise upheld the pre-trial ruling to strike out on the grounds that the particulars related to a different sector of the plaintiff's reputation.

[44] Finally is the case *TVNZ v Ah Koy* [2002] 2 NZLR 616 (CA). The plaintiff alleged that he was defamed in a television broadcast which suggested he was a party to the military coup in Fiji. The defendant sought to plead, by way of mitigation of damages, that the plaintiff's reputation had been damaged by other publications in addition to their own. Anderson J, in a pre-trial ruling, struck out the paragraphs in the statement of defence by which the other publications were pleaded in mitigation. The defendants appealed. The Judge's decision was upheld. The headnote to the case summarised the effect of the Court of Appeal decision in these terms:

> When publications were made independently of each other, and each was defamatory of the plaintiff, the publishers were several rather than joint tortfeasors and liable only for the damage done by their own publication. Where the publications, although independent, were to similar defamatory effect and the harm was caused by the joint consequence of all or a number of publications, the tortfeasors were deemed together to have caused indivisible damage and were classified as joint tortfeasors. Each was then responsible for the whole of the indivisible harm.

It may be seen that the point presently at issue did not directly arise in *Ah Koy*.

[45] However, one of the arguments raised in support of the contention that evidence of similar imputations in other publications should be admitted in mitigation of damages, was that not to do so would be inconsistent with the approach adopted in *Quinn*. Counsel, Mr Miles, argued that in terms of *Quinn* a plaintiff's reputation could be shown to be tarnished on account of extraneous reasons. Therefore, it would be anomalous to disallow evidence of publications on the same subject-matter which likewise had the tendency to tarnish the plaintiff's reputation. It was acknowledged in argument that the further publications may have occurred in the period subsequent to the publication sued upon in the proceeding.

[46] Tipping J in delivering the judgment of the Court dealt with the submission in this manner:

> [39] It is true that Anderson J gave pretrial 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 p 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.

[47] Although, as Mr Forbes stressed in argument, these observations were in response to a particular submission and the issue in *Ah Koy* was contemporaneous and/or subsequent publications referable to the same subject-matter (not subsequent conduct of the plaintiff), nonetheless the above extract constitutes a strong endorsement of the traditional common law approach and a questioning of the approach taken and approved, by at least one Judge, in *Quinn*.

Discussion

[48] It was the tension between the reasoning in *Quinn* on the one hand, and *Ah Koy* on the other, which prompted me to the view that the question of the admissibility of subsequent misconduct evidence is a difficult one. The observations in the Court of Appeal decisions are at least at odds, if not in conflict. In neither was the present issue directly in point. In *Quinn* the issue was whether a damages award was excessive, and the question of subsequent conduct arose only in the context of an examination of one aspect of the trial Judge's summing up. In *Ah Koy* the relevant observations were in response to a submission of counsel based on *Quinn*. Again, the appeal did not concern subsequent misconduct of the plaintiff.

[49] Conscious of what was said in *Ah Koy* I formed the view before the jury panel was discharged that, if the trial was to proceed, the appropriate course was to rule the subsequent misconduct evidence to be inadmissible. As previously explained to counsel that indicated approach was influenced in part by pragmatic considerations. The particulars of misconduct were not pleaded until the most recent statement of defence dated 8 July 2005 was filed (although I understand advice of the intended particulars was given earlier). Consequently the opportunity to resolve the admissibility of the evidence was limited. The issue should have been the subject of a ruling sufficiently in advance of trial to enable that ruling to be challenged.

[50] Absent the opportunity for an appeal, I formed the view that the appropriate course was to adopt a conservative approach and exclude the subsequent conduct evidence. This would accord with the common law position described in *Gatley* and would reflect the doubts expressed in *Ah Koy* as to the correctness of the approach in *Quinn*. When the defendants sought an adjournment of the trial, and Mr Riach did not seriously oppose that course with the result that the jury panel was discharged, I indicated to counsel that it may be preferable for me to give a fully reasoned ruling rather than one influenced by pragmatic considerations. This I will now do.

[51] I agree with Mr Forbes' submission that the rationale for excluding subsequent bad character evidence given in *Gatley* (refer para [30]) is not greatly convincing. The suggestion that the admission of reputational evidence based on subsequent conduct would open the door to a defamer to call neighbours to say they had heard imputations he had himself subsequently "set afloat", is not to my mind persuasive. But in any event it is an observation which may be reflective of the common law position, that only general evidence of reputation may be given, not evidence of specific instances of misconduct.

[52] Nor do I consider that the authorities cited in *Gatley* in relation to subsequent conduct are greatly persuasive. *Dingle*, like *Ah Koy*, concerned evidence of similar defamatory publications, some of which were subsequent to the publication which was sued upon. As the judgment of Tipping J in *Ah Koy* demonstrates, there are sound reasons of principle for limiting evidence of that kind. Such reasons centre upon what the Judge termed "isolation of damages" and, where that is not attainable, then a joint tortfeasor becomes accountable for all the indivisible harm. This, it seems to me, has little to do with the issue whether evidence of subsequent misconduct by the plaintiff should be admitted in mitigation of damages.

[53] In New Zealand relevant provisions in the Defamation Act have changed the landscape. They, I think, comprise the starting-point:

> **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.

32. Defendant's right to prove other matters in mitigation of damages not affected – Nothing in section 29 or section 30 or section 31 of this Act limits any other rule of law by virtue of which any matter is required or permitted to be taken into account, in assessing damages in any proceedings for defamation, in mitigation of damages.

[54] Section 29 identifies a range of matters relevant to the mitigation of damages. However, these comprise ways in which a defendant may minimise the effect or sting of a defamation by steps taken in the post-publication period. An exception is s30(d), whereby "delay for which the plaintiff was responsible", may mitigate damages. Hence, conduct of the plaintiff referable to the defamation itself, and subsequent to it, is made relevant to the assessment damages. If delay per se is relevant, it is a short step to the proposition that misconduct during the period of such delay is also relevant.

[55] Mr Forbes also made the submission that s30 is open-ended, in the sense that "specific instances of misconduct by the plaintiff" are not limited with reference to timing. If anything the description that "the plaintiff **is** a person whose reputation **is** generally bad …" may suggest it is reputation at the date of trial which is material.

But, I am not inclined to place significant reliance upon the use of a present tense verb.

[56] Section 31 continues the theme that post-publication developments which are relevant to the defamation actually sued upon, may mitigate damages. Hence, actual or prospective recovery of compensation for "substantially the same" subject-matter, may be brought to account. This necessarily presupposes an assessment of the situation as at the time of trial. Intervening developments are to be weighed. That said, however, such developments may be brought to account while still assessing reputation at the date of the relevant defamatory publication. In other words, the statutory changes are not conclusive of the need to judge actual reputation at the time of trial.

[57] Against this legislative background the determinative question of principle remains whether in assessing an award of damages it is the plaintiff's reputation at the time of publication, or at the time of trial, which is in issue. I am attracted to the reasoning of McGechan J in *Quinn* that "reputation is an ongoing state" and that "the quantum clock (does not stop) at the moment of defamatory publication".

[58] I think it would be incongruous to expect a jury to have regard to post-publication developments by which the defendant has mitigated the harm done, and to consider delay of the plaintiff's making as mitigating damages, and at the same time direct the jury not to have regard to specific instances of misconduct by the plaintiff during the interregnum. What the damages should be, will still remain a matter of assessment for the jury or the Judge sitting alone. Where a sound reputation has been seriously tarnished by the defamatory publication, and a subsequent instance of misconduct is minor by comparison, the degree of mitigation may be appropriately slight. If the subsequent misconduct is grave in nature, then the award may reflect as much. Importantly, scope for assessment and judgment remains.

[59] To my mind this case provides an illustration why it is necessary to allow evidence of subsequent instances of misconduct to be called. The events in which Mr Tipple was involved in the United States in 2002-2004 attracted considerable

publicity and will, I am sure, be remembered by some members at least of a Christchurch jury. It would be artificial to ask the jury to decide the case putting that subsequent publicity out of mind. Whether the evidence will influence the assessment of damages remains a jury question, but I am at least satisfied they should hear that evidence.

[60] It is important to note there was no challenge to the evidence on the grounds it did not relate to that sector of Mr Tipple's reputation which is at stake in these proceedings. His fitness to hold a gun dealer's licence is at the heart of the case. The instances of conduct in 2000 at Auckland, 2002 in California and 2004 in Georgia were, as I understand them, occasions when the plaintiff was engaged in his business of gun dealing. They are also instances of alleged misconduct involving failures to comply with legal requirements pertaining to firearms, which is also a matter at the centre of this proceeding.

Result

[61] For these reasons, and contrary to the indication which I gave before the jury panel was discharged, I am of the view that the subsequent conduct evidence is admissible.

Costs

[62] Ordinarily costs would follow the event. However, given the circumstances in which this ruling came to be made, and the consequences for the parties, I am not disposed to make an award. This issue should have been tested well in advance of trial. As it is both parties have no doubt incurred costs in preparing for the trial which was to have commenced on Monday. That cost could have been avoided. I do not think the plaintiff should be further penalised. An award is not indicated.

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