

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2011-404-008076  
[2012] NZHC 2738**

BETWEEN                      DARYL YOUNG  
   Plaintiff

AND                              TELEVISION NEW ZEALAND  
   LIMITED  
   First Defendant

AND                              RED SKY FILM & TELEVISION  
   LIMITED  
   Second Defendant

AND                              BRYAN BRUCE  
   Third Defendant

Hearing:            12 July 2012

Appearances: M P Reed QC and P A Morten for the plaintiff  
                         J G Miles QC and D Salmon for the first defendant  
                         J W Tizard for the second and third defendants

Judgment:        19 October 2012

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**RESERVED JUDGMENT OF GILBERT J**

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*This judgment was delivered by me on 19 October 2012 at 2.30 pm  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar  
Date:*

Counsel:            M P Reed, QC, Auckland: [pensula@xtra.co.nz](mailto:pensula@xtra.co.nz)  
                         P Morten, Wellington: [pmorten@missionchambers.com](mailto:pmorten@missionchambers.com)  
                         J G Miles QC, Auckland: [miles@shortlandchambers.co.nz](mailto:miles@shortlandchambers.co.nz)  
                         J W Tizard, Wellington: [jwtizard@oakleymoran.co.nz](mailto:jwtizard@oakleymoran.co.nz)

Solicitors:        Buddle Findlay, Christchurch: [kelly.paterson@buddlefindlay.com](mailto:kelly.paterson@buddlefindlay.com)  
                         Lee Salmon Long, Auckland: [davey.salmon@lsl.co.nz](mailto:davey.salmon@lsl.co.nz)  
                         Oakley Moran, Wellington: [email@oakleymoran.co.nz](mailto:email@oakleymoran.co.nz)

## **Introduction**

[1] The plaintiff, Mr Young, sues the defendants for defamation in respect of a number of publications concerning evidence he gave at David Bain's retrial in 2009. The defendants claim that the words used in the publications are not capable of bearing the defamatory meanings alleged by Mr Young. The first defendant, TVNZ, applies for a determination to this effect. The second and third defendants, Red Sky Film & Television Limited and Mr Bruce, apply to strike out the claims against them on this basis.

[2] All three defendants have pleaded qualified privilege. Mr Young has filed notices of particulars supporting his contention that the defendants were predominantly motivated by ill will in making the publications or otherwise took improper advantage of the occasion of publication. The defendants apply to strike out these particulars.

[3] This judgment deals with these applications and a further application by the defendants for a review of a decision of Bell AJ making procedural orders.

## **Background**

[4] Following a trial by jury in 1995, David Bain was convicted of murdering his parents and siblings in 1994. Mr Bain's convictions were eventually quashed by the Privy Council in 2007 and a retrial was ordered. At his retrial in 2009, the defence claimed that David's father, Robin Bain, committed the murders before killing himself. The jury found David Bain not guilty.

[5] Mr Young was one of the witnesses called by the defence to support its assertions that Robin Bain was of bad character and had a motive to commit the crimes. Mr Young gave evidence about finding Robin Bain in a van in a camping ground sometime after 9.00 am on a school day smelling of stale alcohol, wearing only a towel, and in the company of a female, when he was supposed to be teaching a class at the local school where he was the principal.

[6] After the trial, Mr Bruce investigated the defence evidence supporting the theory that Robin Bain was responsible for the killings. He found information indicating that Mr Young's evidence may not have been accurate. Mr Bruce was concerned that Mr Young's evidence could not be adequately tested in court because the Crown had no prior warning of the evidence that Mr Young was going to give and therefore did not have an opportunity to investigate it.

[7] Mr Bruce and Red Sky produced a documentary which was promoted on Television New Zealand's website on 6 July 2010 and broadcast on TV One at 9.30 that evening. The documentary, called *The Investigator Special: The Case Against Robin Bain*, was presented by Mr Bruce and conveyed his personal view that Robin Bain could not have committed the crimes. In the first part of the documentary, Mr Bruce examined the Crown's evidence and gave his reasons why he thought Robin Bain could not have been responsible. In the second part of the documentary, Mr Bruce reviewed the evidence called by the defence suggesting that Robin Bain was of bad character and had a motive to commit the crimes. During this part of the documentary, viewers were shown in-court camera footage of Mr Young giving evidence. Mr Bruce then revealed some information he had discovered during the course of his investigation that he said raised doubts about the accuracy of Mr Young's evidence.

[8] TVNZ gave further coverage of the issue on its *Breakfast* programme on TV One the following day, 7 July 2010. Viewers were advised that the police were investigating Mr Young's evidence.

[9] Having completed his investigation into the evidence given by Mr Young, Detective Senior Sergeant Harvey of the New Zealand Police wrote to Mr Bruce on 5 May 2011 advising:

I have concluded that untruthful evidence was given by Young. The investigation was referred for legal advice as to whether there was sufficient evidence to support a prosecution for perjury. It was determined that no criminal charges would follow.

Red Sky and Mr Bruce passed this letter on to TVNZ.

[10] TVNZ published excerpts from this letter in an update on *One News* on 30 May 2011. The update was also published on its website together with another article written that day stating that police believed that a defence witness in the retrial, referring to Mr Young, gave untruthful evidence.

[11] Mr Young claims that he was defamed in the documentary, the promotion of it on TVNZ's website on 6 July 2010, and in the 7 July 2010 *Breakfast* programme. He claims that the words used in these publications meant, and were understood to mean, that he is a liar, is dishonest, cannot be trusted, committed perjury when he gave evidence at the retrial, and is a man who commits perjury. He claims that in their natural and ordinary meaning, the words in the 5 May 2011 letter from the police, the 30 May 2011 update and the article of the same date meant, and were understood to mean, that he is a liar, is dishonest, and cannot be trusted. Mr Young has issued this proceeding seeking damages for defamation in relation to these publications.

[12] The defendants have pleaded qualified privilege. Mr Young seeks to defeat these defences by claiming that the defendants were predominantly motivated by ill will towards him in making the publications or otherwise took improper advantage of the occasion of publication. He has provided particulars of these allegations in notices filed in accordance with s 41 of the Defamation Act 1992.

[13] The defendants contend that the words used in the publications are not capable of bearing the defamatory meanings alleged by Mr Young. TVNZ's initial response to the proceeding was to apply for a preliminary hearing to determine this issue. TVNZ's application was listed for mention before Bell AJ on 24 February 2012. The Associate Judge rejected TVNZ's contention that the application should be dealt with before any defence was filed or any other steps were taken. He made orders requiring TVNZ to file its statement of defence and for all parties to provide discovery and complete inspection before the Court would consider any interlocutory applications. His reasons for taking this approach were stated in his minute as follows:<sup>1</sup>

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<sup>1</sup> [5] and [6] Minute of Bell AJ 24 February 2012.

My concern is that in defamation proceedings a plaintiff running a claim against a media defendant often has to run a gauntlet of interlocutory applications. Running that gauntlet of interlocutory applications can itself almost inflict as much trouble and tribulation on a plaintiff, particularly with using up the costs and causing stress, as the original statements complained of. I am concerned that TVNZ is taking a drip-feed approach by first of all attacking the meanings pleaded in the statement of claim while reserving its right to raise [sic] other issues further down the track, with those issues also giving rise to further interlocutory applications.

In my view, it may be better to make a more co-ordinated approach and to require TVNZ first to file a statement of defence in which it should disclose *all* the defences it intends to run at trial; following that, there should be discovery; and following that, any interlocutory applications can be disposed of. That might include not just applications relating to the existing pleading but also other issues that might be raised by other defences.

[14] Red Sky and Mr Bruce subsequently applied to strike out the claims against them on the basis that the words used in the publications are not capable of bearing the defamatory meanings alleged. They also applied to review the Associate Judge's orders requiring the parties to give discovery and complete inspection before determining whether the claims should be struck out. Finally, they applied to strike out the particulars of ill will and for an order convening a preliminary hearing to determine whether the publications were made on occasions of qualified privilege.

[15] TVNZ filed its defence but it also applied to review the orders made by the Associate Judge. Following receipt of Mr Young's particulars of ill will, it applied to strike them out.

[16] At a conference on 1 June 2012, I directed that the following applications would be dealt with at this stage:

- (a) The defendants' applications to review Bell AJ's decision dated 24 February 2012;
- (b) TVNZ's application for an order that none of the publications pleaded in the statement of claim are capable of bearing the defamatory meanings alleged;
- (c) Red Sky and Mr Bruce's application to strike out the claims against them; and

- (d) The defendants' applications to strike out the particulars of ill will pleaded by the plaintiff.

[17] Red Sky and Mr Bruce's application for a preliminary hearing to determine whether the publications were made on occasions of qualified privilege was deferred for later consideration, if necessary.

[18] The timetable orders made by the Associate Judge have effectively been overtaken by these events. However, the defendants nevertheless pursue their review applications. They argue that the issue as to whether the words used in the publications are capable of bearing the defamatory meanings alleged should be determined before any other steps are taken. They submit that this is the settled approach in defamation proceedings. Mr Miles QC, for TVNZ, also submits that the criticisms made by the Associate Judge quoted in [13] above are unjustified and unfair and should not be allowed to stand.

[19] The issues I have to decide at this stage are as follows:

- (a) Are the words used in the documentary capable of bearing the defamatory meanings alleged? Mr Young relies on this publication to found his first cause of action against all three defendants. He also relies on it for his fourth cause of action against TVNZ, and his sixth cause of action against Red Sky. These two causes of action relate to the further publication of the documentary on their respective websites.
- (b) Are the words used in the 6 July 2010 website publication capable of bearing the defamatory meanings alleged? Mr Young relies on this publication to found his second cause of action, which is against TVNZ.
- (c) Are the words used in the 7 July 2010 *Breakfast* programme capable of bearing the defamatory meanings alleged? Mr Young relies on this publication to found his third cause of action, which is against TVNZ.

- (d) Are the words in the police letter dated 5 May 2011 capable of bearing the defamatory meanings alleged? Mr Young relies on this letter to found his seventh, and last, cause of action, which is against Red Sky and Mr Bruce.
- (e) Are the words used in the 30 May 2011 update and article capable of bearing the defamatory meanings alleged? Mr Young relies on this publication for his fifth cause of action, which is against TVNZ.
- (f) Are the particulars filed in respect of TVNZ capable of supporting a finding that it was predominantly motivated by ill will towards Mr Young or otherwise took improper advantage of the occasion of publication?
- (g) Are the particulars filed in respect of Red Sky and Mr Bruce capable of supporting a finding that they were predominantly motivated by ill will towards Mr Young or otherwise took improper advantage of the occasion of publication?
- (h) Was the Associate Judge wrong to order the parties to undertake discovery and inspection before determining whether the publications are capable of bearing the defamatory meanings alleged?

**The legal principles to be applied in determining whether the words are capable of bearing any of the defamatory meanings alleged**

[20] The principles to be applied in determining whether words are capable of bearing a defamatory meaning are well settled and were summarised by Blanchard J in *New Zealand Magazines Ltd v Hadlee (No 2)* as follows:<sup>2</sup>

- (a) The test is objective: under the circumstances in which the words were published, what would the ordinary reasonable person understand by them?

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<sup>2</sup> *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.

- (b) The reasonable person reading the publication is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.
- (c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.
- (d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.
- (e) But the Court will reject those meanings which can only emerge as the product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.
- (f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that a jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them: *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65; [1995] 2 All ER 313 (HL) at p 72; 318.

[21] The natural and ordinary meaning of the words may, in addition to their literal sense, also have an inferential meaning inherent in them. The literal meaning and any inferential meaning must both be considered when determining the natural and ordinary meaning of the words.<sup>3</sup> Any inferential meaning must be taken from the words themselves in the context in which they were published. Mr Young has not pleaded innuendo. He does not rely on extrinsic circumstances to establish a special meaning.

[22] The publication must be considered in its entirety recognising that a reasonable reader or viewer may pay more attention to those matters which are given particular emphasis through headlines or other editorial techniques. This can have particular significance in the case of publications in transient form such as television broadcasts or electronic media. The reasons for this were explained by Hunt CJ in *Amalgamated Television Services v Marsden*:<sup>4</sup>

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<sup>3</sup> *Slim v Daily Telegraph Ltd* [1968] 2 QB 157; [1968] 1 All ER 497 (CA).

<sup>4</sup> *Amalgamated Television Services v Marsden* (1998) 43 NSWLR 158 (CA) at 165-166.



All of these considerations, and more, apply to matter published in a transient form – and particularly in the electronic media. Whereas the reader of the written document has the opportunity to consider or to re-read the whole document at leisure, to check back on something which has gone before to see whether his or her recollection of it is correct, and in doing so to change the first impression of what message was being conveyed, the ordinary reasonable listener or viewer has no such opportunity...Although such a listener or viewer, like the reader of the written article, must be assumed to have heard and/or seen the whole the relevant programme, he or she may not have devoted the same degree of concentration...to each part of the programme as would otherwise have been given to the written article...and may have missed the significance of the existence, earlier in the programme, of the qualification of a statement made later in the published material...

The trial judge in a transient publication case will therefore more readily leave it to the jury to decide whether an imputation effected by any of those circumstances, or any similar circumstances peculiar to such type of publication, was in fact conveyed, then he or she would in relation to a written document case.

[23] As I have noted, Mr Young relies on separate publications to found each separate cause of action. However, earlier publications may provide relevant context for considering the defamatory meanings available from subsequent publications. This is particularly the case where the subsequent publication is close in time to the earlier publication.

[24] The ordinary reasonable person in the defamation context is fair minded, not avid for scandal or unduly suspicious; and not prone to fasten on one derogatory meaning when other innocent or at least less suspicious meanings could apply.<sup>5</sup>

[25] It is for the plaintiff to allege the particular defamatory meanings complained of. In this case, Mr Young alleges that the relevant publications conveyed meanings which are positive assertions of guilt. Such meanings are commonly referred to as tier one meanings and are to be contrasted with lesser meanings such as the existence of grounds to suspect guilt or to investigate possible guilt. This distinction is generally accepted in England and was discussed in such cases as *Lewis v Daily Telegraph Ltd*<sup>6</sup> and *Chase v Newsgroup Newspapers Ltd*.<sup>7</sup> In *APN New Zealand Ltd v Simunovich Fisheries Ltd*,<sup>8</sup> the Supreme Court accepted this distinction as a

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<sup>5</sup> *New Zealand Magazines Ltd v Hadlee (No 2)*, above n 2, at 625-626.

<sup>6</sup> *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL).

<sup>7</sup> *Chase v Newsgroup Newspapers Ltd* [2003] EMLR 218; [2002] EWCA Civ 1772 (CA).

<sup>8</sup> *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2010] 1 NZLR 315 (SC) at [16].

convenient general description of different forms of meaning in. However, the Supreme Court emphasised that the correct approach is to identify the meaning of the words in the context in which they were used rather than attempting to force that meaning into any one of the three tiers.

**Are the words used in the documentary capable of bearing the defamatory meanings alleged?**

[26] Mr Young's defamation claims are based on the statements made by the defendants regarding the evidence he gave at the retrial. It is therefore helpful to begin by summarising that evidence. Mr Young said that in 1992 or 1993 he sold a photocopier to the Taieri Mouth School, where Robin Bain was the principal. He went to the school three times for this purpose. The last of these visits was to complete the paperwork for the purchase to enable delivery. Mr Young arrived at the school as arranged at 9.00 am or shortly thereafter. Robin Bain was not there. A person described by Mr Young as a "lady in the office or another teacher" advised him that Robin Bain was likely to be in his van at the Taieri Mouth Camping Ground, a five minute drive from the school. Mr Young went to the camping ground and found Robin Bain's van. He knocked on one of the back doors and then heard two voices, one of which was a female's voice. He moved back a few paces<sup>9</sup> before Robin Bain came out of the back of the van wearing only a towel and smelling of stale alcohol. Mr Young explained to Mr Bain that he needed to get the paperwork for the sale of the photocopier completed. Mr Bain agreed to meet him at the school. When Mr Young arrived back at the school he noticed that Mr Bain's class was unsupervised and the children were running around. Mr Bain arrived at about 9.45 am and signed the paperwork. Mr Young returned at a later date to install the photocopier and provide training on it. In cross-examination by the Crown prosecutor, Mr Young said that he had been approached by the defence in relation to the matter two or three years before but that he had not been asked to try and find the paperwork relating to the sale until about a week before he gave evidence. He said that he had not attempted to find the paperwork.

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<sup>9</sup> Mr Young said earlier in his evidence that he moved away five or 10 metres.

[27] Mr Young relies on the entire broadcast of the documentary in making his claim. However, the key extracts from the transcript are as follows:

But the fact is that at David's retrial, things were said about Robin which went unchallenged, some of which, in my view, need investigation...

But one man told a story about Robin to the jury that I have real doubts about...

A surprise witness called by the defence at David Bain's retrial was Daryl Shane Young, a photocopier salesman who testified that in 1992 or 1993 he sold a photocopier to Taieri Mouth School principal, Robin Bain...

Okay, so Daryl Young said he knocked on the back door of the van and Robin came out naked except for a towel. But if you take a look at this photo of Robin's van on the day of the murders you can see that he's built a wall right across the back of it. He's got his bed there and there's the wall. In fact here's some footage of a young David showing off the built-in shelving at the back of the new family van, 11 years before the murders in the Christmas of 1983. And if that wall was in place at the time of the alleged incident then Robin couldn't have come out the back door of the van as Mr Young testified. Certainly if Robin had opened the side door of the van to get out then the whole of the van would have been revealed and Mr Young would have seen if Robin had a woman in there or not. So that's my first concern about Daryl Young's testimony.

My second is much more significant. And it arose from a question put by Crown prosecutor Kieran Raftery concerning the sales documents for the photocopier...

I have managed to find that sales document and here it is. And here's Robin Bain's signature and the date? The 2<sup>nd</sup> of July 1993. And here is the name of the salesperson, Ian Arthur. Not Daryl Young, which I found curious. So I rang Ian and I asked him for an interview. And he told me a different story to the one that Daryl Young told the Court.

[28] Viewers were then shown a brief interview of Mr Arthur conducted by Mr Bruce. Mr Arthur confirmed that he was a photocopier salesman in 1993 and that his immediate boss was Mr Young, who was the sales manager. Mr Bruce showed Mr Arthur the sales agreement dated 2 July 1993 for the photocopier sold to the Taieri Mouth School. Mr Arthur said that he recalled making the sale and he identified his handwriting on the agreement. He also recognised Robin Bain's signature and said that he had obtained it.

[29] Mr Bruce told Mr Arthur that Mr Young's evidence was that he had made three trips to the school and had sold the photocopier. Mr Arthur said that he did not recall Mr Young making three separate trips. Mr Arthur also said that he had made

the initial visit and a subsequent visit. He said that Mr Young may have accompanied him on the third visit. However he maintained that he made the sale, not Mr Young. Mr Bruce asked Mr Arthur if he knew anything about a lady in the office or another teacher advising that Robin Bain could be found in his van at the camping ground. Mr Arthur said he had not heard about that. Mr Arthur said that he had also not heard anything about Robin Bain coming out of the back of the van naked or near naked or that a woman's voice had been heard inside the van.

[30] Mr Bruce then said:

So who sold the photocopier to Robin? Ian Arthur whose handwriting is on the sales agreement or Daryl Young who said that he sold it? Well there might be one more person who could shed some light on all of this. Remember how Mr Young said he spoke with another teacher or a lady in the office who said that Robin was in his van down at the camping ground? Well the only person he could have spoken with in that school on that day was this woman, Pene Balk-Jarvis, the only other teacher at Taieri Mouth School at that time. So I phoned her and she agreed to be interviewed.

[31] Mr Bruce's interview with Ms Balk-Jarvis followed. She confirmed that she was the only other teacher working at the school on Friday 2 July 1993 and that there was no office lady. She recalled that this was her last day at the school. She did not recall Mr Young. Nor did she recall advising anyone that Robin was at the camping ground. She said that she never saw Robin Bain drink alcohol, nor did she recall any occasion when he smelled of alcohol. She did not remember Robin Bain failing to turn up for school without informing her or arranging a relief teacher.

[32] Mr Bruce then advised Ms Balk-Jarvis what Mr Young had said in his evidence. She said that if Robin Bain had not turned up that day, she would have either taken his class into her room or organised supervision for them. She said that it would be most unusual for a teacher not to turn up and that the procedure would have been to contact the Board of Trustees and to arrange for the relief teacher to provide cover.

[33] Viewers then heard an extract from a recorded telephone discussion between Mr Bruce and Mr Young as follows:

...I make a programme called *The Investigator* which screens on TV One...

I'm working on an episode about Robin Bain and I've got some documents and photographs that appear to contradict the evidence that you gave in court and I wondered if I could show them to you and have a discussion with you about it.

Oh look I've moved on mate.

This is pretty serious I mean they do suggest that, ah, what you said in court wasn't, wasn't accurate.

Oh I don't; I don't know about that mate.

You don't know about it? Do you know a Mr Ian Arthur?

I know Ian Arthur, yeah.

Yeah, he says that he sold the photocopier to the school.

Well that's inaccurate. It went through in his name but I, I sold it.

[34] Mr Bruce then told the viewers:

Shortly after this Daryl Young made it very clear that he didn't want to talk to me and hung up. Which is a pity because now we have two versions of the events and I can't tell you who's right and who's wrong. It's certainly a matter which in my opinion needs further investigation as to why the jury did not get to hear from fellow teacher Pene Balk-Jarvis or copier salesman Ian Arthur.

And that raises what I think is a fundamental problem here with respect to how we are left to think about Robin Bain. Balance.

Last year a jury found David Bain not guilty of the murders of his family as indeed he has maintained throughout. What saddens me is that at the retrial the defence produced a lot of hearsay evidence to accuse Robin of some vile things to which he will never be able to respond. All in the cause of trying to produce a motive for a crime which I for one don't believe he did.

In this country you can apparently speak ill of the dead and get away with it. But in the course of making this documentary I have met people who have had nothing but good things to say about Robin. That he was a dedicated teacher with a wry sense of humour and a loving and caring father. And what I think we should all remember is that while David got a fair trial, his father never did.

[35] Having reviewed the documentary as requested by the parties,<sup>10</sup> I do not consider that any reasonable viewer could have regarded the words as capable of conveying the defamatory meanings alleged by Mr Young. Mr Bruce did not allege that Mr Young had lied in his evidence to the Court. He stated that he had "real

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<sup>10</sup> I have also reviewed the other publications.

doubts” about whether Mr Young’s evidence was accurate in view of the photographs showing the configuration of Robin Bain’s van and his interviews with Mr Arthur and Ms Balk-Jarvis concerning the photocopier sale. He said that there were two versions of events but he made it clear that he was not able to say which was right and which was wrong. He suggested that the matter required further investigation.

[36] There is nothing in the words used in the documentary or in the way the documentary was presented that could lead a reasonable viewer to conclude that Mr Young is a liar, is dishonest, cannot be trusted, committed perjury when he gave evidence at the retrial, and is a man who commits perjury. The reasonable viewer would recognise that honest witnesses may be inaccurate or mistaken in their evidence, particularly if they are being asked to recall events that occurred 15 years earlier, as Mr Young was. The reasonable viewer is left with the impression that there are grounds to investigate the accuracy of Mr Young’s evidence, not that he lied to the Court. I do not consider that the natural and ordinary meaning of the words used in the documentary are capable of bearing the defamatory meanings alleged by Mr Young.

**Are the words used in the 6 July 2010 website publication capable of bearing the defamatory meanings alleged?**

[37] On 6 July 2010, the day the documentary was broadcast, TVNZ posted the following statements on its website:

Tonight, on TV One’s *The Investigator Special: The Case Against Robin Bain* documentary maker Bryan Bruce singled out the evidence of the retrial defence’s surprise witness Daryl Young for special attention.

In many ways, I think Robin was a victim of the 2006 Evidence Act which allowed in all the hearsay evidence against him and since he and his daughter are dead his reputation cannot be easily defended, Bruce said.

When our lawmakers look back at what we should learn from the Bain case, I would hope they will review the disclosure rules so that the defence have the same obligations to disclose as the prosecution.

And I think they need to consider whether families ought to be able to take defamation action against people who speak ill of their next of kin.

On the documentary Bruce spoke to two people who contradicted the evidence given by photocopier salesman Daryl Young in the High Court in Christchurch about his dealings with Robin Bain as principal of Taieri Beach School. Bruce said Robin Bain had been in effect put on trial and vilified without the benefit of a proper legal defence...

[38] As noted, Mr Young claims that in their natural and ordinary meaning the words used in this publication meant and were understood to mean that he is a liar, is dishonest, cannot be trusted, committed perjury when he gave evidence at the retrial, and is a man who commits perjury. Mr Reed QC, for Mr Young, submits that this is the overwhelming impression created by the publication. I am unable to accept this submission. The statement that two people have contradicted Mr Young's evidence could not lead a reasonable viewer to the conclusion that Mr Young is a liar and committed perjury. As I have already said, a witness recalling events that took place 15 years before may well be honest but mistaken. Similarly, the two people who contradict what Mr Young said may be honest but mistaken. No reasonable person could conclude from what was said on the website that Mr Young is dishonest, cannot be trusted and is a liar and a perjurer.

**Are the words used in the 7 July 2010 *Breakfast* programme capable of bearing the defamatory meanings alleged?**

[39] TVNZ broadcast the following item on TV One on its *Breakfast* programme:

PW Police are investigating the testimony of a witness from the David Bain trial after claims his evidence was misleading. Documentary maker Bryan Bruce studied in court footage from David Bain's retrial to examine the case against Robin Bain. Jack Tame reports.

JT Daryl Young was a late witness that gave evidence in David Bain's defence.

Registrar "...speak the whole truth and nothing but the truth?"

DY "I do".

JT His testimony surrounded meetings he claimed he'd had with David Bain's father, Robin.

DY "They said he's, he's likely to be in his, in his van at the Taieri, Taieri Mouth Camping Ground".

- JT In the years before the murders Daryl Young said he visited Robin Bain's school three times to try to sell it a photocopier. He told the court about a meeting with Robin Bain.
- DY *"I smelled alcohol um and that's why I thought he wasn't at school".*
- BB *"So Daryl Young said he knocked on the back door of the van and Robin came out naked except for a towel. Now if you look at this photo of Robin's van on the day of the murders you can see that he's built a wall right across the back of it".*
- JT Documentary maker Bryan Bruce went through three months of evidence from the trial.
- BB *"What steps did the defence take to check the veracity of what its witnesses were saying?"*
- JT He found two witnesses who were never called by the court, both of whom say Daryl Young's evidence is incorrect.
- BB *"My major concern is that it was heard unchallenged. And unresearched. It couldn't be challenged because it hadn't been researched. It couldn't be researched because he was a surprise".*
- And this signature down here, is this Robin Bain's?*
- IA *"Yes it is".*
- BB *"And did you obtain Robin Bain's signature?"*
- IA *"Yes".*
- JT Another machine salesman says he was the man who sold the copy machine to Robin Bain, that Daryl Young never mentioned meeting Robin.
- BB *"Well I've got some documents and photographs that appear to contradict the evidence that you gave in court and I wondered if I could show them to you and have a discussion with you about it?"*
- DY *"Oh look, I've moved on mate".*
- JT Daryl Young wouldn't appear in the documentary. Police are investigating the claims.

Jack Tame. One News.

#### Abbreviations:

- PW Peter Williams – TV One presenter  
JT Jack Tame – TV One presenter  
DY Daryl Young  
BB Bryan Bruce  
IA Ian Arthur



[40] Unlike the documentary, the impression created by this publication is that Mr Young's evidence may not only have been inaccurate, it may also have been untruthful. This imputation emerges from the combination of the segment showing the registrar asking Mr Young to confirm that he would tell "the whole truth and nothing but the truth", the question raised regarding the steps taken by the defence to check the "veracity" of what the defence witnesses said, and the reference to the police investigating the matter.

[41] However, the publication does not contain any statement that Mr Young is a liar; is dishonest; cannot be trusted; committed perjury and commits perjury. No reasonable viewer could take these meanings from the words used or from the context in which they were used. The reasonable viewer would have understood that the police were investigating whether Mr Young's evidence was truthful and accurate but that no conclusions about this had yet been reached. The words do not convey actual guilt rather that Mr Young's evidence was being investigated by the police. I conclude that the words used in the publication are not capable of bearing the tier one defamatory meanings alleged by Mr Young.

**Are the words in the police letter dated 5 May 2011 capable of bearing the defamatory meanings alleged?**

[42] Mr Young relies on the whole of the police letter but the key extract is set out in [9] above. Mr Tizard, for Red Sky and Mr Bruce, argues that the only conclusion that can be drawn from the letter is that the police are not satisfied that Mr Young lied. He submits that the alternative alleged meanings, being that Mr Young "is dishonest" and "cannot be trusted" are not open on the ordinary meaning of the words used in the letter.

[43] I do not accept this submission. Detective Senior Sergeant Harvey advises in the letter that having completed his investigation he has concluded that Mr Young gave untruthful evidence, not just that he was mistaken. In my view, the words used in this letter could convey to a reasonable person the defamatory meanings alleged by Mr Young.

**Are the words used in the 30 May 2011 update and article capable of bearing the defamatory meanings alleged?**

[44] On 30 May 2011, TVNZ broadcast the following lead news item on *One News*:

...the Police believe a witness in the David Bain retrial gave untruthful evidence, but police won't be taking action against Daryl Young.

This was followed by quoting an extract from Detective Sergeant Harvey's letter dated 5 May 2011:

I have concluded that untruthful evidence was given by Young. The investigation was referred for legal advice as to whether there was sufficient evidence to support a prosecution for perjury. It was determined that no criminal charges would follow.

And then:

However, both Bryan Bruce and Robin Bain's brother, Michael Bain, are questioning why no perjury charges are pending.

... and Police won't elaborate on why they're not prosecuting.

[45] TVNZ published this update on its website on 30 May 2011 under the heading: "*Untruthful evidence*" in *Bain case – Police*. TVNZ also published an article on the same day under the same headline. This article stated:

Another twist has emerged in one of New Zealand's well-known murder cases.

One News can tonight reveal that police believe a defence witness in the David Bain trial gave *untruthful evidence*.

But police will not be taking action against photocopier salesman Daryl Young who gave evidence in the 2009 trial.

Bain was found not guilty of murdering his father, mother, two sisters, and brother in a case that has captivated the country for more than 15 years and which has been the subject of huge controversy.

Now more controversy has been added with a letter released to One News about Young's evidence.

Young was a late witness in Bain's defence and told of his dealings with David's father, Robin Bain.

In Court Young said: “I smelled alcohol and that’s why I thought he wasn’t at school”.

Last year, documentary maker Bryan Bruce challenged the testimony, going as far as to ask police to investigate Young’s entire evidence.

The reply came in a letter 10 months later when Detective Senior Sergeant David Harvey said: “I have concluded that untruthful evidence was given by Young. The investigation was referred for legal advice as to whether there was sufficient evidence to support a prosecution for perjury. It was determined that no criminal charges would follow”.

However, Young’s lawyers have told One News that the letter “contains a completely gratuitous and totally unfounded allegation relating to Mr Young”.

They say “not only is the allegation completely unfounded, but its contrary to the Crown’s own evidence”.

David Bain’s defence also rejects the police findings, calling them unadulterated rubbish.

But both Bryan Bruce and Robin Bain’s brother are questioning why no perjury charges are pending.

Neither police nor Crown lawyers would appear on camera for the story, and police will not elaborate on why they are not prosecuting.

They said the investigation remains open should any further evidence come to light.

However that does not satisfy Young, whose lawyers have told One News they have made a complaint about the police conclusions to the Police Commissioner and the Independent Police Conduct Authority.

[46] These statements convey to the reasonable reader that Mr Young did not tell the truth when he gave evidence at the retrial. A reasonable reader could understand from the statements made in the publications that Mr Young is a liar, is dishonest and cannot be trusted, even though Mr Young was not going to be prosecuted for perjury unless further evidence came to light.

[47] TVNZ argues that any implication of positive misconduct in the headline passage setting out Detective Senior Sergeant Harvey’s conclusion is qualified by the passages directly following it that the police had decided not to take the matter further having taken legal advice. TVNZ argues that the clear imputation from this is that there is insufficient evidence to prosecute Mr Young for perjury. On that basis TVNZ submits that guilt is far from clear.

[48] I do not accept this submission. The clear message to the reasonable reader in both the update and in the article is that Mr Young gave untruthful evidence. Although readers were advised that a decision had been made not to prosecute Mr Young for perjury, the publications emphasise that no explanation had been given for this decision and that it was being challenged. Bryan Bruce and Robin Bain's brother are recorded as having questioned why perjury charges were not being pursued. These publications conveyed guilt, not merely a suspicion of guilt or grounds to investigate it.

[49] I also do not accept TVNZ's submission that the sting of the statements that Mr Young gave "untruthful evidence" is necessarily negated by the forceful rejection of any such allegation by David Bain's defence and by Mr Young's lawyers. This is a matter that should be left for the jury to decide.

[50] I conclude that these publications are capable of bearing the defamatory meanings alleged.

**Are the particulars capable of supporting a finding that TVNZ was predominantly motivated by ill will towards Mr Young or otherwise took improper advantage of the occasion of publication?**

[51] A defence of qualified privilege will be defeated if the plaintiff can establish that the defendant was predominantly motivated by ill will or otherwise took improper advantage of the occasion of publication.<sup>11</sup> The concepts of ill will and improper advantage are different. Improper advantage involves the misuse of an occasion of qualified privilege and is wider than the common law concept of malice. It extends to defendants who are reckless in failing to give such responsible consideration to the truth or falsity of the publication as is demanded by the nature of the allegation and the width of the intended publication.<sup>12</sup>

[52] A plaintiff seeking to defeat a qualified privilege defence must provide particulars of the matters from which ill will or improper advantage may reasonably

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<sup>11</sup> Defamation Act 1992, s 19.

<sup>12</sup> *Lange v Atkinson* [2003] NZLR 385 (CA) at [39] and [48].

be inferred.<sup>13</sup> Generalised assertions will not suffice. A notice giving such particulars is a pleading and is amenable to being struck out in appropriate cases, applying normal strike out principles. The discretion should be exercised sparingly, and only in clear cases. A plaintiff will normally be given an opportunity to re-plead if the pleading is capable of being saved by amendment.

[53] Mr Young's particulars of ill will should not be struck out unless they fail to provide a basis from which a reasonable jury could infer that TVNZ was predominantly motivated by ill will or otherwise took improper advantage of the occasion of publication. Mr Young relies on the following particulars in alleging this:

- (a) Particulars 1 to 6 - these set out the background circumstances relating to how Mr Young came to give evidence at the retrial and the general nature of his evidence. These particulars also describe the subsequent approach Mr Bruce made to him to discuss that evidence. None of these particulars relates to TVNZ.
- (b) Particular 7 - TVNZ did not offer Mr Young the opportunity to comment before broadcasting the documentary, which was broadcast five or six weeks after Mr Bruce spoke to him.
- (c) Particular 8 - TVNZ vigorously promoted the documentary before broadcasting it.
- (d) Particular 9 - TVNZ published the documentary in which Red Sky and Mr Bruce implied that Mr Young had perjured himself. Sub particulars are provided but these all relate to Mr Bruce and Red Sky. They are repeated in the notice filed by Mr Young in respect of them and are summarised at [63(i)] below.

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<sup>13</sup> Defamation Act 1992, s 41.

- (e) Particular 10 - TVNZ promoted and published the documentary with the intention that it would be viewed by as wide an audience as possible, and for the purposes of commercial gain.
- (f) Particular 11 - TVNZ made a copy of the documentary available on its website.
- (g) Particular 12 - TVNZ published the 6 July 2010 website publication which implied that Mr Young had perjured himself.
- (h) Particular 13 - TVNZ published the 7 July 2010 broadcast on its *Breakfast* programme which implied that Mr Young had perjured himself.
- (i) Particular 14 - The Broadcasting Standards Authority determined that TVNZ had treated Mr Young unfairly by not giving him a reasonable opportunity to respond to the allegations made against him in the documentary.
- (j) Particulars 15 to 16 - On 19 April 2011, TVNZ declined to broadcast an apology or pay Mr Young's legal costs, rejecting any suggestion that it had defamed him or acted with ill will towards him.
- (k) Particulars 17 to 21 - TVNZ published the 30 May 2011 update and article with the banner headline "*Untruthful evidence*" in *Bain case – police*. These publications included details of Detective Senior Sergeant Harvey's letter and the fact that Robin Bain's brother had questioned why no perjury charges were pending against Mr Young. TVNZ proceeded with these publications despite being requested not to do so by Mr Young's solicitors.
- (l) Particular 22 - TVNZ published the post documentary reports intending that they be viewed by as large an audience as possible, and for the purposes of commercial gain.

- (m) Particular 23 - TVNZ acted negligently and/or with indifference to the truth when presenting the evidence actually given by Mr Young at the trial.
- (n) Particulars 24 to 25 - TVNZ acted negligently and/or recklessly and/or with indifference to the truth when making the publications and as a result painted a false picture of Mr Young's conduct when he gave evidence at the retrial and aided Red Sky and Mr Bruce to assert that Mr Young had perjured himself.
- (o) Particular 26 - TVNZ "failed to give the responsibility to the truth or falsity of its publications that was required by the nature of the allegations and the intended width of the publication".

[54] Particulars 1 to 6 have nothing to do with TVNZ and cannot support any inference of ill will or impropriety on its part. These particulars must be struck out.

[55] Particular 7 relates to the fact that TVNZ did not contact with Mr Young at any time to give him a further opportunity to comment on the allegations in the five to six week period between the Mr Bruce's initial telephone call and the broadcast of the documentary. The nature of the allegations against Mr Young and the intended breadth of the publication arguably could have required TVNZ to take this step. That is a matter that should be left for the jury to decide. I am not prepared to strike out this particular.

[56] Particulars 8 to 13 relate to TVNZ's promotion and publication of the allegedly defamatory programmes and materials. They are relevant to the breadth of the intended audience and to the nature of the allegations. However, they are not material facts that could support an inference that TVNZ was predominantly motivated by ill will towards Mr Young in making the publications. Nor could these particulars support an inference that TVNZ took improper advantage of the occasion of publication. These particulars must be struck out.

[57] Particulars 9, 12 and 13 are objectionable for the additional reason that they allege meanings that I have found they are not capable of bearing. Mr Young cannot rely on these untenable tier one meanings of guilt and then assert that TVNZ did not or could not have believed these meanings to be true and were accordingly motivated by ill will or were recklessly indifferent as to whether the meanings were true or not and have thereby abused the occasion of publication.

[58] Particular 14 must also be struck out. The decision of the Broadcasting Standards Authority is irrelevant and inadmissible as evidence.<sup>14</sup>

[59] Particulars 15 and 16 relate to TVNZ's refusal to apologise to Mr Young or pay his legal costs or damages. A refusal to apologise may, in some circumstances, be relevant to ill will or improper advantage although it is generally regarded as tenuous evidence at best because it may do no more than demonstrate honest belief.<sup>15</sup> In this case, Mr Young has not advanced any basis for suggesting that TVNZ was aware that it had acted improperly and ought to apologise. A jury could not reasonably infer from TVNZ's refusal to apologise or pay damages and legal costs, that TVNZ was motivated by ill will towards Mr Young or otherwise took improper advantage of the occasion of publication. TVNZ's refusal to apologise is consistent with its contention that it had nothing to apologise for.

[60] Particulars 17 to 22 relate to TVNZ's publication of the police letter under the headline banner "*Untruthful evidence*" in *Bain case – police* and the question raised by Robin Bain's brother as to why no perjury charges were pending against Mr Young. These particulars provide no basis for an inference that TVNZ was reckless as to the truth or falsity of the statements. The letter followed a lengthy investigation by the police. There was nothing sensational or inappropriate as to the manner of publication which included, not only the question raised by Robin Bain's brother but also reported the forceful rejection by David Bain's lawyers and Mr Young's lawyers of the conclusion reached by the police. To follow up a news story with subsequent updating website publications is common industry practice.

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<sup>14</sup> Broadcasting Act 1989, s 19A(c).

<sup>15</sup> John Burrows and Ursula Cheer *Media Law in New Zealand* (6<sup>th</sup> ed, LexisNexis, Wellington, 2010) at 3.1.4.



The fact that this practice was employed in this case cannot support an inference of ill will or recklessness. These particulars must be struck out.

[61] Particulars 23 to 26 are generalised assertions of negligence or recklessness. They are not particulars of specific facts or circumstances from which the alleged inferences could be drawn. They too must be struck out.

[62] In summary, the only particular that survives the strike out application is particular 7. Mr Young may be able to add other particulars in due course to support the inferences he contends for.

**Are the particulars filed in respect of Red Sky and Mr Bruce capable of supporting a finding that they were predominantly motivated by ill will towards Mr Young or otherwise took improper advantage of the occasion of publication?**

[63] Mr Young relies on the following particulars in asserting that Red Sky was predominantly motivated by ill will towards him or otherwise took improper advantage of the occasion of the publications:

- (a) Particular 1 - At 8.30 am on Saturday morning, Mr Young was looking after his children at home. He received a phone call from the third defendant. Mr Bruce said he wanted to talk about evidence Mr Young had given at the Bain retrial on 15 May 2009.
- (b) Particular 2 - Mr Young was approached by the defence to give evidence at the Bain retrial. He did not volunteer. He was unwilling to give evidence. He was told that a subpoena would be issued to compel his attendance if necessary.
- (c) Particular 3 - Mr Young's evidence at the Bain retrial related to his sale of a photocopier to the Taieri School in the 1990s.
- (d) Particular 4 - Mr Bruce had never contacted Mr Young before the Saturday morning telephone call. Mr Young was completely unaware his evidence was being investigated.

- (e) Particular 5 - Neither Red Sky nor Mr Bruce told Mr Young that the conversation was being tape-recorded; that a photographer was filming Mr Bruce while he talked to Mr Young; or that the conversation would be broadcast on national television.
- (f) Particular 6 - Mr Bruce told Mr Young that documents and photographs that he had obtained suggested that the evidence Mr Young had given in court was not accurate. Red Sky and Mr Bruce did not show Mr Young the documents or the photographs.
- (g) Particular 7 - Red Sky and Mr Bruce did not give Mr Young an opportunity to comment on the allegations Mr Bruce intended to make in the documentary in the five or six week period between the initial contact and the date the documentary was broadcast.
- (h) Particular 8 - Red Sky and Mr Bruce assisted TVNZ to promote the broadcast of the documentary.
- (i) Particular 9 - Red Sky and Mr Bruce made it appear in the documentary that Mr Young had perjured himself when giving evidence at the Bain retrial.

9.1 - Mr Bruce said that he had “real doubts” about the story Mr Young told the jury about Robin Bain.

9.2 - Mr Bruce said that Robin Bain could not have come out of the two back doors of the van, but did not disclose to the viewers that there was another door in the back of the van.

9.3 - Mr Bruce said that if Mr Bain had opened the side door to get out, the whole of the van would have been revealed. Red Sky and Mr Bruce did not disclose that Mr Young said at trial that he was standing five to 10 metres away and that he moved away from the van a few paces before Mr Bain opened the door; and did not disclose that

there was no evidence at trial about where Mr Young was standing, once he moved away. I note that this is not an accurate summary of Mr Young's evidence which was that after he heard the voices in the van he "sort of moved away sort of five or 10 metres". Mr Reed later asked "you say you moved away from the van a few paces?" Mr Young replied "yes".

9.4 - The documentary unfairly focused on events that occurred on 2 July 1993 without disclosing that Mr Young said that the incident that he described took place in 1992 or 1993 "at a guess".

9.5 - Red Sky and Mr Bruce did not mention that Mr Young's name appeared in U-Bix Business Systems Ltd documents relating to the 1993 sale; and when a 17 June 1993 letter from U-Bix to Robin Bain was shown in the documentary, Mr Young's name was obscured by a photo of Robin Bain.

9.6 - Red Sky and Mr Bruce did not mention in the documentary that Mr Young told Colin Finnie at the time that he had driven all the way to Taieri School to get an agreement signed; or that he told Laurence Martin, one of his sales team, about his interaction with Robin Bain, and how Robin Bain had come out of the van with just a towel around him.

9.7 - Mr Bruce stated that the matter needed "further investigation" (implicitly, by the police).

9.8 - The language and tone of the documentary was excessive for the occasion of the publication, and is evidence of ill will and/or improper purpose.

- (j) Particular 10 - Red Sky and Mr Bruce promoted and published the documentary with the intention that it would be viewed by as wide an audience as possible, and for the purposes of commercial gain.

- (k) Particular 11 - Red Sky and Mr Bruce made a copy of the documentary available on Red Sky's website.
- (l) Particular 12 - The Broadcasting Standards Authority determined that TVNZ had treated Mr Young unfairly by not giving him a reasonable opportunity to respond to the allegations made against him in the documentary.
- (m) Particulars 13 and 14 - On 19 April 2011, Red Sky and Mr Bruce rejected Mr Young's solicitor's demand for an apology and payment of damages and Mr Young's legal costs, rejecting the suggestion that they had defamed Mr Young or had acted with ill will towards him. They asserted that the documentary was honest opinion based on the facts, all of which they claimed to be able to support with documentation and witnesses.
- (n) Particulars 15 to 17 - Red Sky and Mr Bruce provided a copy of the police letter to TVNZ knowing that TVNZ would publish the letter.
- (o) Particular 18 - Mr Bruce told TVNZ that he questioned why no perjury charges were pending against Mr Young. Red Sky and Mr Bruce knew or ought to have known that this would be broadcast by TVNZ.
- (p) Particular 19 - Red Sky and Mr Bruce acted negligently and/or with indifference to the truth when presenting the evidence actually given by Mr Young at the trial.
- (q) Particular 20 - Red Sky and Mr Bruce acted negligently and/or recklessly and/or with indifference to the truth when presenting a picture of what Mr Young had done, and when asserting that there were real doubts about Mr Young's evidence; that Mr Young's unchallenged evidence enabled him to speak ill of the dead and get away with it; and that he needed investigation.

- (r) Particular 21 - Red Sky and Mr Bruce “failed to give the responsibility to the truth or falsity of the publication that was required by the nature of the allegations and the intended width of the publication”.

[64] I am unable to see how particulars 1 to 4 could possibly support an inference that Red Sky and Mr Bruce were predominantly motivated by ill will towards Mr Young or otherwise took improper advantage of the occasion of publication. There is no suggestion that Red Sky or Mr Bruce had any knowledge of how Mr Young came to give evidence at the retrial. I cannot see how this could be relevant, even if they did. Nor is there anything untoward about the fact that the initial approach was made on a Saturday morning. There is no suggestion that Mr Bruce knew that Mr Young was looking after his children at the time. In any event, I do not see how that could be relevant to the issue of ill will. The fact that this was the first contact by Mr Bruce with Mr Young is equally irrelevant. These particulars must be struck out.

[65] Regarding particular 5, Mr Young was not told that the conversation was being recorded or of the possibility that it might be broadcast on television. However, Mr Bruce identified himself and advised that he makes a programme called *The Investigator* which screens on TV One and that he wanted to talk to him about the evidence he gave at the Bain trial. He also explained that the documents and photographs he had obtained appeared to contradict the evidence that Mr Young gave in court. Mr Bruce said that he wanted to meet with Mr Young so that he could show him these documents and photographs and discuss them with him. After Mr Young declined his invitation, Mr Bruce emphasised that in his view the matter was “pretty serious” because it indicated that Mr Young’s evidence was not accurate. This particular, on its own, could not justify an inference of ill will or improper advantage. However, it may be capable of supporting such an inference if other particulars are provided.

[66] As to particular 6, Mr Bruce did not show Mr Young the documents or photographs but this was because Mr Young declined Mr Bruce’s invitation to meet

with him for this purpose, saying that he had “moved on”. This particular cannot support the alleged inferences and must also be struck out.

[67] Particular 7 relates to the fact that Red Sky and Mr Bruce did not make further contact with Mr Young prior to publication, following the initial telephone call. For the same reasons given in relation to this particular also relied on against TVNZ, I consider that this particular should be allowed to stand.

[68] Particulars 8, 10 and 11 all relate to the promotion and broadcast of the documentary. They relate to the width of the broadcast and are therefore relevant to the degree of care that may have been required by the defendants to consider the truth or falsity of what was broadcast. But they are not facts or circumstances from which an inference of ill will or improper advantage could be drawn and must be struck out.

[69] Particular 9 sets out the basis for Mr Young’s contention that Red Sky and Mr Bruce presented an unbalanced and unfair picture relating to his evidence. This particular could support an inference of ill will or improper advantage and should remain.

[70] Particular 12, referring to the determination of the Broadcasting Standards Authority, cannot stand for the reasons already given. It too must be struck out.

[71] Particulars 13 and 14, which relate to Red Sky and Mr Bruce’s refusal to apologise and pay damages and legal costs, are not sufficient on their own to support an inference of ill will or improper advantage but could have marginal relevance taken together with other particulars. Unlike TVNZ, Mr Young does allege that Mr Bruce and Red Sky deliberately presented an unfair and unbalanced picture relating to his evidence.

[72] The fact that Red Sky and Mr Bruce passed a copy of the police letter to TVNZ could not, in my view, support an inference of ill will or improper advantage. It does not suggest recklessness as to the truth or falsity of the contents of the letter, which simply reported on the conclusion reached following an independent

investigation by the police. Nor could the fact that this letter was passed to TVNZ support an inference of ill will, particularly in circumstances where Mr Young had already demanded an apology and damages from all defendants. Particulars 15 to 17 must therefore be struck out.

[73] I consider that particular 18, which relates to Mr Bruce's alleged comment to TVNZ questioning why perjury charges were not being pursued should be allowed to stand. It could conceivably support an inference of ill will in combination with other particulars, including further particulars that may be added by Mr Young.

[74] Particulars 19 to 21 are generalised assertions of negligence or recklessness but do not contain particulars of material facts from which ill will or improper advantage could be inferred. They must be struck out.

[75] In summary, particulars 5, 7, 9, 13, 14 and 18 should not be struck out at this stage. Mr Young has indicated that he intends to file amended notices and he should be given that opportunity. His amended notice could include some or all of these particulars.

**Was the Associate Judge wrong to order the parties to undertake discovery and inspection before determining whether the publications are capable of bearing the defamatory meanings alleged?**

[76] The Associate Judge made orders that he considered were most likely to achieve the just, speedy and inexpensive disposal of this proceeding. In doing so, he was exercising a discretion. His decision cannot be interfered with unless the defendants can show that he acted on a wrong principle, failed to take into account relevant matters, had regard to irrelevant matters, or was plainly wrong.

[77] Mr Miles submitted that the Associate Judge was plainly wrong for the following reasons:

- (a) He wrongly viewed TVNZ's application challenging the pleaded meanings as a tactical move by TVNZ to cause delay and additional

costs to the plaintiff. Mr Miles relies on the statement made by the Associate Judge in his minute set out at [13] of this judgment and points out that there was no evidence to support this conclusion.

- (b) The approach adopted was contrary to the generally accepted practice of narrowing or defining the scope of defamation proceedings.
- (c) Discovery should not have been required until the pleadings were settled because these define the scope of discovery.
- (d) The scope of discovery is more appropriately dealt with once the present applications have been resolved. This is because they have the potential to significantly affect the shape and form of pleadings, the defences relied on and the scope of discovery. The applications may even dispose of the proceeding entirely.
- (e) The Associate Judge was wrong to conflate the deadline for filing affidavits of documents with the deadline for inspection.
- (f) Discovery is not required to enable determination of the pleading issues raised by the present applications.

[78] Mr Tizard advanced similar arguments in support of the review application brought by Red Sky and Mr Bruce.

[79] I consider that there is merit in Mr Miles' submission that the Associate Judge should not have criticised TVNZ for proposing that the correct approach was to begin by determining whether the words used in the publications are capable of the defamatory meanings alleged in the claim. This is a common practice and there is clearly merit in it. I also consider that the Associate Judge should not have required TVNZ to plead "*all*" of the defences it intended to rely on at trial. TVNZ should not be required, for example, to decide whether to plead truth before the alleged meanings are settled. As Mr Tizard submitted, the defences that the defendants might properly and responsibly plead will depend on the meanings that the words in



the publication could convey to a reasonable viewer. I also accept the defendants' submissions that they may be put to unnecessary cost in having to give discovery before the meanings pleaded in the statement of claim are settled and the issues defined.

[80] I have been persuaded that the Associate Judge erred and accordingly, although the orders have largely been overtaken by the present applications, I formally set those orders aside.

## **Result**

[81] The orders made by Bell AJ on 24 February 2012 are set aside.

[82] I determine that the words used in the documentary, the 6 July 2010 website publication and the 7 July 2010 *Breakfast* programme are not reasonably capable of bearing the defamatory meanings alleged by Mr Young. Mr Young may file and serve an amended statement of claim within 28 days of the date of this judgment amending his first, second, third, fourth and sixth causes of action which rely on these publications. In the event he does so, the defendants are to file and serve their defences within 28 days of service of the amended claim.

[83] I determine that the words used in the police letter dated 5 May 2011 and in the 30 May 2011 update and article are capable of bearing the defamatory meanings alleged by Mr Young.

[84] All particulars other than particular 7 in the notice of ill will dated 5 April 2012 filed in respect of TVNZ are struck out.

[85] Particulars 1 to 4, 6, 8, 10 to 12, 15 to 17, and 19 to 21 in the notice of ill will dated 24 February 2012, filed in respect of Red Sky and Mr Bruce, are struck out.

[86] If any party seeks costs, they should do so by filing and serving a memorandum within 21 days of the date of this judgment. Any memorandum in reply should be filed and served within 21 days thereafter.

[87] I direct the Registrar to arrange a case management conference before me in consultation with counsel on the earliest convenient date after the above steps have been taken.

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M A Gilbert J