IN THE COURT OF APPEAL OF NEW ZEALAND

CA738/2012
[2014] NZCA 50

BETWEEN	DARYL SHANE YOUNG Appellant
AND	TELEVISION NEW ZEALAND LIMITED First Respondent
AND	RED SKY FILM & TELEVISION LIMITED Second Respondent
AND	BRYAN BRUCE Third Respondent

Hearing:	18 February 2014
Court:	Wild, Miller and Dobson JJ
Counsel:	P A Morten, A J Romanos and K Paterson for Appellants J G Miles QC and C I Hadlee for First Respondent J W Tizard for Second and Third Respondents
Judgment:	6 March 2014 at 11 am

JUDGMENT OF THE COURT

A Mr Young's appeal is dismissed in all respects with the consequences:

(a) All the defamatory meanings pleaded by Mr Young in respect of the 2010 publications remain struck out.

(b) The particulars of ill will and the taking of improper advantage given by Mr Young which Gilbert J struck out remain struck out.

(c) The setting aside by Gilbert J of the Associate Judge's directions is upheld.

B The cross-appeal by TVNZ is allowed. Particular 7 of ill will and the taking of improper advantage by TVNZ is struck out.

C The cross-appeal by Red Sky and Mr Bruce is also allowed. Particulars 5, 7, 9, 13, 14 and 18 of ill will and the taking of improper advantage by Red Sky and Mr Bruce are struck out.

D Mr Young is to pay the costs of his appeal and TVNZ's cross-appeal to TVNZ as for a standard appeal and cross-appeal on a band A basis with usual disbursements.

E Mr Young is also to pay the costs of his appeal and the cross-appeal of Red Sky and Mr Bruce to Red Sky and Mr Bruce as for a standard appeal and cross-appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] Did Gilbert J err in striking out all the defamatory meanings pleaded by the appellant, Mr Young, in respect of the main publications complained of and all but seven of the particulars of ill will of which Mr Young had given notice? And did the Judge err in reversing directions given earlier in this defamation proceeding by Associate Judge Bell?

[2] That is what we must decide on this appeal and these cross-appeals from a judgment Gilbert J gave in the High Court at Auckland on 19 October 2012.[1]

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1 *Young v Television New Zealand Ltd* [2012] NZHC 2738 [High Court judgment].

Background

[3] On 29 May 1995, following a trial in the High Court at Dunedin presided over by the late Williamson J, the jury found Mr David Bain guilty of murdering the other five members of his family in the family home at Dunedin on 20 June 1994. He was sentenced to life imprisonment.

[4] On 10 May 2007, the Privy Council quashed those convictions and ordered a new trial.[2]

[5] Panckhurst J presided over that new trial which took place in the High Court at Christchurch in 2009. This time the jury found Mr David Bain not guilty of murdering the other members of his family.

[6] In both trials the nub of Mr David Bain's defence was that it was David's father, Mr Robin Bain, who had murdered his wife and other three children, before shooting himself dead.

[7] The two Bain trials, with their different outcomes, continue to be a matter of public interest and dissension in New Zealand. A claim by Mr David Bain for compensation for the years he spent in prison remains unresolved, and the subject of litigation in the High Court at Auckland.

[8] On 6 July 2010 the first respondent, Television New Zealand (TVNZ), telecast on its TV One channel, a documentary entitled *The Investigator Special: The Case Against Robin Bain*. Viewers numbered some 600,000. The documentary was produced by the second and third respondents, Red Sky Film and Mr Bruce, and presented by Mr Bruce.

[9] Screening of the documentary was preceded by what Mr Morten termed "promos". These comprised a report on the forthcoming documentary published by TVNZ on its website on 4 July 2010, an interview with Mr Bruce on TV One's *Breakfast* programme on 6 July 2010 and two further promotional publications published by TVNZ on its website, also on 6 July 2010.

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2 *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71.

[10] Following its telecast on 6 July 2010, TVNZ placed the documentary on its website where it was available to any user of the World Wide Web.

[11] On 7 July 2010, the day following telecast of the documentary, TVNZ telecast on its TV One *Breakfast* programme a report that the police were investigating the evidence Mr Young had given for the defence at Mr David Bain's retrial, following claims that it was misleading.

[12] About a year later, on 30 May 2011, on its TV One *One News* programme, TVNZ telecast an item reporting that the police believed Mr Young had given untruthful evidence at Mr David Bain's retrial, but did not intend prosecuting him for perjury. TVNZ placed that report and an article about the police investigation of Mr Young's evidence on its website on the same day, 30 May 2011. The genesis of these publications was a letter dated 5 May 2011 the police sent to Mr Bruce. The letter advised that the police had completed their investigation into the evidence given by Mr Young in the Bain retrial and the questions Mr Bruce had raised in the documentary. The letter advised:

> 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 should follow.

[13] On 14 December 2011 Mr Young filed in the High Court at Auckland a claim against TVNZ, Red Sky and Mr Bruce. His statement of claim alleged:

(a) TVNZ, Red Sky and Mr Bruce had defamed him in the 6 July 2010 documentary (first and fourth causes of action);

(b) TVNZ had defamed him in each of its 6 July 2010 website, 7 July 2010 *Breakfast* and 30 May 2011 *One News* and website publications (respectively, the second, third and fifth causes);

(c) Red Sky had defamed him in having the documentary available on its website (sixth cause);

(d) Red Sky and Mr Bruce had defamed him by handing to TVNZ the letter dated 5 May 2011 the police had sent to Mr Bruce advising him of the outcome of its investigation into Mr Young's evidence, and thus publishing that letter (seventh cause);

(e) the words of each of the publications in their natural and ordinary meaning meant and were understood to mean Mr Young:

- is a liar;
- is dishonest; and
- cannot be trusted.

(f) Mr Young also alleged the words in the documentary, the 6 July 2010 website and 7 July 2010 *Breakfast* publications, meant he:

- committed perjury when he gave evidence in the Bain retrial; and
- is a man who commits perjury.

[14] In respect of each publication Mr Young claimed general, aggravated and punitive damages.[3]

[15] The statement of defence filed on 15 February 2012 by Red Sky and Mr Bruce included defences that the words in the documentary and the police letter complained of:

- were not defamatory and do not bear nor were capable of bearing any of the defamatory meanings alleged by Mr Young;
- were published on occasions of qualified privilege.

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[3] Not quantified in accordance with s 43(1) Defamation Act 1992.

[16] Rather than filing a statement of defence, TVNZ on 15 February 2012 applied for a preliminary hearing to determine whether any of the publications pleaded by Mr Young in his statement of claim were capable of bearing the defamatory meanings alleged. One ground for the application was that the terms of the defences of honest opinion and qualified privilege TVNZ intended to plead depended on determination of the preliminary question.

[17] Mr Young opposed that application. His notice of opposition filed on 22 February 2012 asserted the application was premature, would not reduce the issues in his proceeding and would lead to delay.

[18] Following a conference with counsel on 24 February 2012, Associate Judge Bell directed TVNZ to file a statement of defence followed by discovery and inspection by the parties.[4] He set a timetable. In giving those directions the Associate Judge stated:

> [5] 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 other issues further down the track, with those issues also giving rise to further interlocutory applications.
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> [6] 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.

[19] TVNZ filed its statement of defence on 23 March 2012. It advanced the same affirmative defences as Red Sky and Mr Bruce: the statements complained of do not bear and were not capable of bearing the alleged defamatory meanings and were published on occasions of qualified privilege.

[20] Mr Young's response was two-fold. First, he filed notices pursuant to s 41 of the Defamation Act 1992 giving particulars of ill will by each of TVNZ, Red Sky

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4 *Young v TVNZ Ltd* HC Auckland CIV-2011-404-8076, 24 February 2012.

and Mr Bruce. Secondly, he filed a statement denying the words or statements he complained of were not capable of bearing the defamatory meanings he alleged, and denying also that they had been published on an occasion of qualified privilege.

[21] The respondents also filed several other applications:

(a) On 1 March 2012 Red Sky and Mr Bruce applied to strike out the causes of action in Mr Young's statement of claim and his particulars of ill will, and for review of Associate Judge Bell's directions.

(b) On 2 March 2012 TVNZ applied for review of the Associate Judge's directions, and for a hearing of its application for a preliminary determination as to whether the alleged defamatory meanings were open.

(c) On 2 May 2012 TVNZ also applied to strike out Mr Young's particulars of ill will.

[22] It is those applications to determine whether the defamatory meanings alleged were open, to strike out the causes of action and particulars of ill will and for review of the Associate Judge's directions that Gilbert J determined in the judgment under appeal and cross-appeal.

[23] Gilbert J's judgment removed all defamatory meanings alleged in relation to the 2010 publications, leaving Mr Young with only his defamation claims in relation to the 2011 references to the letter from the police to Mr Bruce. All but one of the particulars of ill will alleged against TVNZ were struck out, as were the majority of those alleged against Red Sky and Mr Bruce.

[24] Over opposition from Mr Miles QC, we provisionally accepted a draft amended statement of claim. We refer to this below in one or two respects. It is common ground that Mr Young should have the opportunity to re-plead his case, dependent on the outcome of his appeal. Gilbert J's judgment afforded the

opportunity to file an amended statement of claim.[5] Fresh directions are a matter for the High Court.

Defamatory meanings

[25] Mr Morten accepts Gilbert J correctly stated the principles applicable in deciding whether words are capable of bearing the defamatory meanings alleged. Given that acceptance, we need not reiterate those principles, which the Judge drew largely from Blanchard J's summary in this Court's judgment in *New Zealand Magazines Ltd v Hadlee (No 2)*, which Mr Morten acknowledges is definitive.[6] Mr Morten's argument on appeal prompts us to emphasise four points:

(a) Mr Morten rightly retreated from his written submission that Gilbert J "has usurped the function of the ultimate fact-finder by determining defamatory meaning". As Mr Miles pointed out, whether words are capable of bearing the defamatory meaning alleged is a question reserved for the Judge.[7] Whether they do bear that meaning is a question of fact for the jury.[8]

(b) Given the capacity of ordinary reasonable television viewers to "read between the lines", the natural and ordinary meaning of the words complained of includes their inferential meaning. In other words, it is not just what is expressly said that matters, but also what viewers would reasonably infer from what is said.[9]

(c) Meanings dependent on a strained interpretation or on groundless speculation are not open. As Gilbert J correctly noted:

> [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

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5 High Court judgment, above n 1, at [82].
6 *New Zealand Magazines Ltd v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.
7 Defamation Act, s 36.
8 Alistair Mullis and Richard Parkes (eds) *Gatley on Libel and Slander* (12th ed, Sweet & Maxwell, London, 2013) at [34.5].
9 *Gatley* (12th ed) at [34.6] citing Lord Phillips MR in *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263 at [7].

> meaning when other innocent or at least less suspicious meanings could apply.[10]

(d) The words must be read in their context.

[26] No party disputed that Gilbert J was right to hold that the context encompassed all the publications we have summarised in [8] to [12] above, although only some of them are alleged to be defamatory.[11] Further, Mr Young complains that part only of the documentary defamed him. His argument to us rather sought to ignore or at least sideline the remainder of the documentary – an approach we reject.

The documentary

[27] Gilbert J summarised the evidence Mr Young had given at Mr David Bain's retrial.[12] He then set out the "key extracts" from the transcript of the documentary of which Mr Young complained. There followed a summary of those parts of the documentary in which Mr Bruce interviewed first Mr Ian Arthur and then Ms Balk-Jarvis. Each gave an account that could not be reconciled with Mr Young's evidence.

[28] Next the Judge set out an extract from a recorded telephone discussion between Mr Bruce and Mr Young. Given Mr Young's focus on this and its relevance also to the cross-appeals, we set it out just as Gilbert J did:[13]

> Mr Bruce: … I make a programme called *The Investigator* which screens on TV One …
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> Mr Young: Oh look I've moved on mate.
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> Mr Bruce: This is pretty serious I mean they do suggest that, ah, what you said in court wasn't, wasn't accurate.
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> Mr Young: Oh I don't; I don't know about that mate.
>
> Mr Bruce: You don't know about it? Do you know a Mr Ian Arthur?
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> Mr Young: I know Ian Arthur, yeah.

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10 *New Zealand Magazines Ltd v Hadlee (No 2)* at 625–626.

11 We note the draft first amended statement of claim expressly pleads all these publications as context, and also pleads innuendo meanings.

12 High Court judgment at [26].

13 At [33].

Mr Bruce: Yeah, he says that he sold the photocopier to the school.

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

[29] Gilbert J then set out what Mr Bruce next said to viewers of the documentary:[14]

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

[30] As urged by all parties, we have viewed the documentary and the other publications complained of. We see no error in Gilbert J's conclusion that no reasonable viewer could have regarded the words as capable of conveying the defamatory meanings alleged by Mr Young. As the Judge pointed out, Mr Bruce told viewers he had "real doubts" about Mr Young's evidence. He said he did not know which of the two versions of events (Mr Ian Arthur and Ms Balk-Jarvis on the one hand, and Mr Young on the other) was right and expressed the opinion that the matter needed further investigation. We see no error in Gilbert J's conclusion that there is nothing in the words used in the documentary or in the manner of its presentation that could lead a reasonable viewer to conclude that Mr Bruce was saying or inferring that Mr Young was a liar, dishonest, not to be trusted, or had

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[14] At [34].

committed perjury when he gave evidence at the retrial, and is a man who commits perjury. Gilbert J concluded:[15]

> … 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.

Again, we see no error in this. Indeed, it accords with our own view of the documentary.

[31] In his argument on appeal, Mr Morten sought to characterise the documentary as a calculated and sustained attack on Mr Young as a witness who had lied to the Court. He suggested the part dealing with Mr Young's evidence was the "piece de resistance" or "climax" or "sexy bit" of the documentary. We do not accept that. Certainly that part comes toward the end of the documentary when viewers may sense a gathering of momentum. But Mr Morten's characterisation is not a fair and balanced view of the documentary. More accurate is the submission of Mr Miles for TVNZ: the documentary is a restrained, analytical discussion of the issues; the part dealing with Mr Young's evidence is a "sub-set" of the documentary.

[32] The concern of the documentary is very much that set out in [29] above. In defending himself by pointing the finger at his father, Mr David Bain had effectively put Mr Robin Bain on trial also for the murder of the four other members of the family, yet no one was there to defend Mr Robin Bain or respond to the "vile things" said about him, including by Mr Young. A particular concern of the documentary was the inability of the Crown to rebut the evidence of defence witnesses such as Mr Young, because it was not disclosed before the trial. As the law stands in New Zealand, the prosecution must disclose the proposed evidence of its witnesses and any relevant documents, but the defence has no corresponding obligation, save in respect of any evidence supporting an alibi or any expert (opinion) evidence it

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15 At [36].

proposes calling.[16] These concerns are quite properly the subject of a public debate to which the documentary might contribute. They do not justify characterising this documentary as a calculated attack on Mr Young.

[33] To summarise, we uphold Gilbert J's ruling that the words in the documentary complained of are not capable of bearing the defamatory meanings alleged.

6 July 2010 website publication

[34] The essence of the allegedly defamatory content of this publication is:[17]

> 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.
>
> …
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> 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 …

Otherwise, the publication foreshadows the concerns we have referred to in [29] above, in particular the admission of hearsay evidence critical of a dead person unable to defend himself, and the need for "our law makers … [to] review the disclosure rules so that the defence have the same obligations to disclose as the prosecution".[18]

[35] We see no error in Gilbert J's conclusion that this publication was also not capable of bearing the defamatory meanings alleged. Indeed, again, we agree with the Judge.

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16 Criminal Disclosure Act 2008, ss 22 and 23.
17 As quoted in the High Court judgment, above n 1, at [37].
18 As quoted in the High Court judgment at [37].

7 July 2010 Breakfast *programme*

[36] The Judge set out that part of the programme Mr Young complains of.[19] We need not. It includes:

- the presenter telling viewers that the police are investigating claims Mr Young's evidence "was misleading";

- an excerpt from video footage showing Mr Young being sworn in before he gave evidence in Mr David Bain's retrial, and promising to tell the truth;

- excerpts from Mr Young's evidence;

- Mr Bruce asking "what steps did the defence take to check the veracity of what its witnesses were saying?";

- a news presenter stating "[Mr Bruce] found two witnesses who were never called by the court, both of whom say Daryl Young's evidence is incorrect"; and

- excerpts from the transcript of Mr Bruce's telephone call to Mr Young – that is, parts of the transcript we have set out in [28] above, but also this fuller request that Mr Bruce put to Mr Young toward the start of the conversation:

> … 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?

[37] Gilbert J held that this publication was not capable of bearing any of the alleged defamatory meanings. But he observed that this publication, unlike the documentary, created the impression that Mr Young's evidence "may not only have been inaccurate, it may also have been untruthful".[20]

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19 At [39].
20 At [40].

[38] Without necessarily agreeing with that observation, we certainly agree with the Judge that what was said in this *Breakfast* programme is not capable of bearing any of the alleged defamatory meanings.

[39] Gilbert J found that the words in the letter of 5 May 2011 the police sent Mr Bruce, which Mr Bruce passed on to TVNZ, were capable of conveying the alleged defamatory meanings. Similarly, the 30 May 2011 publications by TVNZ reporting on that letter and the police investigation of Mr Young's evidence. The respondents have not cross-appealed against those findings.

Particulars of ill will

What Gilbert J did

[40] Gilbert J struck out all but particular 7 of the 26 particulars of ill will Mr Young had given in relation to TVNZ. Of the 21 particulars relating to Red Sky and Mr Bruce, the Judge ruled that particulars 5, 7, 9, 13, 14 and 18 should remain. He struck out the rest.

The principles

[41] In support of his submission that Gilbert J had erred in striking out all the other particulars, Mr Morten referred us to *Gatley on Libel and Slander,*[21] *Laws of New Zealand,*[22] *Seray-Wurie v The Charity Commission of England and Wales,*[23] *Turner v Metro-Goldwyn-Mayer Pictures Ltd,*[24] this Court's decision in *Lange v Atkinson*[25] and *Media Law in New Zealand.*[26]

[42] In summarising the applicable principles Gilbert J referred only to ss 19 and 41 of the Defamation Act and to *Lange v Atkinson*. Mr Morten accepts *Lange* is the leading case. But we view as accurate and complete the Judge's summary of the

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21 Patrick Milmo and WVH Rogers (eds) *Gatley on Libel and Slander* (11th ed, Sweet & Maxwell, London, 2008) at [30.5]. Our citations are to the most recent edition of *Gatley* – above at n 8.

22 *Laws of New Zealand* Defamation (online ed) at [220].

23 *Seray-Wurie v The Charity Commission of England and Wales* [2008] EWHC 870 (QB) at [31].

24 *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449 (HC) at 454–455.

25 *Lange v Atkinson* [2000] 3 NZLR 385 (CA) at [39] and [42]–[48]

26 John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, LexisNexis, Wellington, 2010) at [3.1.4] and following.

guiding principles when considering whether to strike out particulars of ill will given under s 41.[27] We do not accept Mr Morten's only specific criticism of Gilbert J's summary – that he "applied too low a level for striking out the particulars". Gilbert J specifically noted that the strike out discretion "should be exercised sparingly, and only in clear cases".[28]

[43] For Red Sky and Mr Bruce, Mr Tizard took issue with the decision of the English Court of Appeal in *Jameel v The Wall Street Journal Europe SprL*. There, delivering a judgment concurred in by the other two members of the Court, Simon Brown LJ said:[29]

> But every time a meaning is shut out (including any holding that the words complained of either are, or are not, capable of bearing a defamatory meaning) it must be remembered that the judge is taking it upon himself to rule in effect that any jury would be perverse to take a different view on the question. … The Judges' function is no more and no less than to pre-empt perversity …

[44] Mr Tizard's point was that perversity is not the threshold: the test is whether ordinary fair minded viewers would infer that the comments demonstrated ill will. We agree with Mr Tizard. But Simon Brown LJ's point was that ill will/improper advantage should be taken away from a jury in a case where it would be perverse for the jury to find malice. That seems to us merely to be the corollary of the test as Mr Tizard frames it.

TVNZ

[45] Gilbert J summarised the particulars Mr Young relied on in respect of TVNZ. He then went through each of them briefly giving his reason or reasons for striking it out, save for particular 7. We see no need to replicate that exercise. We see no fault in the Judge's decision on any particular, save for 7. Nothing advanced by Mr Morten on appeal alters that view.

[46] Mr Morten argued that particulars 8, 9, 11, 12, 13, 19 and 20 should be permitted as evidence that TVNZ was running a campaign against Mr Young

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27 The Judge's summary is at [51]–[52] of the High Court judgment.
28 At [52].
29 *Jameel v The Wall Street Journal Europe SprL* [2004] EMLR 6, [2003] EWCA Civ 1694 at [14].

motivated by ill will. He relied on Venning J's judgment in *Hubbard v Fourth Estate Holdings Ltd.*[30] The facts of *Hubbard*, where Fourth Estate had previously published seven articles about Mr Hubbard, each pejoratively entitled, bear no relation to those here.

[47] Inappropriately wide publication (for example, to people who have no legitimate interest) and/or inappropriately timed publication (for example, long after the matter ceased to be of any genuine interest) could indicate ill will or the taking of improper advantage. But, again, that is not the position here. There was limited promotion before telecast of the documentary, and limited and focused follow up when the police completed their investigation into the evidence Mr Young had given. We reiterate the point that the two trials of Mr David Bain continue to be a matter of public interest and concern.

[48] We were urged to look at the particulars "as a bundle". That is the familiar submission that the sum might hopefully be more than the parts. Here there is nothing in any of the particulars pointing to ill will, so nothing in their sum.

[49] We disagree with Gilbert J on particular 7:

> 7. Despite the fact that the documentary was not going to be broadcast on national television for another five or six weeks, neither the first, second nor the third defendants made any further approach to Mr Young. Mr Young was offered no opportunity to comment about the very serious allegations the third defendant was intending to make in the documentary (namely, that *the plaintiff lied when he gave evidence on oath at the Bain retrial*), and which the first defendant was going to air on national television.
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> (Our emphasis.)

[50] Gilbert J held the nature of the allegations against Mr Young and the intended breadth of the publication arguably could have required TVNZ to take this step. He ruled the matter should be left for the jury to decide.

[51] We accept the points made by Mr Miles for TVNZ on its cross-appeal on particular 7. First, the position of TVNZ as publisher differs from that of the

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[30] *Hubbard v Fourth Estate Holdings Ltd* HC Auckland CIV-2004-404-5152, 13 June 2005 at [38].

producers. It was Red Sky and Mr Bruce who produced the documentary. TVNZ was entitled to rely on their experience and expertise, particularly where the documentary itself included footage of Mr Bruce giving Mr Young the opportunity to respond to the accounts and documents contradicting the evidence he had given. That demonstrated a desire by Mr Bruce to ensure accuracy and balance.

[52] Second, particular 7, as well as many of the particulars Gilbert J struck out, is premised on the alleged defamatory meanings the Judge also struck out, and is equally untenable. That part of particular 7 we have emphasised in [49] above founds the particular on the struck out defamatory meanings. Mr Young pleaded tier one defamatory meanings – positive assertions of guilt.[31] He did that because tier one meanings cannot be met with defences such as truth or honest opinion (and accordingly TVNZ did not plead those defences). Further, damages are higher for tier one meanings adjudged defamatory. Apt to what Mr Young did in framing his statement of claim is the following comment in *Gatley on Libel and Slander*:[32]

> The court will be sceptical about pleas of malice in which the claimant pitches the meaning high and then asserts that the defendant did not or could [not] believe that high meaning to be true, and so is malicious.

[53] Third, and following from the previous point, Mr Young argues the publications he complains of were reckless because the defamatory meanings he alleged were so serious. But of course he has "made up" (Mr Miles' words) those alleged meanings. Even if the Court considered TVNZ ought to have afforded Mr Young a further opportunity to respond in the five to six week interim, TVNZ's

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[31] The three tiers or "*Chase*" levels of meaning derive from the decision of the English Court of Appeal in *Chase v Newsgroup Newspapers Ltd* [2003] EMLR 11; [2003] EWCA Civ 1772. They are:
(a) First tier: assertions of actual misconduct by the plaintiff;
(b) Second tier: assertions that there exist grounds to suspect misconduct by the plaintiff;
(c) Third tier: assertions that there exist grounds for investigating whether the plaintiff is guilty of misconduct.
This categorisation was adopted by the Supreme Court in *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315 at [15] and [16]. The Court cautioned against forcing meanings into one of the tiers, emphasising that "meanings in different tiers may shade into each other". Indeed, this Court had noted in an earlier case "there can be an imputation of suspicion so strong as to be indistinguishable from guilt …": *Hyams v Peterson* [1991] 3 NZLR 648 (CA) at 655. Notwithstanding that, the "considerable gulf" between tier one and tier two meanings has been recognised, particularly in relation to criminal offending: *Gatley* (12th ed), above n 8 at [30.6], citing *Charman v Orion Publishing Group Ltd* [2005] EWHC 2187 (QB).

[32] *Gatley* (12th ed) at [30.5].

failure to do that would be an error of judgment. It could not possibly indicate ill will or recklessness. In allowing particular 7 to stand, Gilbert J erroneously focused on a matter of judgment, rather than on recklessness.

Red Sky and Mr Bruce

[54] Gilbert J ruled particulars 5, 7, 9, 13, 14 and 18 of ill will on the part of Red Sky and Mr Bruce should stand.

[55] Particular 5 is one of the first six particulars which attempt to extract ill will or the taking of improper advantage from Mr Bruce's telephone call to Mr Young. This is the call detailed in [28] above and, further, in [58] below. It is:

> 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.

[56] Allowing it to remain, Gilbert J explained:[33]

> … 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.

[57] We disagree. We reiterate the point made in [48] above. There are no particulars particular 5 can supplement or support in terms of ill will or improper advantage. Particular 5 should have been struck out along with the other five particulars in the 'telephone call' group.

[58] Particular 7 is the same particular 7 pleaded against TVNZ we have ruled should have been struck out. Similarly, we hold that it cannot stand against Red Sky and Mr Bruce. To the reasons we gave in respect of TVNZ we add two points. First, that part of Mr Bruce's telephone conversation with Mr Young included in the documentary, and set out in [28] above, is not the full conversation. The full conversation includes this exchange:

> Mr Bruce: … Look I'm working on an episode about Robin Bain and I have got some documents and photographs that appear to

[33] High Court judgment, above n 1, at [65].

> 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?
>
> Mr Young: … look I've moved on mate.

[59] Thus, Mr Bruce told Mr Young about the documents, photographs and account from Mr Ian Arthur he had, offered to show these to Mr Young and asked if he could discuss them with Mr Young. It was that offer that Mr Young rejected by telling Mr Bruce that he had moved on, felt a bit threatened by Mr Bruce and ultimately by hanging up on Mr Bruce.

[60] The second point relates to particular 12 (or particular 14 against TVNZ) which the Judge struck out against all three respondents:

> 12. On 18 March 2011, the Broadcasting Standards Authority determined that TVNZ had treated Mr Young unfairly because he was not given a reasonable opportunity to provide a response to the allegations made against him in the program. The Authority found that the program raised serious issues regarding the veracity of evidence, which would have a significant impact on Mr Young's reputation, and the broadcaster did not ensure that he was given a fair and reasonable opportunity to respond to those matters.

[61] The Broadcasting Standards Authority (BSA) was concerned with fairness – something quite different from malice or recklessness. Mr Morten accepted that particular 12 had been properly struck out. Our point is that the BSA's decision provides no support for particular 7. Not that it matters, but Mr Tizard emphasised to us that he did not agree with the BSA's decision.

[62] Particular 9 is:

> 9. In the documentary itself, the second and third defendants made it appear that the plaintiff had perjured himself when giving evidence at the Bain retrial.

There follow nine supporting sub-particulars. It suffices to instance:

> 9.1 The third defendant said that he had "real doubts" about the story Mr Young told the jury about Robin Bain.
>
> …

> 9.7 The third defendant stated that the matter needed "further investigation" (implicitly, by the Police).
>
> 9.8 The language and the tone of the documentary was excessive for the occasion of the publication, and is evidence of ill will and/or improper purpose.
>
> …

[63] Gilbert J held:

> [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.

[64] We accept Mr Tizard's submission that particular 9 is inconsistent with Gilbert J's finding that the documentary is not capable of bearing the defamatory meanings alleged by Mr Young. The defamatory meanings particularly relevant to particular 9 are the two we have set out in [13](f) above. This particular therefore cannot stand and we strike it out.

[65] Particulars 13 and 14 are:

> 13. By letter dated 31 March 2011, addressed to the defendants, Mr Young's solicitors sought the broadcast of an appropriate apology, damages, and payment of Mr Young's legal costs.
>
> 14. By letter dated 19 April 2011, the second and third defendants rejected any suggestion that they had ill will towards Mr Young, or had defamed him. They asserted that the documentary was honest opinion based on the facts, all of which they could support with documentation and witnesses.

[66] Gilbert J reasoned:

> [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.

[67] We agree with the Judge that an inference of ill will or improper advantage cannot be drawn merely from a refusal to apologise and pay damages and costs. Before the refusal "could have marginal relevance taken together with other

particulars", there must be something else indicating ill will or improper advantage. Mr Young has not pointed to anything. Indeed, the Judge made that very point when striking out identical particulars against TVNZ:

> [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.[34] 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.

[68] The Judge noted that Mr Young alleged that Red Sky and Mr Bruce had deliberately presented an unfair and unbalanced picture relating to Mr Young's evidence, but did not level the same allegation against TVNZ. We do not accept that, particularly for the reasons we have set out in [31]–[32] and [55]–[59] above.

[69] Particular 18 must be considered with the related particulars 15–17. This is the Judge's summary of those four particulars:[35]

> (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.

[70] Gilbert J explained, in the following paragraphs, his reasons for allowing particular 18 only to remain:

> [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.

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34 Burrows and Cheer, above n 25, at [3.1.4].

35 At [63].

> [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.

[71] We disagree. As with particular 5, there are no particulars which particular 18 can support. Further, given the police decision not to charge Mr Young in respect of the untruthful evidence the police concluded he had given in the Bain retrial, Mr Bruce's question was a fair one. It was not a question open to an allegation that it indicated ill will or the taking of improper advantage by Red Sky and Mr Bruce. Particular 18 must be struck out.

[72] Accordingly, we strike out particulars 5, 7, 9, 13, 14 and 18 of ill will by Red Sky and Mr Bruce.

Review of Associate Judge's directions

[73] Gilbert J set aside the orders made by the Associate Judge for these reasons:

> [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.

[74] We need only say that we agree with those reasons in all respects. The Judge's approach is supported by *Lange v Atkinson, Hyams v Peterson, APN New Zealand Ltd v Simunovich Fisheries Ltd* and *Osmose New Zealand v Wakeling.*[36] Also *Gatley*, citing Tugendhat J in *Bercow v Lord McAlpine of West Green (No 1)*:[37]

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[36] *Lange v Atkinson*, above n 24; *Hyams v Peterson* [1991] 1 NZLR 711 (HC); *APN New Zealand Ltd v Simunovich Fisheries Ltd*, above n 29 and *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841 (HC).

[37] *Gatley* (12th ed), above n 8, at [30.14] citing *Bercow v Lord McAlpine of West Green (No 1)* [2013] EWHC 981 (QB) at [40].

> … in very many libel actions, furthering the overriding objective requires that the actual meaning of words complained of be determined at as early a stage in the litigation as is practical.

Result

[75] Mr Young's appeal is dismissed in all respects. The consequence is:

(a) All the defamatory meanings pleaded by Mr Young in respect of the 2010 publications remain struck out.

(b) The particulars of ill will and the taking of improper advantage given by Mr Young which Gilbert J struck out remain struck out.

(c) The setting aside by Gilbert J of the Associate Judge's directions is upheld.

[76] The cross-appeal by TVNZ is allowed. Particular 7 of ill will and the taking of improper advantage by TVNZ is struck out.

[77] The cross-appeal by Red Sky and Mr Bruce is also allowed. Particulars 5, 7, 9, 13, 14 and 18 of ill will and the taking of improper advantage by Red Sky and Mr Bruce are struck out.

Costs

[78] Mr Young is to pay the costs of his appeal and TVNZ's cross-appeal to TVNZ as for a standard appeal and cross-appeal on a band A basis with usual disbursements.

[79] Mr Young is also to pay the costs of his appeal and the cross-appeal of Red Sky and Mr Bruce to Red Sky and Mr Bruce as for a standard appeal and cross-appeal on a band A basis with usual disbursements.

Solicitors:
Buddle Findlay, Christchurch for Appellant
Lee Salmon Long, Auckland for First Respondent
Oakley Moran, Wellington for Second and Third Respondents