Supreme Court of New South Wales

Amalgamated Television Services v Marsden Matter No 40005/97 [1998] NSWSC 4 (4 February 1998)

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AMALGAMATED TELEVISION SERVICES v MARSDEN

CA 40005/97

4 February 1998

Mason P, Handley JA, Hunt CJ at CL

The Supreme Court of New South Wales Court of Appeal

NATURE OF JURISDICTION: Appeal from Levine J

FILE NO/S: CA 40005 of 1997

HEARING DATE/S: 31 October 1997

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PARTIES: AMALGAMATED TELEVISION SERVICES v MARSDEN

JUDGMENT OF: MASON P, HANDLEY JA, HUNT CJ at CL

COUNSEL:

APPELLANT - J R Sackar QC & J S Wheelhouse

RESPONDENT - GO'L Reynolds

SOLICITORS:

APPELLANT - Mallesons Stephen Jaques

RESPONDENT - Phillips Fox

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AMALGAMATED TELEVISION SERVICES PTY LTD v

MARSDEN

Defamation - precision of imputation - Capacity to defame - issue to be determined - transient or ephemeral publication - Broadcasting Act 1942, s 124; Broadcasting Services Act 1992, s 206 (Cwth) - distinction between implication and inference - inference upon inference - invitation to speculate

In an appeal from the decision in a separate trial pursuant to SCR Pt 31 r 2 concerning the capacity of the matter complained of in a defamation action to convey certain of the imputations pleaded by the plaintiff -

Held:

(1) Section 7A(1) of the Defamation Act 1974, which provides that the Court and not the jury is to determine whether the matter complained of is reasonably capable of carrying (or conveying) the imputation pleaded by the plaintiff, is declaratory of the common law.

(2) The task for the trial judge, and on appeal the task for the Court of Appeal, is one of deciding whether there is or was a case to go to the jury - whether it is or was open to the jury in the particular case to find that the ordinary reasonable reader (or listener or viewer) would have understood the matter complained of in the defamatory sense pleaded.

Jones v Skelton (1963) 63 SR 644; **Lloyd v David Syme & Co Ltd** (1985) 3 NSWLR 728 *followed*

(3) If reasonable persons may differ as to the conclusion to be drawn, the issue as to whether the imputation was in fact conveyed must be left to the jury; otherwise, it is for the trial judge (or the Court of Appeal) to determine.

Shirt v Wyong Shire Council [1978] 1 NSWLR 631; **Parker v John Fairfax & Sons Ltd** (Court of Appeal, 30 May 1980, unreported) [SLAR]; **Potter v Commonwealth** (Court of Appeal, 26 August 1980, unreported); **Farquhar v Bottom** [1980] 2 NSWLR 380 *followed*

(4) Statutory provisions such as s 124 of the Broadcasting Act 1942 (Cwth) and its successor, s 206 of the Broadcasting Services Act 1992 (Cwth), which deem publications by the electronic media of radio and television to be publications in a permanent form, enact a fictional situation solely in order to render defamatory statements so published libel rather than slander (and thus avoid the need for proof of special damage). They do not remove the necessarily transient or ephemeral nature of such publications, which is relevant to the way in which they are interpreted by the ordinary reasonable listener or viewer.

Wainer v Rippon [1980] VicRp 15; [1980] VR 129 *followed*

(5) The issue as to whether such a publication in fact conveyed a pleaded imputation will more readily be left to the jury where the transient nature of the publication affects the listener's or viewer's ability to interpret what was said.

Gorton v ABC (1973) 1 ACTR 6; **Morosi v Broadcasting Station 2GB Pty Ltd** [1980] 2 NSWLR 418n; **Brown v ABC** (Hunt J, 4 May 1987, unreported) *applied*

(6) There is an important distinction between an implication and an inference. An implication is included in and is part of that which is expressed by the publisher. It is something which the reader (or listener or viewer) understands the publisher as having intended to say. An inference is something which the reader (or listener or viewer) adds to what is stated by the publisher; it may reasonably or even irresistibly follow from what has been expressly or impliedly said, but it is nevertheless a conclusion drawn by the reader (or listener or viewer) from what has been expressly or impliedly said by the publisher. It is the reader's (or listener's or viewer's) own conclusion.

Lubrano v Gollin & Co Pty Ltd [1919] HCA 61; (1919) 27 CLR 113; **Rose v Hvric** [1963] HCA 13; (1963) 108 CLR 353; **Bargold Pty Ltd v Mirror Newspapers Ltd** [1981] 1 NSWLR 9; **Harrison v Mirror Newspapers Ltd** [1981] 1 NSWLR 620 *followed*

Mirror Newspapers Ltd v Harrison [1982] HCA 50; (1982) 149 CLR 293 *referred to*

(7) The publisher is not held responsible for an inference which the ordinary reasonable reader (or listener or viewer) has drawn from an inference already drawn from the matter complained of because it is unreasonable for the publisher to be held so responsible.

Lewis v Daily Telegraph Ltd [1964] AC 234; **Mirror Newspapers Ltd v Harrison** [1982] HCA 50; (1982) 149 CLR 293 *followed*

(8) There is no unreasonableness involved in making the publisher responsible for an inference drawn by the ordinary reasonable reader (or listener or viewer) from a statement which the publisher is reasonably understood to have intended to imply in the matter complained of.

(9) Where the publisher invites the adoption of a suspicious approach, it is reasonable for the publisher to be responsible for at least some conclusions reached for which it would not otherwise have been reasonable to make the publisher responsible. A degree of conjecture or guesswork is therefore permitted which would not otherwise be permitted. However, the requirement of reasonableness still applies. The publisher is not responsible for every conclusion which may have been reached by such conjecture or guesswork.

Jones v Skelton (1963) 63 SR 644 *explained*

(10) The *application* of these principles must keep up with the techniques of defamation by modern media communications, but the *principles* themselves remain unchanged. In the end, the test remains one of reasonableness - whether it is reasonable to hold the publisher responsible for a conclusion which is not reasonably understood to have been expressed or implied by what the publisher has said, but which the ordinary reasonable reader (or listener or viewer) has drawn for himself or herself, perhaps by having taken into account his or own beliefs which have been excited by what was published. That is fundamental to the publisher's responsibility. If the publisher does anything which makes it reasonable for him to be held responsible for something more (such as by an invitation to speculate), then he is made responsible for it.

(11) An imputation must be pleaded with sufficient precision as to avoid the likelihood of confusion either at the pleading stage or at the trial in relation to the meaning for which the plaintiff contends.

Whelan v John Fairfax & Sons Ltd (1988) 12 NSWLR 148; **Drummoyne Municipal Council v ABC** (1990) 21 NSWLR 136; **Rigby v John Fairfax Group Pty Ltd** (Court of Appeal, 1 February 1996, unreported) [SLAR] *followed*

ORDERS

1. The defendant's appeal is upheld in part, and the orders made by Levine J in relation to imputations (g) and (h) are set aside.

2. Imputation (g) (as amended) will go to the jury.

3. Imputation (h) (as amended) will not go to the jury.

4. Each party is to pay his and its own costs both in the proceedings before Levine J (so far as they related to imputations (g) and (h)) and in the Court of Appeal.

DATE OF HEARING : 31 October 1997

DATE OF JUDGMENT : 4 February 1998

Appearances

For the appellant (defendant) : J R Sackar QC & J S Wheelhouse

For the respondent (plaintiff) : G O'L Reynolds

Solicitors

For the appellant (defendant) : Mallesons Stephen Jaques

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AMALGAMATED TELEVISION SERVICES PTY LTD v

MARSDEN

JUDGMENT

MASON P: I agree with Hunt CJ at CL.

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JUDGMENT

HANDLEY JA: I agree with Hunt CJ at CL.

AMALGAMATED TELEVISION SERVICES PTY LTD v

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JUDGMENT

HUNT CJ at CL: Pursuant to leave already granted, this is an appeal against a decision by Levine J, in a separate trial in the Defamation List pursuant to SCR Pt 31 r 2, that the matter complained of in an action brought by Mr John Marsden (as plaintiff) against Amalgamated Television Services Pty Ltd (as defendant) was capable of conveying two of the imputations pleaded by the plaintiff in accordance with Pt 67 r 11(2).

The matter complained of was published on 7 May 1996, as part of the "*Witness*" programme on the Seven Network throughout Australia, and it was given the title "*The Dark Side*". It is internally described as a "major investigation" into "under age sex in Sydney". In brief, it commences by referring to what is said to have been the dismissal by the High Court of an appeal by the plaintiff, thus enabling the defendant to go ahead and screen its "major investigation".[1] The report of this investigation comprises two parts, divided by a commercial break lasting three and a half minutes.[2] What is described as the "first part" of the report is described as dealing with the "disturbing and often graphic stories of victims ready to turn their shame and anger into justice", and it consists of interviews with three boys (who had signed statutory declarations as to the truth of their stories) and with a man who says that he had been the barman at "Costello's" - said to have been the "most notorious" of the "main centres of paedophile activity in the Kings Cross of the 70's and early 80's".

The narrator says:

"*This is a story that won't just fuel the public outrage about paedophile activity. It will also send shock waves through the establishment. For tonight we'll examine the behaviour of a man with friends in the highest places. His name is John Marsden, the President of the Council for Civil Liberties, former head of the New South Wales Law Society, former member of the New South Wales Police Board and, say his accusers, a paedophile.*"[3]

The plaintiff's statements from an earlier television programme are replayed - that he had "never had sex with anyone under age", and that "[a]s far as I know, I have never ever slept with someone under age". All three boys identify the plaintiff as having had "sex" with them when they were fourteen or fifteen years of age or "under age", and the barman says that he has seen the plaintiff with "young prostitutes" around the Cross and with "kid[s]" at Costello's. After referring to allegations made against the plaintiff earlier in Parliament, and the determination by the Director of Public Prosecutions that there was insufficient evidence to prosecute him, the narrator continues:

"*Marsden claimed he had been cleared. ... But tonight's story should cause many in public life to rethink their support for Marsden.*"

The first part of the investigation report concludes by the narrator pointing out that the plaintiff was "not the only patron of Costello's who liked boys". The owner of that club, a man named Johnny McLean, is described as "a pervert whose awful legacy lives on ..." -

"*... for, as we'll see in part two of our story, among those he corrupted as children were the Murphy brothers who went on to commit one of Australia's worst crimes. The brutal murder in 1986 of the nurse and former beauty queen, Anita Cobby.*"

After the commercial break, the investigation "continues", and its "implications" are said to "become far more disturbing":

"*Not only has abuse by Sydney men destroyed lives and minds, but it's created people capable of the most horrific crimes, including the murder of Anita Cobby.*"

Sex with boys at Costello's is described by one of the boys earlier interviewed, and by both the barman and the doorman of that club. The investigation report goes into some detail of the activities of McLean, and of a man named Tony Bevan who is described as the former mayor of Wollongong (both men are said to be now dead), and of a man named Joe Westwood (who is said to be still alive and living in Queensland). The treatment afforded to a young boy named Les Murphy and his brothers (all subsequently convicted of the rape and murder of Anita Cobby) is described in detail by various people (including their brother Patrick), and very much less detailed reference is made to the conduct afforded to another young boy named Andrew Tregurtha, who was convicted of killing two of his clients at the age of sixteen. The narrator concludes his part in the investigation report by asserting that those whose bodies have been corrupted have been left with corrupted values. It is, he says:

"*... all part of an appalling legacy - the betrayal of trust, the shattered dreams, the lives wasted by drugs and self loathing.*"

The youth worker interviewed during the investigation says that the community has paid a very high price for having ignored and neglected the pleas of these boys. The boy who appears in both parts of the investigation report, and who wonders what he is capable of doing as a result of the anger inside him, says that society does not need

more people like him and others walking around.

Instead of pleading any imputation that he is a pederast (or containing some more precise definition of what that word encompasses), the plaintiff has elected to plead six imputations expressed in terms that he has committed criminal offences:

"*(a) The plaintiff has committed criminal offences by having sexual intercourse with boys who were under the age of sixteen, knowing them to be under the age of sixteen.*

(b) The plaintiff has committed criminal offences by having sexual intercourse with boys who were under the age of sixteen, with reckless indifference as to whether they were under the age of sixteen.

(c) The plaintiff has committed criminal offences by having sexual intercourse with boys who were under the age of sixteen.

(d) The plaintiff has committed criminal offences by having sexual intercourse with male prostitutes who were fifteen years of age, knowing them to be under the age of sixteen.

(e) The plaintiff has committed criminal offences by having sexual intercourse with male prostitutes who were fifteen years of age, with reckless indifference as to whether they were fifteen years of age.

(f) The plaintiff has committed criminal offences by having sexual intercourse with a [sic] male prostitutes who were fifteen years of age."

The significance of the differing ages of fifteen and sixteen years, and of the departure from what may be thought to be the usual ages of ten or eighteen years expressed in the current statute,[4] is unclear, and the specific criminal offences said to have been imputed are not identified.[5] No complaint in relation to this curious form of pleading is before this Court.

The only issues raised in this appeal relate to imputations (g) and (h), which are in the following terms:

"*(g) The plaintiff caused the rape and murder of Anita Cobby by Lesley Murphy in that he was one of a number of men who had anal intercourse with Murphy when he was under thirteen years of age which acts caused Murphy such grave psychiatric damage that he raped and murdered Ms Cobby.*

(h) The plaintiff caused the murders of two men by Andrew Tregurtha in that he was one of a number of men who subjected Tregurtha to inhuman and degrading acts of physical sexual abuse when he was a child which acts caused Tregurtha such grave psychiatric damage that he committed the two murders."

Although no objection had been taken before Levine J to the form in which these imputations have been pleaded, such an objection was taken in this Court after queries as to whether that form was appropriate had been raised by the members of the Court.

The form of an imputation

The importance of some precision in the pleading of the plaintiff's imputation lies primarily in the fact that, by virtue of s 9(2) of the Defamation Act 1974, each imputation has now become a separate cause of action to which the defendant must plead.[6] It is a fundamental rule that the defendant in *any* proceedings is entitled to know the nature of the case to which he must plead and which he will be called upon to meet at the trial.[7] If there is likely to be confusion in a defamation action either at the pleading stage or at the trial as to the meaning for which the plaintiff contends, the defendant is necessarily embarrassed.[8] Part 15 r 26(1)(b) permits the striking out of any pleading (or part thereof) which has a tendency to cause prejudice, embarrassment or delay in the proceedings.

There has been a lot said over the years in relation to the need for precision in the pleading of imputations in defamation actions, not all of it consistent. The history of the differing views taken by this Court may be traced, for those who are interested, in a number of first instance decisions of mine.[9] It is now safe to say that this Court has once again re-affirmed its earlier stand,[10] that an imputation must be stated with sufficient precision as to avoid the likelihood of confusion in relation to the meaning for which the plaintiff contends.[11]

The form in which each of the two imputations in issue in this appeal has been pleaded was (we were informed) designed to overcome any imprecision of the word "caused" - so that, if the jury accept that the ordinary reasonable viewer of the telecast would have interpreted the matter complained of in the sense of the words in each imputation following the expression "in that", they would also accept that the matter complained of conveyed the imputation that the plaintiff "caused" the rape and murder of Anita Cobby by Lesley Murphy and/or the murder of two men by Andrew Tregurtha. Such a method of pleading was accepted by this Court in **Drummoyne Municipal Council v ABC**, provided that it is successful in making clear the meaning for which the plaintiff contends.[12]

It was made apparent to counsel for the plaintiff during the hearing of the appeal in the present case that this form of pleading had not been successful in identifying the sense in which the word "caused" was used in these two imputations. "Caused" is what has become known as a "weasel" word,[13] in that, such is its convenient ambiguity, no-one will ever know the way in which it is being used or understood. Here, it could mean the immediate cause (or the last link in the chain of causation) or it could mean some preceding link without which the consequences asserted by the plaintiff could not have occurred.[14] Such ambiguity would necessarily be destructive of a trial involving such emotive issues as this one will involve.

Following the debate as to the form of these two imputations during the hearing of the appeal, the plaintiff was granted leave to substitute the words "bore a responsibility for" for the word "caused" where it first appears in each imputation and to substitute the words "which acts in combination caused" for the words "which acts caused", where they appear in each imputation, so that the imputations in question now read:

"*(g) The plaintiff bore a responsibility for the rape and murder of Anita Cobby by Lesley Murphy in that he was one of a number of men who had anal intercourse with Murphy when he was under thirteen years of age which acts in combination caused Murphy such grave psychiatric damage that he raped and murdered Ms Cobby.*

(h) The plaintiff bore a responsibility for the murders of two men by Andrew Tregurtha in that he was one of a number of men who subjected Tregurtha to inhuman and degrading acts of physical sexual abuse when he was a child which acts in combination caused Tregurtha such grave psychiatric damage that he committed the two murders."

The effect of the amendments

Before turning to the issue of the capacity of the matter complained of to convey those two imputations, it is important to point out that, like all amendments made during the course of argument, these amendments could well be improved upon further reflection, and to emphasise the very considerable difference made by them to the possible gravity of the plaintiff's original complaint. So far as imputation (g) is concerned, the plaintiff is now content with an imputation which asserts no more than that it was the collective effect of all the acts of anal intercourse which Les Murphy had with different men (including the plaintiff) which caused Murphy's psychiatric damage, which in turn led to his participation in the rape and murder of Anita Cobby. So far as imputation (h) is concerned, the plaintiff is similarly now content with an imputation which asserts no more than that it was the collective effect of all the inhuman and degrading acts of physical abuse inflicted upon Tregurtha by different men (including the plaintiff) which caused Tregurtha's psychiatric damage, which in turn led to his participation in the murder of two men. In each case, the responsibility which the plaintiff bore was of a somewhat remote and relatively minor kind, particularly by comparison with a possible interpretation of the imputations as originally pleaded.

The law

The nature of the submissions made as to the capacity of the matter complained of to convey these two imputations, and as to the issues raised, requires a statement first of some matters of general principle.

The Privy Council, sitting on appeal from this Court, has held variously that the issue of the capacity of the matter complained of in a defamation action is both a question of law[15] and a question which is not strictly speaking one of law.[16] In both cases, however, their Lordships have described the task itself as one of deciding whether it is or was open to the jury in the particular case to find that ordinary reasonable readers (or listeners or viewers) would have understood the matter complained of in the defamatory sense pleaded. That is also the issue posed by s 7A(1) of the Defamation Act 1974, which is merely declaratory of the common law. In other words, the issue is the familiar one - one which is often made the subject of a ruling by the trial judge - as to whether there is or was a case to go to the jury.[17]

The issue on an appeal from such a ruling is not - as was argued by the plaintiff in the present case - that, as the trial judge had made a finding of fact, the defendant had to demonstrate that he had misdirected himself on a question of law. Even if it were a finding of fact (which it was not), an appeal to this Court is by way of rehearing, the trial judge enjoyed no advantage in reaching the decision which he did which this Court does not also enjoy in relation to this issue, and it would be this Court's duty to determine this issue for itself.[18] The issue in this appeal - as with any other question as to whether there is or was a case to go to the jury - is whether this Court independently comes to the same conclusion in relation to that ruling.

Although "designed to illuminate a different area" (namely, negligence), the function of both the trial judge and of this Court on appeal in determining whether there is or was a case to go to the jury is well stated in Prosser's "*Handbook of the Law of Torts*":[19]

"*The most common statement is that if reasonable persons may differ as to the conclusion to be drawn, the issue must be left to the jury; otherwise it is for the court.*"

That statement has been applied by this Court in negligence actions,[20] and in a defamation action.[21] It was also applied by me in relation to the capacity to defame issue, in **Farquhar v Bottom**[22] in a passage which has been accepted as far afield as Canada.[23]

The ordinary reasonable meaning of the matter complained of may be either the literal meaning of the published matter, or what is implied by that matter, or what is inferred from it.[24] In deciding whether any particular imputation is capable of being conveyed, the question is whether it is *reasonably* so capable,[25] and any strained or forced or utterly unreasonable interpretation must be rejected.[26] The ordinary reasonable reader (or listener or viewer) is a person of fair average intelligence,[27] who is neither perverse,[28] nor morbid or suspicious of mind,[29] nor avid for scandal.[30] That person does not live in an ivory tower but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs.[31]

The mode or manner of publication is a material matter in determining what imputation is capable of being conveyed.[32] The reader of a book, for example, is assumed to read it with more care than he or she would read a newspaper. The more sensational the article in a newspaper, the less likely is it that the ordinary reasonable reader will have read it with the degree of analytical care which may otherwise have been given to a book,[33] and the less the degree of accuracy which would be expected by the reader.[34] The ordinary reasonable reader of such an article is understandably prone to engage in a certain amount of loose thinking.[35] There is a wide degree of latitude given to the capacity of the matter complained of to convey particular imputations where the words published are imprecise, ambiguous, loose, fanciful or unusual.[36]

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.[37] Although such a listener or viewer (like the reader of the written article) must be assumed to have heard and/or seen the whole of the relevant programme, he or she may not have devoted the same degree of concentration (particularly, I would say, where it is the radio) to each part of the programme as would otherwise have been given to

the written article,[38] and may have missed the significance of the existence, earlier in the programme, of a qualification of a statement made later in the published material.[39]

The trial judge in a transient publication case will therefore more readily leave it to the jury to decide whether an imputation affected by any of those circumstances, or any similar circumstances peculiar to such type of publication, was in fact conveyed than he or she would in relation to a written document case.[40] I should add that, in distinguishing between the written and the electronic media, and in referring to the transient form of the latter, I have been referring to what is the fact: that publications when broadcast or telecast by the electronic media are necessarily transient or ephemeral in nature, notwithstanding provisions such as s 124 of the Broadcasting Act 1942 (Cwth) and its successor, s 206 of the Broadcasting Services Act 1992 (Cwth), which deem them to be "publication in a permanent form". Such statutory provisions enact a fictional situation solely in order to make defamatory statements so published libel rather than slander (and thus avoid the need for proof of special damage).[41] There is no longer any distinction in New South Wales between libel and slander.[42] In any event, such statutory provisions can have no effect upon the circumstances in which the listener or viewer understands what imputations are being conveyed.

What must be emphasised is that it is the test of reasonableness which guides any court in its function of determining whether the matter complained of is capable of conveying any of the imputations pleaded by the plaintiff. In determining what is reasonable in any case, a distinction must be drawn between what the ordinary reasonable reader, listener or viewer (drawing on his or her own knowledge and experience of human affairs) could understand from what the defendant has said in the matter complained of and the conclusion which the reader, listener or viewer could reach by taking into account his or her own belief which has been excited by what was said. It is the former approach, not the latter, which must be taken.[43] The publisher is not held responsible, for example, for an inference which the ordinary reasonable reader, listener or viewer draws from an inference already drawn from the matter complained of, because it is unreasonable for the publisher to be held so responsible.[44] That is an issue which has assumed some importance in this case.

It is necessary to emphasise the important distinction between an implication and an inference. An implication is included in and is part of that which is expressed by the publisher. It is something which the reader (or listener or viewer) understands the publisher as having intended to say. An inference is something which the reader (or listener or viewer) adds to what is stated by the publisher; it may reasonably or even irresistibly follow from what has been expressly or impliedly said, but it is nevertheless a conclusion drawn by the reader (or listener or viewer) from what has been expressly or impliedly said by the publisher.[45] It is the reader's (or listener's or viewer's) own conclusion. Attention to this distinction, in the context of the capacity to defame issue, seems to have been drawn for the first time in my judgment in **Bargold Pty Ltd v Mirror Newspapers Ltd**,[46] when I pointed out that such a distinction appeared to have been accepted by Lord Devlin in **Lewis v Daily Telegraph Ltd**.[47] That distinction was subsequently accepted in that context by this Court in **Harrison v Mirror Newspapers Ltd**.[48] The High Court found it unnecessary to discuss the distinction in the appeal to that Court in **Harrison**,[49] and the distinction therefore stands.

An inference is drawn from an inference when the reader, listener or viewer draws an inference which is available in the matter complained of and then uses that inference as a basis (at least in part) from which a further inference is drawn. The publisher is held responsible for the first of those inferences but not for the second because - as I have already said - it is unreasonable for the publisher to be held so responsible. In **Mirror Newspapers Ltd v Harrison**,[50] the High Court illustrated the process which leads to an inference upon an inference in the case where the matter complained of states that the plaintiff had been charged with an offence. The first inference available from that statement (for which the publisher *is* held responsible) is that the police believed the plaintiff to be guilty or had a ground for charging him.[51] The second inference, which is based at least in part upon that first inference (and thus is *not* one for which the publisher is held responsible because it is unreasonable to do so), is that the plaintiff is in fact guilty of the offence charged.[52] That requirement of reasonableness must apply in every case. There can, however, be no unreasonableness involved in making the publisher responsible for an inference drawn by the reader (or listener or viewer) from a statement which the publisher is reasonably understood to have intended to imply in the matter complained of.

The issues

For convenience, I repeat the two imputations in issue:

"*(g) The plaintiff bore a responsibility for the rape and murder of Anita Cobby by Lesley Murphy in that he was one of a number of men who had anal intercourse with Murphy when he was under thirteen years of age which acts in combination caused Murphy such grave psychiatric damage that he raped and murdered Ms Cobby.*

(h) The plaintiff bore a responsibility for the murders of two men by Andrew Tregurtha in that he was one of a number of men who subjected Tregurtha to inhuman and degrading acts of physical sexual abuse when he was a child which acts in combination caused Tregurtha such grave psychiatric damage that he committed the two murders."

As to imputation (g), Lesley Murphy is referred to by that name expressly in the matter complained of (line 474), and elsewhere as Les Murphy.[53] The matter complained of also expressly asserts that Murphy had been subjected to anal intercourse at the hands of a number of men when he was under thirteen years of age (lines 359-366, 439-443, 481-488), and that he raped and murdered Anita Cobby (lines 355-357). There is, however, no express statement that the combination of those acts of anal intercourse caused Murphy such grave psychiatric damage that he committed those crimes. The defendant asserts that the matter complained of is incapable of being reasonably understood to have implied such statements, but (as I understand it) it does not dispute that a reasonable inference is available to that effect. I will return to the significance of that assertion presently.

Again, there is no express statement in the matter complained of that the plaintiff ever had anal intercourse with Lesley Murphy when he (Murphy) was under thirteen years of age or at all. Nor could any such statement reasonably be understood to have been implied by the matter complained of. That is (as I understand it) conceded by the plaintiff. The plaintiff asserts that it was nevertheless a reasonable inference for the ordinary reasonable viewer to have drawn from the matter complained of. The defendant asserts that the matter complained of is incapable of giving rise to any reasonable inference to that effect. Whether that inference is capable of reasonably arising is the *first issue* which must now be resolved.

If such an inference was available, the defendant says, the imputation as to the plaintiff's responsibility for the asserted consequences of those acts could therefore only be available as an inference upon an inference, and thus it is unreasonable for the publisher to be made responsible for it. The plaintiff asserts that such asserted consequences upon Murphy were reasonably understood to have been implied by the matter complained of. Whether they may reasonably have been understood to have been implied is the *second issue* which must be resolved. Whether an inference upon an inference is otherwise permissible in this case is the *third* such *issue*.

Finally in relation to imputation (g), the defendant challenges the assumption made by the imputation that, even if the ordinary reasonable viewer did draw the inference that the plaintiff had had anal intercourse with Les Murphy, he bore any responsibility for the rape and murder of Anita Cobby. That is the *fourth issue* which must be resolved.

As to imputation (h), Andrew Tregurtha is referred to by that name expressly (line 503). The matter complained of also expressly asserts that he murdered two men (lines 520-523). It does not state expressly that he had been subjected to inhuman and degrading acts of physical sexual abuse by a number of men when he was a child, but it is not disputed (as I understand it) that such a statement is implicit in the matter complained of by way of the following statements: that Tregurtha was only sixteen years old when he murdered two men (lines 514-515, 520-521); that he was a male prostitute, and the two men were his clients (lines 520-521); and that he felt inhuman, he felt degraded and he despised that they enjoyed what they did (lines 546-548). The reference to "they" is to Tregurtha's clients, but it is not, in its context, restricted to the two men who were murdered.

There is, however, no express statement in the matter complained of that the combination of those inhuman and degrading acts caused Tregurtha such grave psychiatric damage that he murdered the two men. Nor is there any express statement that the plaintiff ever subjected Tregurtha to such acts. Whether an inference that he did so is

capable of reasonably arising is the *fifth issue* to be resolved. As in relation to imputation (g), whether the combination of such acts had the asserted consequences upon Tregurtha may reasonably have been implied is the *sixth issue*. Whether an inference upon an inference is otherwise permissible in this case is the *seventh* such *issue*.

The first issue: whether the inference that the plaintiff had anal intercourse with Murphy is available

The plaintiff submits that an inference that he had anal intercourse with Les Murphy when he was under thirteen years of age may reasonably be drawn from the following statements expressed in or implied by the matter complained of:

(1) Les Murphy was subjected to anal intercourse at Costello's from the age of eleven or twelve (lines 359-366).

(2) Costello's was one of the three main centres of paedophile activity in Kings Cross, the most notorious of all (lines 77-80), a paedophile hangout (line 222) and a grim paedophile school (lines 501-502), where paedophiles could prey on the young without being interfered with themselves (lines 276-277), where not uncommonly boys had something slipped into their drink and were taken upstairs or wherever (lines 282-285), and where there were boys as young as nine years old available for sexual purposes (lines 300-307) as well as boys aged eleven to thirteen years (lines 295-296).

(3) Les Murphy first went to Costello's when he was eleven or twelve years old and he was buggered there (lines 363-366). He was especially prized because of his extreme youth (lines 360-362).

(4) The plaintiff is a paedophile (line 110) who frequently picked up young under age male prostitutes with whom he had sex (lines 122-134, 155-158, 184-190, 199-202, 211-214), and he did so at Costello's where he was a patron who liked boys (lines 218-245, 257-259), where he was known to the boys by name and by nickname ("Madge") (lines 224-226), and where he took a boy upstairs and on other occasions drove boys away in a car (lines 235-239). The age of the boys at Costello's could be seen merely by looking at them (lines 296-297).

(5) Johnny McLean is identified as having had anal intercourse with Les Murphy when he was either eleven or twelve years old or "pretty young" (lines 258-268, 368-370, 411-412, 434-438). Les Murphy's brother Patrick also names three men who have done so - Joe Westwood (lines 439-443, 468-473), Tony Bevan, and a man whose name has been "beeped out" (line 481). In its context, the viewer could reasonably have interpreted this as having occurred at Costello's.

The basis upon which the plaintiff's case is principally put is that the ordinary reasonable viewer would have identified him as the man named by Patrick Murphy and whose name had obviously been deleted by the defendant. Patrick Murphy appears in the second part of the investigation report. It is necessary to refer to the context in which he does appear a little more fully.

The presenter of the "*Witness*" programme (Jana Wendt) commences the second part of "*The Dark Side*" by saying that the abuse of children by Sydney men had not only destroyed lives and minds but that it had also created people capable of the most horrific crimes, including the murder of Anita Cobby, a murder which had shortly before in the investigation report been described as a brutal murder in 1986 of a nurse and former beauty queen. Les Murphy is said by the narrator of the report (Graham Davis) to be serving a life sentence for Anita Cobby's rape and murder.

What happened at Costello's is described in some detail, and it is unnecessary to repeat what I have already said. The narrator goes on to say that Les Murphy (especially prized because of his extreme youth) and his brothers Gary and Michael (who were also convicted of that murder), had all been abused at Costello's. Various people describe how Les Murphy was treated, and detail is given of anal intercourse with Les Murphy by two men: Johnny McLean and Joe ("Josey no toes") Westwood. There is also a reference to another man, Tony Bevan (the former mayor of Wollongong), cruising the NSW South Coast looking for children with whom he could have "sex". Both

Bevan and McLean are said now to be dead, but Westwood was still alive and living in outback Queensland. Patrick Murphy's statement is then both shown and read out. He says (lines 481-485):

"*I know for a fact that Tony Bevan, [beep] and Joe Westwood have been molesting children from the age of when I was twelve. My brothers were involved in this and I think that Les, he started off when he was pretty young.*"

Patrick Murphy gives "sodomising" as the meaning of "molesting" (line 489) - in other words, anal intercourse. His words as read out are interrupted by an audible beep. At the time when they are being read out, the words also appear in printed form on the screen, and the name beeped out is represented by dots.[54]

The plaintiff argues that the obvious deletion of the second man's name constituted an invitation by the defendant to the ordinary reasonable viewer to speculate as to the identity of the man named by Patrick Murphy, and to conclude that he had in fact referred to the plaintiff but that the defendant had not dared to republish such an express allegation against him.

This argument has its origin in the decision of the Privy Council in **Jones v Skelton**,[55] in which Jones (a local shire councillor) complained that a letter published in a local newspaper had imputed impropriety on his part as a councillor. The letter attacked the Council's decision to approve the plaintiff's application to convert his garage into servants' quarters in the face of its campaign against homeless people living in garages. This almost complete *non sequitur* was followed by this statement:

"*It is beyond understanding. Or is it?*"

The letter was then signed "Ratepayer". The Privy Council said:[56]

"*The question mark might convey to the reasonable reader the thought and the meaning that there had been some impropriety. The reader, a jury might conclude, was invited to adopt a suspicious approach and so to be guided to the real explanation of what had taken place - an explanation which the writer of the letter did not care or did not dare to express in direct terms. It was therefore open to a jury to decide that a reasonable reader would conclude that the plaintiff had brought improper influence (short of corruption) to bear upon his fellow councillors.*"

The second sentence of that passage was quoted by the Privy Council in its subsequent decision in **Lloyd v David Syme & Co Ltd**,[57] as authority for its conclusion that certain phrases in the matter complained of in that case - upon which the defendant had relied as a disclaimer of the imputations otherwise available - did no more than "rather convey the impression that the author is anxious to wound but fearful to strike too obviously". The allusion, which is an apt one, is to Alexander Pope's "*Epistle to Dr Arbuthnot*":

"*Damn with faint praise, assent with civil leer,*

And, without sneering, teach the rest to sneer;

Willing to wound, and yet afraid to strike,

Just hint a fault, and hesitate dislike."

I accept that the obvious deletion of the name of one of the three men identified by Patrick Murphy as having had anal intercourse with the Murphy brothers at the relevant time - without explanation or qualification - could reasonably have been interpreted by the ordinary reasonable viewer as indicating that the defendant had not dared to republish such an express allegation against the particular man identified by Patrick Murphy. I also accept that the viewer's natural reaction would have been to speculate

just who that man was or - to use the more precise language of the Privy Council - to "adopt a suspicious approach" in concluding just who that man was. That does not necessarily mean, however, that the defendant is responsible for every conclusion reached in that way.

What the Privy Council was saying in **Jones v Skelton** is that, if the publisher invites the adoption of a suspicious approach, it is reasonable for him to be responsible for at least some conclusions reached for which it would not otherwise have been reasonable to make him responsible. A degree of conjecture or guesswork is therefore permitted which would not otherwise be permitted. However, the requirement of reasonableness still applies. The publisher is not responsible for every conclusion which may have been reached by such conjecture or guesswork.

I do not accept that the mere beeping out of the man's name could reasonably have been interpreted by the viewer as an *invitation* by the defendant to guess or speculate as widely as the viewer may have liked, in such a way as to make the defendant responsible for whatever conclusion may have been reached by that guesswork. This case is quite different from the invitation ("Or is it?") in **Jones v Skelton**. It is as if the face of someone being led into court by police officers had been pixilated (or distorted) simply in order to avoid identification. Much more indication is required before it would be reasonable to interpret what was published as such an invitation. The defendant would nevertheless be responsible for any reasonable inference based in part upon the fact that the defendant had not dared to republish the express allegation against that man, and (by analogy to what Holroyd Pearce LJ said in **Lewis v Daily Telegraph Ltd**[58]) the defendant could hardly complain if the ordinary reasonable viewer reasonably concluded that Patrick Murphy had named someone other than the person whom he had in fact named.

The parties put forward various arguments as to whether it was reasonably open to the viewer in the circumstances of this case to conclude that Patrick Murphy had identified the plaintiff by name as one of the three men who had sodomised the Murphy brothers at the relevant time, and in particular that he too had had anal intercourse with Les Murphy at that time.

The plaintiff expressly disclaims any reliance upon this being a class libel. Such a concession was undoubtedly correct, as a class libel would be available only if, as the first stage, the matter complained of could fairly be read as asserting that each member of the class - that is, every patron of Costello's at the relevant time - had had anal intercourse with Les Murphy.[59] The matter complained of here clearly cannot be so interpreted.

What the plaintiff submits is that he is nevertheless pointed to, he is the principal target of the investigation, and that it was therefore reasonable for the viewer to conclude that he was the man named by Patrick Murphy. He points out that he is named at the outset of the report as the man who had attempted to prevent the investigation from being screened (lines 9-12), and as the man prominent in public life whose behaviour as a paedophile is to be examined in it (lines 104-110). The "story" is said to have been of such a nature as to be likely to cause many in public life "to rethink their support for Marsden" (lines 167-168). After the commercial break, the implications of the *continuing* investigation into under age sex in Sydney shows that "abuse by Sydney men" had "created" people capable of murder (lines 269-273), the Sydney men being the paedophiles who "preyed on the young" at Costello's (lines 274-277). The plaintiff is identified, in the way already indicated, as a paedophile who picked up young under age males at Costello's. The narrator says that, for the first time, the defendant had been able to reveal the role which McLean "and other paedophiles" played in "spawning some of Australia's most wicked men" (lines 352-354). Later, the narrator says that the Murphy brothers had been drawn into a ring and that, when McLean had finished with a boy, he would "simply pass him on to someone else [in the ring]" (lines 435-438). Les Murphy is said to have been buggered at Costello's from when he was aged eleven or twelve years (lines 363-366). The plaintiff says that he could reasonably have been identified as part of McLean's ring around which Les Murphy was passed, because he had earlier been described as a member of a "circle" of men having "sex" with under age boys (lines 199-210), and - because he is also described by reference to a number of public offices which he has held (lines 106-109) - he is tied in with McLean and Bevan, who are said to have had a veneer of respectability (lines 336-337). McLean is directly linked with Bevan as a friend (lines 313-325).

The plaintiff also submits that the ordinary reasonable viewer would interpret the defendant's fear of republishing the express allegation made by Patrick Murphy against the third man as arising from the fact that the third man was still alive. He points out that, of all the men named or tied in as part of McLean's ring of paedophiles who had had anal intercourse with Les Murphy, only he and Westwood are said to be still alive, and Westwood is already named by Patrick Murphy. He must therefore be the man who was named. However, this line of reasoning seems to me necessarily to involve the process of drawing an inference (that Patrick Murphy had named the plaintiff) based at least in part upon another inference (that the reason why the defendant dared not republish that express allegation by Murphy was because he was still alive and could sue).

Alternatively, the plaintiff also submits that, such is the nature of the allegations of anal intercourse with Les Murphy already made expressly in the matter complained of against McLean, the ordinary reasonable viewer would have discarded McLean as being the person against whom the defendant had not dared to republish the express allegation of such intercourse made by Patrick Murphy. That left the plaintiff as the only man named or tied in as part of McLean's ring of paedophiles who had had such intercourse with Les Murphy. In my view, such a line of reasoning does *not* involve a process of drawing an inference upon an inference.

If all these matters are taken in isolation, it would in my opinion be open to the jury to find that the ordinary reasonable viewer would have identified the plaintiff as the man named by Patrick Murphy as having had anal intercourse with his brother Les at the relevant time, but whose name had been deleted by the defendant. I am not satisfied, however, that such a finding would be open on any basis which did not depend upon such an interpretation of what Patrick Murphy said. Such is the seriousness of the allegation that any other basis for such an inference would require such an extent of sheer speculation that it would be quite unreasonable to make the defendant responsible for it.[60] Any such basis would have been available only if the matter complained of had constituted a class libel but, as it cannot be interpreted as asserting that every patron of Costello's had had anal intercourse with Les Murphy at the relevant time, there is (as the plaintiff correctly conceded) no class libel here. The alternative basis upon which the plaintiff puts his case - which does not depend upon Patrick Murphy's naming of him - necessarily fails.

But those matters must be looked at not in isolation but in the context of the whole of the matter complained of. Upon this basis, the defendant submits that it would have been unreasonable for the ordinary reasonable viewer to have drawn such an inference for at least two reasons.

Primarily, the defendant says that it must have been obvious to the viewer that the investigation fell into two quite distinct and self-contained segments: the first dealing with the plaintiff's paedophile activity and with his false denials of it; and the second dealing with the consequences of paedophilia generally upon the boys themselves. The only nexus between the two parts, the defendant says, is the subject of paedophilia. The defendant conceded that, at the very end of the first part, the narrator introduces McLean as the pervert whose awful legacy is to be seen in the second part of the investigation report, but it says that this was for the obvious purpose of informing the viewers of what was to follow, and to keep them tuned in after the commercial break. The defendant points out that the plaintiff is neither named nor pictured in the second part of the report,[61] and it argues that the ordinary reasonable viewer *must* have understood that there had been no intention on its part in the second part of the report to refer back to anything to do with the plaintiff. The defendant, of course, does have to persuade this Court that the viewer *must* have so interpreted the matter complained of in order to defeat the plaintiff's argument. If the interpretation for which the plaintiff contends is reasonably open, then it is a jury question as to whether the ordinary reasonable viewer would in fact have so interpreted the matter complained of.

There are, however, a number of statements made during the investigation report - some of them admittedly ambiguous - which tend to contradict the interpretation for which the defendant contends as that which the ordinary reasonable viewer *must* have given to the matter complained of. The fact that some of those statements are ambiguous operates in the plaintiff's favour upon this issue.

The plaintiff is said at the outset to have failed to stop the screening of an investigation into under age sex in Sydney (lines 1-3, 9-12) - a single investigation which has more than one part (line 16) - and no attempt is made at that early stage to indicate that the different parts of that investigation which the plaintiff failed to stop being screened were intended to be quite distinct and self-contained. Early in the first part, and in a passage already quoted earlier in this judgment, the narrator says (while a photograph

of the plaintiff is being shown on the screen) that the "story" - a single story, not the first of two stories - will not only fuel the public outrage about paedophile activity, it will also send shock waves through "the Establishment" because of the behaviour of the plaintiff - a man with friends in the highest places - is to be examined (lines 102-110). Again, no attempt is made at that stage to indicate that it is only in the first part of the investigation report that the plaintiff's behaviour will be examined. Then, when McLean is introduced at the conclusion of the first part as the pervert whose awful legacy is to be seen in the second part of the report (lines 258-268), again there is no attempt to indicate that the examination of the plaintiff's behaviour was now completed.

At the very conclusion of "*The Dark Side*", the narrator says (lines 549-552):

"*And for the abused, corrupted bodies make for corrupted values. It's all part of an appalling legacy - the betrayal of trust, the shattered dreams, the lives wasted by drugs and self loathing.*"

The youth worker says (lines 553-558):

"*The price of our neglect of these kids has been very high in actual fact. That we have ignored their pleas, we, we, we've neglected them in this way as a community, we've paid a very high price for that.*

Q. Because they bounced back and smacked us around? A. They sure did."

And the boy who appears in both parts of the investigation report says (lines 559-562):

"*It's a dark part of society that they don't look at. It's got to be addressed, it's got to be cleaned up because [if] you don't, society doesn't need more people like me and others walking around.*"

The defendant argues that the reference here by the narrator to the appalling legacy, echoing the introduction to the second part of the report and the subject matter of that second part (the awful legacy of McLean the pervert), makes it clear that this was intended to summarise only the second part of the report. However, the narrator's final statement is at least also open to the reasonable interpretation that it was intended to be a summary of the whole report, which commenced with the presenter, having referred to the plaintiff's unsuccessful attempt to prevent the investigation into under age sex in Sydney being screened, saying (lines 12-16):

"*In recent months Australians have been shocked with revelations of men who have sexually abused children. Tonight some of those victims strike back, they give us the names of the men who've abused them.*"

Only after that statement has been made is it indicated that the investigation report is to have more than one part. The link here is between the "sexually abused children" referred to at the commencement and the "abused" - that is, the sexually abused children - to whom the narrator refers at the conclusion. The defendant also argues that the appearance of the boy in both parts of the report is clearly explicable, and thus of neutral effect upon this issue. In the first part, he relates being picked up for sex by the plaintiff in Fitzroy Gardens (not at Costello's) (lines 122, 131-132) and, in the second part, he explains how he was initially corrupted by McLean at Costello's (lines 279-292) - who is said to have fathered in him the anger which he felt (line 351).

The defendant's argument that it would have been obvious to the ordinary reasonable viewer that "*The Dark Side*" fell into two quite distinct and self-contained parts could well be accepted by the jury, but it does not persuade me that the viewer *must* have so interpreted it. In my view, it still remains open to the plaintiff to argue that, because of the necessarily transient or ephemeral nature of a telecast, the viewer would not have interpreted the matter complained of in the way for which the defendant contends.

The defendant's secondary argument is similar to one of the plaintiff's submissions, but it turns that submission against the plaintiff. The defendant says that, such is the nature of the allegations made against the plaintiff expressly and by clear implication in the first part of the report, the ordinary reasonable viewer *must* have discarded the plaintiff as being the person against whom the defendant had not dared to republish the express allegation of anal intercourse with Les Murphy made by Patrick Murphy. The defendant says that everything which could have been said against the plaintiff had been said against him in the first part of the report, which the defendant describes as being confrontationalist and "no holds barred" in nature, with nothing left to the imagination.

There are, however, two matters of some significance involved in such an allegation that the plaintiff had had anal intercourse with Les Murphy which were not alleged against him in the first part. First, there is what the plaintiff says is the responsibility which anyone who had had such intercourse with Les Murphy bears for his subsequent violence, whatever the extent of that responsibility may be. (I leave for later the defendant's challenge to the assumption made by imputation (g) that any such consequence follows; at this stage, I am concerned only with the issue as to whether the matter complained of is capable of conveying the inference that the plaintiff did have anal intercourse with Murphy.) Secondly, there is what could reasonably be interpreted as a significant difference in substance between having anal intercourse with boys aged fourteen or fifteen years and already prostituting themselves, as alleged against the plaintiff in the first half of the report (lines 65-66, 149-158, 191-193, 247-249), and having anal intercourse with a boy only eleven or twelve years old, which is the age at which Les Murphy is said to have first been buggered and corrupted (lines 363-366).

Indeed, the defendant relies upon the difference is substance between the two allegations as another reason why the ordinary reasonable viewer *must* have discarded the plaintiff as being the third man expressly named by Patrick Murphy. To some extent, this distinction is strengthened by two of the plaintiff's own statements included in the programme: one to the effect that, like heterosexuals, gay men do not ask young males whom they meet for sex to produce their birth certificates (lines 127-130), and the other (lines 165-166):

"*As far as I know, I have never ever slept with someone under age.*"[62]

These statements, although challenged in the investigation, could be interpreted as suggesting that the plaintiff's sexual interests lay in relation to boys beyond the age of puberty, rather than those who had not yet reached that stage of sexual development.

Again, these further arguments - taken singly or in combination with the defendant's primary argument - do not persuade me that it would not have been reasonable for the ordinary reasonable viewer to have drawn the inference from what was published that Patrick Murphy had named the plaintiff as having sodomised Les Murphy when he was "pretty young" - that is, having had anal intercourse with him when he was at least under thirteen years of age.

I am thus satisfied by the plaintiff that an inference that he did have such intercourse with Les Murphy is open on the matter complained of, but only upon that basis - the principal basis upon which the plaintiff's case has been put. In my judgment, therefore, the plaintiff has succeeded in relation to the first issue to be resolved, on the principal basis upon which his case has been put.

The second issue: whether the psychiatric damage to Murphy from anal intercourse as asserted in the imputation could have been understood to have been implied in the matter complained of

The imputation asserts that the collective effect of the acts of anal intercourse with Les Murphy by different men when he was under thirteen years of age was to cause him such grave psychiatric damage that he raped and murdered Anita Cobby. The plaintiff has argued that such consequences were reasonably understood to have been implied by the matter complained of. As an implication for defamation purposes is something which the reader (or listener or viewer) understands the publisher as having intended to say, it is for the jury to determine how the ordinary reasonable reader (or listener or viewer) interpreted what was published. The question here is whether it was open to the jury to find in favour of the plaintiff upon this issue.

The plaintiff argues that the implication could reasonably have been seen by the ordinary reasonable viewer from the following statements made expressly in the matter complained of:

(1) Abuse of children by Sydney men created people capable of the most horrific crimes, including the murder of Anita Cobby (lines 264-268, 270-273).

(2) Abuse by McLean fathered anger in one boy (not Les Murphy); in others he fathered appalling violence. He and other paedophiles played a role in spawning some of Australia's most wicked men, including Les Murphy who raped and murdered Anita Cobby (lines 264-268, 351-358).

(3) Kids who are the product of this kind of persistent and constant abuse are bred into people who are capable of doing almost anything (lines 494-499).

(4) The corrupted bodies of those who have been abused lead to corrupted values. It's all part of an appalling legacy: the betrayal of trust, the shattered dreams, and the lives wasted by drugs and self-loathing (lines 549-552).

(5) A very high price has been paid for the neglect of these kids and for ignoring their pleas (lines 549-552).

(6) One of the boys interviewed, who had originally been abused at the age of fourteen (lines 35-39), also says that he has a lot of anger inside him, and he wonders sometimes what he is capable of doing (lines 348-350).

(7) Les Murphy was a gentle kid when he moved in with McLean at Costello's (line 373), where he was especially prized because of his extreme youth (lines 361-362) and where he was being buggered (by the patrons of Costello's) when he was aged eleven or twelve years (lines 363-366).

(8) The Murphys were, however, corrupted with the passing years (lines 382-383). Youth worker Anne Crow says that, when she saw Les Murphy, he was not a very nice kid (line 392).

(9) Anita Cobby was a victim of graduates of the grim paedophile school called "Costello's" (lines 500-502).

(10) How much the abuse affected the development of the Murphy brothers can only be guessed at, though the savagery which they went on to inflict and the pain which they caused the Cobby family is all too well known (lines 489-492).

(11) The person who murdered Anita Cobby was psychopathic (line 493 in its context).

Other than the bald denial that the implication for which the plaintiff contends was reasonably available as such, the defendant has offered no argument upon this issue. I am satisfied that the implication was so available. Any finding by the jury to the contrary would in my view be almost perverse. In my judgment, therefore, the plaintiff has succeeded in relation to the second issue to be resolved as well.

The third issue: whether an inference upon an inference is otherwise permissible in this case

In the light of what I have already said when discussing the law applicable to the capacity of the matter complained of to convey a particular imputation, this third issue arises only because of statements made by Levine J in his judgment under appeal which suggest that a publisher may nevertheless be responsible in some cases for an inference which is drawn upon another inference. What the judge said was this:

"*The principles in relation to inference drawing are apparently entrenched. It is their application that might have to be reconsidered in the light of the development of the techniques of modern media communications. If a process of reasoning is fairly capable of being described as an inference upon an inference leading to an imputation, or a process of reasoning fairly can be described as "speculation" leading to an imputation, the current state of the law would appear to preclude a plaintiff ever relying upon any*

imputation founded upon such a process of reasoning or indeed upon speculation. I am of the view that this should no longer necessarily be the case. In other words the identification of the process of reasoning as inference upon inference, or indeed as speculation, should not automatically and finally preclude a plaintiff relying upon an imputation arrived at by such processes. The nature of the processes can always be identified as inference upon inference or as speculation, but the consequences (the imputations thereby arrived at) may have to be reconsidered in the light of the published material.

Unduly precious and painstaking identification of the ratiocination of the recipient of a publication, and analysis thereof, can lead to an unreasonable and unrealistic and thus an unfair and unjust outcome on the question of the capacity of a publication in this era conveying meanings to readers/viewers/ listeners of this era.

If the nature of the published material is calculated to, that is likely to have the effect of, or can fairly be described as an invitation to speculate to a given end or to draw an inference upon an inference, and those inferences readily can be identified by reason of the nature and quality of the program itself, why should not the publisher be responsible for them?

`In your face' television, it can be fairly be argued, leaves nothing or extremely little to the imagination or to free thought. Is a person fairly to be described as `avid for scandal' when, by a process of inference upon inference or indeed speculation, upon which course the published material clearly invites, if not indeed compels, the viewer to embark, really avid for scandal or otherwise not reasonable or merely a `consumer' of the scandal the publisher telecasts?"[63]

There was some debate before this Court as to whether those statements played any part in the decision which the judge reached upon the capacity of this publication to convey the two imputations in issue. The plaintiff asserts that they did not; the defendant asserts that they did. It may fairly be said that the judge's intention is unclear from the judgment itself. But the plaintiff is still arguing before this Court that the viewer was being invited to speculate, the defendant is still arguing that the imputations could only be conveyed by drawing an inference upon an inference, and there still remains an issue for the jury as to whether the psychiatric damage to Les Murphy from anal intercourse at the relevant age was understood to have been implied in the matter complained of rather than inferred from it. If, contrary to what I would expect the jury to find, they are not satisfied that it was so implied, it will be necessary for the trial judge to direct them as to what the consequences of that finding will be. For this reason, it is necessary for this Court to consider whether the statements made by Levine J are correct. It was the existence of these statements in his judgment upon which the defendant relied when successfully seeking leave to appeal.

What Levine J says should no longer be the law is that a plaintiff is precluded from relying upon any imputation founded upon either of two processes of reasoning - those which are "fairly capable of being described" either as drawing an inference upon an inference or as speculation. The law at present does indeed preclude a plaintiff from reliance upon the first of those processes of reasoning. The judge accepts that that principle is entrenched. It certainly is, by decisions in the House of Lords[64] and the High Court.[65] A plaintiff is not, however, completely precluded from reliance upon the second of those processes of reasoning. The decision of the Privy Council in **Jones v Skelton** permits a reasonable degree of conjecture or speculation where the publisher has invited it, as I have already pointed out.

Each of the two processes of reasoning is, of course, quite different from the other, and there is room for misunderstanding when the two are considered together as they have been by the judge in this case. There is also room for misunderstanding when the issue is described, again as it has been by the judge, as whether a process of reasoning is one which is merely "fairly capable of being described" as drawing an inference upon an inference. (I will not cause further misunderstanding by continuing to consider both processes of reasoning together.) Where the capacity of the matter complained of to convey a particular imputation is being considered, it is true to say that the defendant will fail to exclude it from the jury unless that imputation can *only* be conveyed by such a process. Except in that situation, however, it will usually be for the jury to determine whether the first step in the process of reasoning involves an implication or an inference. They must be directed that, if the imputation does arise, and if it does arise from drawing an inference upon an inference rather than upon an implication, it would not be reasonable for the defendant to be made responsible for that

imputation, and the defendant is entitled to succeed in relation to it. It would therefore be very unwise to refer to any process of reasoning which is merely "fairly capable of being described" in that way.

Levine J, having accepted that the exclusion of an imputation reached by this process of reasoning results from an entrenched principle, suggests that this should no longer be the case and that the plaintiff should not be precluded from relying upon such an imputation reached where -

"... the nature of the published material is ... likely to have the effect of, or can fairly be described as, an invitation ... to draw an inference upon an inference, and [that inference] readily can be identified by reason of the nature and quality of the programme itself."

The judge did not provide an example of a publication which had such characteristics. I am frankly unable to formulate one for myself. I would have thought, with respect, that in almost every case - if, indeed, not in every case - a publication could have such characteristics, including an identification of the ultimate inference to be drawn, only because either the imputation was implicit in the matter complained of or there was only one inference to be drawn.

The judge concluded that the matter complained of here was capable of being understood as *inviting* the viewer to adopt both processes of reasoning, and he reserved his view as to whether it went so far as to *compel* the viewer to do so. This conclusion appears to have been based upon an interpretation of the matter complained of as "calculated virtually to preclude a viewer, and a reasonable viewer, from the bother of forming any independent judgment". There is, the judge says, "little, if any, room for questioning the position of the defendant in the story told by [the matter complained of]". I do not agree. I have already held that the present case does not invite the viewer to speculate by merely deleting the name of the man identified by Patrick Murphy. Nor does it either invite or (still less) compel a process of reasoning by drawing an inference upon an inference.

I recognise that the techniques of defamation by modern media communications have developed in a way which Alexander Pope could never have envisaged, and that the *application* of the principles laid down by the House of Lords and the High Court must keep up with those developments. The advent of radio and television has already resulted in trial judges in cases involving such publications more readily leaving it to a jury to decide whether an imputation has been conveyed than they would in relation to a written document case. I referred to that principle earlier in this judgment. But, in the end, the test remains one of reasonableness - whether it is reasonable to hold the publisher responsible for a conclusion which is not reasonably understood to have been expressed or implied by what the publisher has said, but which the ordinary reasonable reader (or listener or viewer) has drawn for himself or herself, perhaps by having taken into account his or own beliefs which have been excited by what was published. As I understand the law of defamation, that is fundamental to the publisher's responsibility. If the publisher does anything which makes it reasonable for him to be held responsible for something more (such as by an invitation to speculate), then he is made responsible for it. That is nothing new, and the principles remain the same. There is nothing in the present case - notwithstanding its "in your face" approach - to suggest that those principles should be applied in any different way to the way in which they are usually applied. With all due respect to Levine J, I am entirely unable to agree with what he has said.

In my judgment, therefore, the plaintiff has failed in relation to the third issue to be resolved, but that failure does not prevent imputation (g) going to the jury.

The fourth issue: whether the plaintiff bore any responsibility for the rape and murder of Anita Cobby even if he did have anal intercourse with Les Murphy

The defendant submits that, as it is expressly stated in the matter complained of that McLean was responsible for having lured Les Murphy into the paedophile "net" (lines 411-412), for having corrupted him (lines 264-265, 434-438) and for having fathered his appalling violence (lines 351-358),[66] and as it is also expressly stated that his murder of Anita Cobby was McLean's legacy (lines 263-268), it would have been unreasonable for the viewer to identify the plaintiff as bearing any responsibility for that murder. The defendant has emphasised that it was McLean who created the under age sex industry by providing Costello's, which was the "school" from which Les Murphy and others had graduated (lines 501-502), that there is no express or implied statement in the matter complained of that the plaintiff knew McLean, and that the plaintiff is

shown to be no more than a mere consumer - or, as it was put in argument (no doubt by analogy to trade practices law) he is an "end user" - of the services provided there. Les Murphy, it is said, was already corrupted by McLean before he was passed around the ring. He was also subjected to very rough treatment by Westwood whilst living with him (lines 465-470).

This argument is to some extent contradicted by the statement of the narrator that the Murphy brothers were "being corrupted with the passing years" (lines 382-383) but, even if the defendant is accepted as having demonstrated that the ordinary reasonable viewer *must* have interpreted the programme as asserting that Les Murphy was originally corrupted by McLean, that does not, in my view, necessarily deny that those consumers who merely had anal intercourse with Les Murphy at the relevant time (although after he had been originally corrupted by McLean) still bear at least some responsibility for the cumulative effect of their actions.

The defendant's argument was first put prior to the plaintiff's amendment of the two imputations in question. In relation to the original imputation (g), the argument had substantial strength. The effect of the amendments, however, has been - as I said earlier - to assert a responsibility on the part of the plaintiff for the murder of Anita Cobby of a somewhat remote and relatively minor kind, on the basis that it was the collective effect of all the acts of anal intercourse which Les Murphy had had with different men (including the plaintiff) which caused Murphy's psychiatric damage. The fact that McLean obviously bears the principal responsibility for that psychiatric damage does not, accordingly, absolve those others who had anal intercourse with him at the relevant time from any responsibility at all.

In my judgment, therefore, the plaintiff has succeeded in relation to the fourth issue to be resolved. Accordingly, in my view, the defendant's appeal in relation to imputation (g) should be dismissed, although I stress that the basis upon which I hold that the imputation should go to the jury is very different to that upon which the plaintiff succeeded before Levine J. This is an issue which is relevant to the order which should be made as to costs.

The fifth issue: whether the inference that the plaintiff subjected Tregurtha to inhuman and degrading acts is available

The plaintiff submits that an inference that he subjected Andrew Tregurtha to inhuman and degrading acts may reasonably have been drawn from the following statements expressed in or implied by the matter complained of:

(1) Andrew Tregurtha was a male prostitute (line 520) and a graduate of the grim paedophile school called "Costello's" (lines 500-503), where he had worked at the bar (lines 503-504).

(2) The plaintiff is a paedophile (line 110) who frequently picked up young under age male prostitutes with whom he had sex (lines 122-134, 155-158, 184-190, 199-202, 211-214), and he did so at Costello's where he was a patron who liked boys (lines 218-245, 257-259), where he was known to the boys by name and by nickname ("Madge") (lines 224-226), and where he took a boy upstairs and on other occasions drove boys away in a car (lines 235-239). The age of the boys at Costello's could be seen merely by looking at them (lines 296-297).

(3) The plaintiff had certain fetishes for slapping boys on the backside while having sex with them, because that was what excited him (lines 144-147), to the extent that the boys would remember him for the things which he did (lines 180-182). He had treated one boy named Mark badly and very roughly in a room upstairs at Costello's, causing the boy to describe him as a mongrel or an arsehole.

(4) One boy who identifies the plaintiff as having had sex with him at the age of fifteen (lines 155-158), or maybe fourteen and a half (lines 143-151), says that he had been raped and raped, he had begged and cried to be let go, and he had been let go bleeding like a pig (lines 37-39).

I do not accept that it was open to the viewer reasonably to associate the incident described in the fourth paragraph with the plaintiff. In its context, it appears that this happened when the boy was fourteen, but it is the same boy who describes the plaintiff's fetish for slapping boys on the backside (lines 144-147), and he makes no mention

at that stage of any more serious violence on the part of the plaintiff. The matter complained of also asserts that this boy had been introduced into the paedophile scene by McLean (lines 430-435), and that it was McLean who had fathered such anger in him that he wondered what he was capable of doing (lines 346-351). Even allowing for the looser application of the usual tests in the case of transient or ephemeral publications by the electronic media, it would in my view be wholly unreasonable to identify the plaintiff as responsible for the violence described in the fourth paragraph.

The plaintiff again submits that he is the principal target of the investigation, for the reasons stated when I was dealing with the first issue (as to whether the plaintiff had had anal intercourse with Les Murphy), and that he is said to be a paedophile who inflicts violence on boys with whom he has sex. He says that he would thus be identified by the ordinary reasonable viewer as one of the men responsible for subjecting Tregurtha to inhuman and degrading acts. Again, he correctly disclaims any reliance upon a class libel. In my view, the matter complained of cannot be interpreted as asserting that every patron of Costello's had subjected Tregurtha to such acts.

There is nothing in the matter complained of which provides a peg or pointer to the plaintiff in relation to Tregurtha to which the common law pleader could have affixed in parenthesis the words "meaning thereby the plaintiff", as there was in relation to Les Murphy - the man identified by Patrick Murphy and whose name was "beeped" out by the defendant. Such a peg or pointer is not necessary,[67] but its absence inevitably makes it more difficult for the plaintiff to establish that, in the absence of a class libel, he could reasonably have been identified by the ordinary reasonable viewer as one of the men who had subjected Tregurtha to such acts.

The plaintiff nevertheless seeks to do so by reference to two particular matters. First, he says that the violence alleged against him and detailed in the third paragraph above demonstrates to the viewer that he is no ordinary paedophile, and so is a likely candidate for having subjected Tregurtha to such acts. The degree of violence alleged, however, is very much less than inhuman, and it is only degrading to a minor extent when considered against the general background alleged - far less than would be required in the mind of the ordinary reasonable viewer to effect the psychiatric damage required, even in combination with the acts of others. Secondly, the plaintiff says that, if the imputation concerning Les Murphy is capable of arising, the imputation concerning Andrew Tregurtha is more likely also to arise because both are described as graduates of the grim paedophile school called "Costello's" (lines 500-503). I acknowledge that link, but it does not persuade me that the viewer could reasonably conclude that, because the plaintiff had had anal intercourse with Les Murphy, he would also have inflicted inhuman and degrading acts on Andrew Tregurtha. I am not satisfied that this inference is reasonably available. As in relation to the alternative basis upon which the plaintiff's case was put in relation to Les Murphy (the first issue resolved), the extent of sheer speculation involved in accepting a serious allegation of this type as referring to the plaintiff is such that it would be quite unreasonable to make the defendant responsible for it.

In my judgment, therefore, the plaintiff has failed in relation to the fifth issue. Accordingly, in my view, the defendant's appeal in relation to imputation (h) should be upheld. As the two remaining issues were fully debated, however, I propose to record my views in relation to them.

Sixth issue: whether the psychiatric damage to Tregurtha from inhuman and degrading acts could have been understood to have been implied in the matter complained of

The imputation asserts that the collective effect of the inhuman and degrading acts to which Andrew Tregurtha was subjected by different men was to cause him such grave psychiatric damage that he committed two murders. The issue as to whether such an assertion was reasonably understood to have been implied by the matter complained of is similar to the second issue which has already been resolved in favour of the plaintiff, and it relies upon largely the same material.

The plaintiff argues that the implication for which he contends here could reasonably have been so understood by the ordinary reasonable viewer from the following statements made expressly in the matter complained of:

(1) Abuse of children by Sydney men created people capable of the most horrific crimes, including murder (lines 264-268, 270-273, 524-528, 535-543).

(2) Abuse by McLean fathered anger in one boy (not Andrew Tregurtha); in others he fathered appalling violence. He and other paedophiles played a role in spawning some of Australia's most wicked men, including Les Murphy who raped and murdered Anita Cobby (lines 264-268, 351-358).

(3) Kids who are the product of this kind of persistent and constant abuse are bred into people who are capable of doing almost anything (lines 494-499).

(4) The corrupted bodies of those who have been abused lead to corrupted values. It's all part of an appalling legacy: the betrayal of trust, the shattered dreams, and the lives wasted by drugs and self-loathing (lines 549-552).

(5) A very high price has been paid for the neglect of these kids and for ignoring their pleas (lines 549-552).

(6) One of the boys interviewed, who had originally been abused at the age of fourteen (lines 35-39), also says that he has a lot of anger inside him, and he wonders sometimes what he is capable of doing (lines 348-350).

(7) Andrew Tregurtha had been a really nice kid from a good family, very polite, well mannered, well spoken, articulate and intelligent (lines 501-512, 529-530); but, by the time he murdered the two men, he was a graduate of the grim paedophile school called "Costello's" (lines 500-503).

(8) At the time of the killings, his self-esteem was right down to rock bottom (lines 545-546), and the value on his own life was so low that the thought of taking someone else's life was not as horrifying to him as it may have been to other people (lines 535-540).

Again, other than a bald denial that the implication for which the plaintiff contends was reasonably available as such, the defendant has offered no argument upon this issue. I am satisfied that the implication was so available and that any finding by the jury to the contrary would be almost perverse. In my judgment, therefore, the plaintiff has succeeded in relation to the sixth issue.

The seventh and last issue: whether an inference upon an inference is otherwise permissible in this case

For the reasons which I gave in relation to the third issue, in my judgment the plaintiff has failed in relation to this issue also.

Costs

Each party has succeeded in the appeal in relation to one imputation but has failed in relation to the other imputation. As to imputation (g), the plaintiff succeeded upon only one of the two bases argued, a very different basis to that which was successful before Levine J, and then only after he had substantially amended the imputation. On the other hand, the defendant failed to object to the form of the imputations when the matter was heard by Levine J.

In those circumstances, each party should in my judgment pay his and its own costs both in the proceedings before Levine J (so far as they related to these two imputations) and in this Court.

ORDERS PROPOSED

(1) The defendant's appeal is upheld in part, and the orders made by Levine J in relation to imputations (g) and (h) are set aside.

(2) Imputation (g) (as amended) will go to the jury.

(3) Imputation (h) (as amended) will not go to the jury.

(4) Each party is to pay his and its own costs both in the proceedings before Levine J (so far as they related to imputations (g) and (h)) and in the Court of Appeal.

[1] In fact, it was the dismissal by a single justice of the High Court of the plaintiff's application for an injunction pending the hearing of his application for special leave to appeal from the decisions of Levine J and of this Court refusing an injunction to restrain the defendant from telecasting this investigation: Levine J (29 April 1996, unreported); Court of Appeal (2 May 1996, unreported); Gummow J [1996] HCA 13; (1996) 136 ALR 243.

[2] There are four commercial breaks in the one hour "*Witness*" programme, each of approximately the same length. The two segments of the "*The Dark Side*", together with its own commercial break, last just on thirty minutes.

[3] The transcript as pleaded does not correctly record this passage.

[4] Crimes Act 1900, ss 78H-78Q.

[5] Prior to 1984, homosexual intercourse was unlawful whatever the age of the participants involved: Crimes Act, ss 79-80. The time frame within which the plaintiff is alleged to have had "sex" with boys is stated at different places to have been the 1970's and early 1980's (lines 78, 274), and the boys are described at one place as "the class of '74" (line 26).

[6] **Petritsis v Hellenic Herald Pty Ltd** [1978] 2 NSWLR 174 at 190; **Singleton v Ffrench** (1986) 5 NSWLR 425 at 428.

[7] **Saunders v Jones** (1877) LR 7 Ch D 435 at 451; **Rex v Associated Northern Collieries** [1910] HCA 61; (1910) 11 CLR 738 at 740; **Dare v Pulham** [1982] HCA 70; (1982) 148 CLR 658 at 664. Other authorities for this proposition are collected in **Sims v Wran** [1984] 1 NSWLR 317 at 321-322.

[8] **Whelan v John Fairfax & Sons Ltd** (1988) 12 NSWLR 148 at 155.

[9] **Tarkanyi v Mirror Newspapers Ltd** [1983] 2 NSWLR 688 at 699-706; **Hepburn v TCN Channel Nine Pty Ltd** [1984] 1 NSWLR 386 at 389-395; **Morris v Newcastle Newspapers Pty Ltd** (1986) 1 NSWLR 260 at 263-264; **Whelan v John Fairfax & Sons Ltd** (at 152-153).

[10] See **Feros v West Sydney Radio Pty Ltd** (Court of Appeal, 22 June 1982, unreported) at 3; **Sinclair v John Fairfax & Sons Ltd** (Court of Appeal, 4 March 1986, unreported) per McHugh JA (with whom Glass JA agreed) at 8-9; **Singleton v Ffrench** (at 433, 435).

[11] **Drummoyne Municipal Council v ABC** (1990) 21 NSWLR 135 at 138, 155, where my statement to that effect in **Whelan v John Fairfax &Sons Ltd** (at 155) was approved. The approach of this Court in the **Drummoyne Municipal Council Case** is now said to be "well settled": **Rigby v John Fairfax Group Pty Ltd** (Court of Appeal, 1 February 1996, unreported) per Priestley JA (with whom Meagher JA agreed) at 12 [SLAR [1997] HCA 46; (1996) 17 LegRep SL2a]. Kirby P, who had dissented in the **Drummoyne Municipal Council Case**, recognised in **Rigby** (at 1) that his earlier dissent had been to "no avail". The same approach has been taken by the Full Federal Court, in **Bourke v State Bank of NSW** (4 August 1995, unreported) at 24.

[12] (1990) 21 NSWLR 135 at 138-140, 154-155.

[13] Brewer's "*Dictionary of Phrase and Fable*"; "weasel word" is an expression of US origin, but it is very expressive when applied to a word which has both a more serious and a less serious meaning. See also "*The Grand Panjandrim*", Hook, at 151.

[14] The *causa causans* or the *causa sine qua non*.

[15] **Jones v Skelton** (1963) 63 SR 644 at 650.

[16] **Lloyd v David Syme & Co Ltd** (1985) 3 NSWLR 728 at 733.

[17] **Jones v Skelton** (at 656); **Steele v Mirror Newspapers Ltd** [1974] 2 NSWLR 348 at 372; **Farquhar v Bottom** [1980] 2 NSWLR 380 at 386; **Lloyd v David Syme & Co Ltd** (at 733).

[18] **Warren v Coombes** [1979] HCA 9; (1979) 142 CLR 531 at 551-552. The position may well be different in relation to an oral publication where witnesses have given evidence as to the manner in which the words were spoken and there was no electronic record taken, when the trial judge's findings of fact in relation to the manner in which the publication took place may assume some importance. Even then, however, the ultimate issue would still be for this Court to decide.

[19] 5th Edn (1984), by Prosser & Keeton, at 238. The earlier words quoted are taken from the judgment of Samuels JA in **Parker v John Fairfax & Sons Ltd** (Court of Appeal, 30 May 1980, unreported) at 16 [SLAR 5 September 1980, Legal Reporter Vol 1 No 6 at 6].

[20] **Shirt v Wyong Shire Council** [1978] 1 NSLWR 631 at 648, referring to the same statement in the 3rd Edn, at 209. The issue was more extensively discussed by this Court in **Potter v Commonwealth** (26 August 1980, unreported), per Moffitt ACJ at 1-3, Samuels JA at 3-4.

[21] **Parker v John Fairfax & Sons Ltd** (at 16).

[22] [1980] 2 NSWLR 380 at 386-387, referring to the same statement in the 4th Edn, at 308.

[23] "*The Law of Defamation in Canada*", Brown (2nd Edn, 1994), par 5.12.

[24] **Jones v Skelton** (at 650).

[25] Defamation Act, s 7A. This merely reflects the common law: **Capital and Counties Bank Ltd v George Henty & Sons** (1882) 7 App Cas 741 at 745; **Lewis v Daily Telegraph Ltd** [1964] AC 234 at 259, 266 (HL); **Jones v Skelton** (at 650); **Farquhar v Bottom** (at 385); **Mirror Newspapers Ltd v Harrison** [1982] HCA 50; (1982) 149 CLR 293 at 302.

[26] **Jones v Skelton** (at 650).

[27] **Slatyer v Daily Telegraph Newspaper Co Ltd** [1908] HCA 22; (1908) 6 CLR 1 at 7.

[28] **Ibid** (at 7).

[29] **Keogh v Incorporated Dental Hospital of Ireland** [1910] 2 Ir R 577 at 586.

[30] **Lewis v Daily Telegraph Ltd** (at 260).

[31] **Lewis v Daily Telegraph Ltd** (at 277); **Morgan v Odhams Press Ltd** [1971] 1 WLR 1239 at 1245; **Lang v Australian Consolidated Press Ltd** [1970] 2 NSWR 408 at 412; **Middle East Airlines Airliban SAL v Sungravure Pty Ltd** [1974] 1 NSWLR 323 at 340.

[32] **Capital and Counties Bank Ltd v George Henty & Sons** (at 744, 771); **English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Odhams Press Ltd** [1940] 1 KB 440 at 452-453.

[33] **Morgan v Odhams Press Ltd** (at 1254, 1269). The principles stated in these last two paragraphs - as encapsulated in **Farquhar v Bottom** (at 385-386) - have been adopted in this Court. See, for example, **John Fairfax & Sons Ltd v Foord** (1988) 12 NSWLR 708 at 719; **Crampton v Nugawela** (1997) A Torts R SS 81-416 at 63,867.

[34] **Ibid** (at 1270); **Steele v Mirror Newspapers Ltd** (at 373).

[35] **Lewis v Daily Telegraph Ltd** (at 277); **Morgan v Odhams Press Ltd** (at 1245); **Steele v Mirror Newspapers Ltd** (at 373); **Mirror Newspapers Ltd v World Hosts Pty Ltd** [1979] HCA 3; (1979) 141 CLR 632 at 641; **Parker v John Fairfax & Sons Ltd** (at 8).

[36] **Lewis v Daily Telegraph Ltd** [1963] 1 QB 340 at 374 (CA).

[37] **Gorton v ABC** (1973) 1 ACTR 6 at 11; **Brown v ABC** (Hunt J, 4 May 1987, unreported) at 11.

[38] **Morosi v Broadcasting Station 2GB Pty Ltd** [1980] 2 NSWLR 418(n) at 420.

[39] **Gordon v Amalgamated Television Services Pty Ltd** [1980] 2 NSWLR 410 at 413.

[40] **Brown v ABC** (at 12-13).

[41] **Wainer v Rippon** [1980] VicRp 15; [1980] VR 129 at 135.

[42] Defamation Act 1974, s 8; "Defamation" LRC 11, par 34.

[43] **Livingstone-Thomas v Associated Newspapers Ltd** (1969) 90 WN (Pt 1) 223 at 235; **Mirror Newspapers Ltd v World Hosts Pty Ltd** (at 641-642); **Mirror Newspapers Ltd v Harrison** (at 301); **Sergi v ABC** [1983] 2 NSWLR 669 at 677; **John Fairfax & Sons Ltd v Foord** (1988) 12 NSWLR 706 at 719; **Radio 2UE Sydney Pty Ltd v Parker** (1992) 29 NSWLR 448 at 455.

[44] **Lewis v Daily Telegraph Ltd** (at 259-260, 274, 286) (HL); **Mirror Newspapers Ltd v Harrison** (at 299-300).

[45] cf **Lubrano v Gollin and Co Pty Ltd** [1919] HCA 61; (1919) 27 CLR 113 at 118; **Rose v Hvric** [1963] HCA 13; (1963) 108 CLR 353 at 358.

[46] [1981] 1 NSWLR 9 at 12.

[47] [1964] AC 234 at 279-280: see **Bargold Pty Ltd v Mirror Newspapers Ltd** [1981] 1 NSWLR 9 at 12.

[48] [1981] 1 NSWLR 620 at 627.

[49] **Mirror Newspapers Ltd v Harrison** [1982] HCA 50; (1982) 149 CLR 293 at 300.

[50] [1982] HCA 50; (1982) 149 CLR 293 at 300.

[51] The phrase "reasonable cause" is substituted for "ground" at p 301.

[52] The cases referred to by the High Court are **Lang v Australian Consolidated Press Ltd** [1970] 2 NSWR 408 and **Rochfort v John Fairfax & Sons Ltd** [1972] 1 NSWLR 16.

[53] His first name is spelt "Leslie" in **Murphy v The Queen** [1989] HCA 28; (1989) 167 CLR 94 at 95.

[54] However, in a hand written version of these words also shown, only Bevan and Westwood are named and there is no indication that any third man is named by Patrick Murphy. No doubt the reason for this discrepancy will be elucidated by interrogatories.

[55] (1963) 63 SR 644.

[56] (at 651).

[57] (1985) 3 NSWLR 728 at 734.

[58] "The publisher can hardly complain in such a case if he is reasonably understood as having said something that he did not mean" (at 374)(CA).

[59] **David Syme & Co v Canavan** [1918] HCA 50; (1918) 25 CLR 234 at 238; **Knupffer v London Express Newspapers Ltd** [1944] UKHL 1; [1944] AC 116 at 119, 123, 124.

[60] cf **Knupffer v London Express Newspapers Ltd** (at 124).

[61] The plaintiff's picture - together with that of the boy who appears in both parts of the investigation report - is included in those shown in the closing titles to the complete "*Witness*" programme, but the defendant's assertion is correct.

[62] (cf the plaintiff's earlier statement "I have never had sex with anyone under age" - line 111.)

[63] There appears to be some corruption in the transcript of the last paragraph.

[64] **Lewis v Daily Telegraph Ltd** (at 259-260, 274, 286).

[65] **Mirror Newspapers Ltd v Harrison** (at 299-300).

[66] Film of Les Murphy is shown on the screen during the words "in others he fathered appalling violence" (line 351).

[67] **Morgan v Odhams Press Ltd** (at 1243-1244, 1253-1254, 1258-1259, 1265).