29/09; [2009] VSC 473

SUPREME COURT OF VICTORIA

MOONEY v THE AGE COMPANY LIMITED & ANOR

Kaye J

19, 23 October 2009

CIVIL PROCEEDINGS – DEFAMATION – PRACTICE AND PROCEDURE – IMPUTATION PLEADING REASONABLE BASIS TO SUSPECT PLAINTIFF IMPLICATED IN MURDER – WHETHER WORDS CAPABLE OF DEFAMATORY MEANING PLEADED BY PLAINTIFF – WHETHER IMPUTATIONS TOO IMPRECISE AND UNCERTAIN.

M. claims damages against *The Age* in respect of an article written by the second defendant Rule. In the statement of claim, M. pleaded that the article was defamatory of her and was understood to mean, among other things, "that there were reasonable grounds to suspect that M. may have been implicated in the murder of her husband." The defendants applied to strike out each of the three innuendos pleaded by M. and alleged that the first imputation was incapable of arising from the article and was imprecise and ambiguous. Further that the other imputations were not pleaded with sufficient precision and they constituted "hyperbole".

HELD: Application in respect of imputations one and three rejected. In relation to imputation two, the words "and voracious" should be struck out of the imputation pleaded.

1. The question whether a particular publication is defamatory of a plaintiff, is determined by reference to the test whether an ordinary reasonable person, to whom the publication was made, would understand the publication to convey a meaning, or meanings, which would lower, or damage, the reputation of the plaintiff in the eyes of right thinking members of the community. In the last four decades or so, the practice has developed whereby a plaintiff specifies, as "false innuendos", the ordinary and natural meaning or meanings, which it will be alleged, at trial, that the publication bore of and concerning the plaintiff. The question, whether the words published by the defendant in fact bore those meanings, is a question of fact, to be determined at trial by the tribunal of fact. Accordingly, the question, whether the words published by the defendant bore the meanings pleaded by the plaintiff, will be a question of fact for the jury, that is, whether a jury could reasonably conclude that an ordinary reasonable reader of the article would have understood the publication in the sense alleged in imputation (a) pleaded by the plaintiff. That is, the critical question is whether the article is reasonably capable of being understood, in the eyes of an ordinary reasonable reader, to have borne the meaning alleged in imputation (a).

2. The "ordinary reasonable" reader person is described as someone who is not "avid for scandal", and who is neither "unusually suspicious nor unusually naïve" nor lives in an ivory tower, and who reads between the lines in light of his or her general knowledge and experience of worldly affairs. Thus, the ordinary reasonable reader does engage in a degree of loose thinking. In this respect, it is important to bear in mind that the ordinary reasonable reader is a lay person and not a lawyer, and such a person has a much greater capacity for implication than a lawyer. Similarly, the ordinary reasonable reader will "read casually and not expect a high degree of accuracy". On the other hand, it is necessary to bear in mind the distinction between the reader's understanding of what the article is stating, and a judgment or conclusion, which the reader may reach as a result of his or her own beliefs and prejudices, after reading the article; the defamatory quality of the article is to be determined by the former, and not the latter, proposition.

3. Bearing in mind the principles relating to the mental processes of the ordinary reasonable reader, a jury would not be acting unreasonably, if it were to conclude that the overall thrust of the article was to impute that the plaintiff was reasonably suspected of being involved in the murder of her husband. Accordingly, the article, which is the subject of the claim, is capable of bearing the meaning specified in sub-paragraph (a) of paragraph 5 of the statement of claim.

KAYE J:

1. The plaintiff was the wife of Anthony Mooney, who died on 7 September 2008 at the age of 46 years. In this proceeding, the plaintiff claims damages against the defendants in respect of an article written by the second defendant, and published by the first defendant, on the first and fourth pages of the "Insight" section of the Saturday *Age* newspaper published on 23 May 2009. On the first page the article was headed "Death in Branxholme". On the fourth page the article

was headed "Branxholme Death Mystery". The present application, which is before me, consists of an application by the defendant, by summons, to strike out each of the three innuendos pleaded by the plaintiff as arising from the article.

2. In paragraph 5 of the statement of claim, the plaintiff pleads that, in its ordinary and natural meaning, the article was defamatory of her, and was understood to mean:

> "(a) that there were reasonable grounds to suspect that the plaintiff may have been implicated in the murder of her husband;
>
> (b) that the plaintiff was a cold-hearted and voracious woman who married her husband for personal gain rather than love;
>
> (c) that the plaintiff was a cold-hearted wife and mother in that she was unmoved by the tragic death of her husband."

3. The defendants contend that the first imputation is incapable of arising from the article, and further that it is imprecise and ambiguous as presently drafted. The defendant objects to the second and third imputations on the grounds that they are not pleaded with sufficient precision, and that they constitute "hyperbole".

The article

4. The article is quite lengthy. It is only necessary for me to give a brief summary of it. I shall refer to it in greater detail, when considering the submissions made by the parties in relation to the imputations pleaded by the plaintiff. The article commences by reporting that Mr Mooney, before his death, had been a fit and successful builder. However, about ten weeks before he died, he was stricken with a sudden pain which caused him to feel ill. The article then refers to the purchase by the plaintiff and Mr Mooney of the property at Branxholme, at which Mr Mooney was living at the time of his death. The article states that the plaintiff, and the couple's two young daughters, had been absent on a world cruise for more than two months before Mr Mooney's death. During that time, Mr Mooney had been living in the house on Branxholme, while his son and stepson were each living in the cottage on the same property. On the evening on which he died, Mr Mooney had telephoned his son and complained of being ill. By the time Mr Mooney's son and stepson arrived, he was in distress, and soon after died.

5. The article then refers to the plaintiff's marriage to Mr Mooney. In the first column on page 4, the article states that during the previous two years the plaintiff and Mr Mooney had been virtually separated, but that Mr Mooney had been hoping for a reconciliation with the plaintiff on her return home. The article states that the plaintiff had stated to a friend that she regarded Mr Mooney as being "superfluous" in her life.

6. The article then proceeds to state that while the plaintiff was away, Mr Mooney had obtained a poison from a mate, with whom he was drinking in the Condah Pub. Mr Mooney had requested that poison, because he had had problems with possums on the property. The article then states that about three weeks before Mr Mooney's death, his sister and brother in law visited him. During the course of a meal, they commenced to use a sauce which was in the kitchen. The sister stated that the sauce tasted "awful", and that she immediately tipped it down the sink. Mr Mooney's brother in law was surprised at the lumpy appearance of the sauce, which did not seem to him to have been the result of age. The article states "at the time he didn't think much of it".

7. The article then returns to the circumstances of the death of Mr Mooney. After his death, his brother, Gary Mooney, who was a policeman, ascertained from the Coroner's Court that the cause of death appeared to be pneumonia. The article then proceeds to deal with the reactions of the plaintiff after Mr Mooney's death. It describes her "gritty self discipline" at church and at the graveside, and that she did not shed any tears. It refers to the fact that the plaintiff, after the funeral, invited a friend to visit the homestead to look at the antique beds. The article also describes how the plaintiff did not seem concerned to erect any appropriate memorial to her late husband, but that, a few months after his death, she left the property to live in Perth.

8. In the last column, the article describes a phone call, which friends of the deceased man took from the plaintiff. In that phone call, the plaintiff is said to have stated that she had

researched the symptoms suffered by her husband before his death, and that she had ascertained that they were the same symptoms as a person suffering strychnine poisoning would display. Subsequently, the article reports that Gary Mooney ascertained, in February 2009, that toxicology tests had confirmed that strychnine had killed his brother. The article concludes by stating that the Homicide Squad became involved, and that they had interviewed "almost everyone who might throw a light" on how a person of the cheerful disposition of Mr Mooney could have come to have died from a poison, which he used gloves to handle. The article stated that the question to be considered at the forthcoming coronial inquest would be "… was it accident, suicide or something more sinister?"

Imputation (a) – submissions

9. As I stated, the defendants submit that imputation (a) should be struck out on two bases. First, Mr M Wheelahan SC, who appeared with Mr S O'Meara for the defendants, submitted that the article could not be understood, by the ordinary reasonable reader, to impute that the plaintiff was reasonably suspected of being implicated in her husband's murder. Mr Wheelahan developed that argument by a detailed and careful reference to the article as a whole. In essence, he submitted that there were two "streams" of factual statement contained within the article. The first "stream" is the repeated reference to the fact that the plaintiff had been overseas, on a cruise, for more than two months before the death of her husband. The second "stream" was that the plaintiff's husband's death was caused by strychnine poisoning. Mr Wheelahan submitted that the article did not, at any time, combine those two streams, so that the ordinary reasonable reader could not understand that the article was alleging that the plaintiff had been responsible for the death of her husband.

10. Mr Wheelahan commenced by referring to the fact that the article, near its commencement, stated that the date of Mr Mooney's death was Sunday 7 September 2008. In the fifth column on the first page, the article reported that the plaintiff was then overseas, and that she was not due to return for a further two weeks, after completing a world cruise on which she had embarked, with her two daughters, more than two months previously. In the first column on the fourth page, the article then stated that the plaintiff had been living in the house with her daughters before her departure for overseas, while her husband, from whom she was then virtually separated, was living in the cottage with the adult sons. The second column on that page makes it plain that it was while the plaintiff was away that Mr Mooney spoke to his friends at the Condah Pub about his problems with the possums, and that it was then that he obtained poison from one of his friends at the hotel. Thus, Mr Wheelahan submitted that the article made it plain that the strychnine, which was ultimately found to be responsible for the death of Mr Mooney, was acquired by Mr Mooney, independently of the plaintiff, while the plaintiff was away on her overseas trip.

11. Mr Wheelahan then stated that the reference, at the foot of the same column, to the incident relating to the contaminated sauce, on an ordinary reasonable analysis of the article, turned out to be a matter of no moment. He submitted that that was so because an ordinary reader would readily understand that it was highly unlikely that the plaintiff would have poisoned the sauce, given that it was available for use, not only by her husband, but also by her two sons. In addition, Mr Wheelahan submitted that the article made it plain that the strychnine, which was responsible for Mr Mooney's death, was acquired by him after the plaintiff had left for overseas. That point was emphasised by the fact that the article, in the fifth column on the fourth page, stated that the plaintiff received news of her husband's death while still on the cruise ship, and that it took her three days to be able to return home by aeroplane. Mr Wheelahan pointed out that while the article, in the sixth column, stated that the plaintiff apparently considered that her husband had died of strychnine poisoning, before the coroner's report to that effect came to light, nevertheless the article, at the same time, contained a reasonable innocent explanation for that understanding by the plaintiff. He noted that the article pointed out that, subsequently, it was ascertained that the plaintiff's two sons had told her that Mr Mooney had been using strychnine while she was away. Mr Wheelahan submitted that that statement, in the article, negated any adverse imputation in respect of the plaintiff, which might otherwise have derived from the article suggesting that she was aware that her husband had died of strychnine, before the pathologist's test had revealed that to be so.

12. In response, Mr R McGarvie SC, who appeared with Mr D Parker for the plaintiff, submitted that the article, read as a whole, by the ordinary reasonable reader, is capable of giving rise to

the imputation pleaded in paragraph 5(a) of the statement of claim. Mr McGarvie, first, submitted that the article was reasonably capable of giving rise to the imputation that it was reasonably suspected that the plaintiff's husband, Mr Mooney, had been murdered. Mr McGarvie pointed to the fact that the second page of the article was entitled "Branxholme Death Mystery". The article concluded by referring to the involvement of the Homicide Squad, and by posing the question whether the death was by accident, suicide or "something more sinister". Mr McGarvie pointed to the sections of the article, in which the writer discounted the possibility that Mr Mooney had accidentally poisoned himself by using strychnine to eradicate possums on his property. The article expressly stated that Mr Mooney maintained that he knew that the poison used by him was dangerous, and that he wore gloves when he handled it. Similarly, Mr McGarvie submitted that the article would be reasonably understood as discounting the possibility that Mr Mooney had committed suicide. The article expressly referred to the fact that Mr Mooney was a "cheerful" optimistic man, who had just gained a $1.9 million building contract at Monivae College in Hamilton. The article commenced by stating that Mr Mooney was a man "whose glass was always half full". The article also reported that a close friend of Mr Mooney had stated that he was an habitual optimist. In those circumstances, Mr McGarvie submitted that a jury could reasonably conclude that the article imputed that the there were reasonable grounds to suspect that Mr Mooney had died as a result of murder by strychnine poisoning.

13. Mr McGarvie further submitted that a jury could reasonably conclude that the article imputed that the plaintiff was reasonably suspected of committing that murder. First, he pointed to the fact that the plaintiff had been reported as stating to a friend that her husband was "superfluous", and that she had acted in a manner which was unemotional and cold hearted at his funeral and after his death. Thus, Mr McGarvie submitted, the plaintiff is portrayed as a "black widow", who did not care that her husband had died. Mr McGarvie also pointed to the section of the article, in which the plaintiff readily drew the inference that her husband had died as a result of strychnine poisoning, and that she had made a point of telling a friend of her conclusion. Mr McGarvie submitted that the article might be understood as implying that the plaintiff had readily recognised an opportunity to divert suspicion from herself, by blaming her husband's death on an accident due to his use of strychnine to poison possums. Finally, Mr McGarvie submitted that, while the article imputed that Mr Mooney had died in suspicious circumstances, the only person indicated by the article as being the subject of such suspicion was the plaintiff. No-one else was pointed to, or even hinted at, in the article as having been implicated in the death of Mr Mooney. Rather, the article, repetitively, referred to circumstances, such as the plaintiff's estrangement from Mr Mooney, her lack of care for him from the outset of their marriage, and the evident lack of grief suffered by the plaintiff as a result of her husband's death.

14. Mr McGarvie also submitted that the reference to the incident relating to the sauce was not an irrelevant detail in the article, but, rather, that it had been included for a particular purpose. The article reported that Mr Mooney had been living on his own in the house while his family was away. The two sons had remained in the cottage. Before her departure it was reported that the plaintiff had been living in the house. The section of the article, referring to the sauce, stated that Mr Mooney's brother in law "at the time" did not "think much of" the fact that the sauce tasted vile. Mr McGarvie submitted that the jury might conclude that the implication of that section was that an incident, which at the time seemed irrelevant, may now have some sinister connotation, in light of the findings as to the circumstances in which Mr Mooney died.

15. Accordingly Mr McGarvie submitted that the article is capable of giving rise to the imputation pleaded in paragraph 5(a) of the statement of claim.

Conclusion whether article capable of bearing imputation (a)

16. The principles, which relate to the question raised by the defendants' application, are not in dispute. Ultimately, the question whether a particular publication is defamatory of a plaintiff, is determined by reference to the test whether an ordinary reasonable person, to whom the publication was made, would understand the publication to convey a meaning, or meanings, which would lower, or damage, the reputation of the plaintiff in the eyes of right thinking members of the community. In the last four decades or so, the practice has developed whereby a plaintiff specifies, as "false innuendos", the ordinary and natural meaning or meanings, which it will be alleged, at trial, that the publication bore of and concerning the plaintiff. The question, whether the words published by the defendant in fact bore those meanings, is a question of fact, to be

determined at trial by the tribunal of fact. In this case, the plaintiff has elected for her case to be heard by a jury. Accordingly, the question, whether the words published by the defendant bore the meanings pleaded by the plaintiff, will be a question of fact for the jury. It is not for me to determine, at this stage, whether the article, published by the defendants, did bear the meanings alleged by the plaintiff. Rather, the question is whether a jury could reasonably conclude that an ordinary reasonable reader of the article would have understood the publication in the sense alleged in imputation (a) pleaded by the plaintiff. That is, the critical question is whether the article is reasonably capable of being understood, in the eyes of an ordinary reasonable reader, to have borne the meaning alleged in imputation (a).[1]

17. As I stated, that issue must be determined by reference to how the article would have been understood by the ordinary reasonable reader of it. The attributes ascribed by the law to the "ordinary reasonable" reader (or listener) are well known, and not in dispute. Such an hypothetical person is described as someone who is not "avid for scandal", and who is neither "unusually suspicious nor unusually naïve".[2] Equally, the hypothetical "ordinary reasonable" reader has been described as an ordinary person, who does not live in an ivory tower, and who reads between the lines in light of his or her general knowledge and experience of worldly affairs.[3] Thus, the ordinary reasonable reader does engage in a degree of loose thinking.[4] In this respect, it is important to bear in mind that the ordinary reasonable reader is a lay person, and not a lawyer, and such a person has a much greater capacity for implication than a lawyer.[5] Similarly, the ordinary reasonable reader will "read casually and not expecting a high degree of accuracy".[6] On the other hand, it is necessary to bear in mind the distinction between the reader's understanding of what the article is stating, and a judgment or conclusion, which the reader may reach as a result of his or her own beliefs and prejudices, after reading the article; the defamatory quality of the article is to be determined by the former, and not the latter, proposition.[7]

18. In considering that question, it must also be borne in mind that while the test, of the ordinary reasonable reader (or listener), is the same, its application may differ, depending on the mode and nature of the publication in question. The ordinary reasonable reader of a serious newspaper article may be expected to consider the material with greater care and precision, than when reading a newspaper or hearing a transient broadcast, such as on the radio. That principle was well described by Hunt CJ in *Amalgamated Television Services Pty Ltd v Marsden*, where his Honour (omitting references) stated:

> "The mode or manner of publication is a material matter in determining what imputation is capable of being conveyed ... 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 ..., and the less the degree of accuracy which would be expected by the reader .. The ordinary reasonable reader of such an article is understandably prone to engage in a certain amount of loose thinking. ... 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. 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 ... ."[8]

19. Mr Wheelahan submitted that the article in question was a serious piece, and would have been read carefully and analytically by a person who chose to read it. On the other hand, Mr McGarvie submitted that the article had a sensational air to it, by referring to a mystery death, and by deliberately raising issues by way of insinuation rather than direct expression.

20. For the purposes of this ruling, I accept that the article would have been read, by the ordinary reasonable recipient of it, more carefully than a news item read, in haste, during a week day. On the other hand, the article was not a serious political commentary, nor an analysis of an important item of current affairs, which might have been read carefully and critically by an ordinary reasonable reader. Rather, I agree with Mr McGarvie that the article was intended to create an aura of mystery and suspicion in the manner in which it was written. It is a lengthy article, which does not develop logically or sequentially, but, rather, which tends to alternate various topics. In that sense, the article does leave room, in the mind of the ordinary reasonable reader, for greater latitude of implication and imputation.

21. In determining the question posed by the defendants' submissions in respect of imputation (a), it is important to bear in mind the limited nature of the question which I must determine, namely, whether a jury is reasonably capable of concluding that the article, in the eyes of an ordinary reasonable reader, bore the imputation pleaded in paragraph 5(a) of the statement of claim. The question as to the meaning of an article is, as I stated, ultimately a question of fact for the jury. Indeed, such a question is quintessentially a jury question. Ultimately, a jury, consisting of six men and women, who are not lawyers, drawn from the community, are far better placed to decide what a particular newspaper article might have meant to an ordinary reasonable reader, than a lawyer or judge. Thus, some restraint must be exercised in determining the question posed by the first submission made by Mr Wheelahan and Mr O'Meara in respect of imputation (a).

22. Bearing those principles in mind, I have come to the conclusion that a jury could reasonably determine that the article bore the meaning pleaded in imputation (a) in paragraph 5 of the statement of claim. In reaching that conclusion, I shall, for the moment, put aside the second submission, made by Mr Wheelahan, in respect of the particular wording used to plead that imputation. However, in my view a jury could reasonably determine that the article, in the mind of an ordinary reasonable reader, meant that there were reasonable grounds upon which to suspect that the plaintiff had been criminally involved in the murder of her husband. In reaching that conclusion, I acknowledge the force of the points made by Mr Wheelahan in his cogent and well prepared submissions. It may well be that, ultimately, those submissions will persuade a jury that the article would not have been so understood by the ordinary reasonable reader. However, in my view, the matters raised by Mr McGarvie in his submissions are sufficient to persuade me that a jury would not be acting unreasonably if it were to conclude that, notwithstanding Mr Wheelahan's submissions, the article did bear the meaning described in imputation (a).

23. In determining this question, it is important to bear in mind that the article is one of significant length. The heading to the second page refers to a "mystery". Clearly, the article is not referring to an accidental death, or to some other such tragedy. Rather, the article raises the question whether more sinister circumstances were at work in leading to the death of Mr Mooney. Accordingly, the article commences by stating that Mr Mooney was 46 years of age, and was a fit, successful builder "whose glass was always half full". In that sense, the article discounts sudden or natural causes, and death resulting from suicide. The latter proposition is reiterated on page four, in which Mr Mooney is twice described in terms of being an optimistic personality with no reason to bring about his own death. The article, on page four, twice referred to the fact that Mr Mooney had taken care to wear gloves when he handled the poison used by him to eradicate possums from his property, thus discounting the possibility of accidental death. On the other hand, by referring to the involvement of the Homicide Squad, and by posing the question (to be answered at a coroner's inquest) whether death was by accident, suicide or "something more sinister", the article is clearly capable of being understood as imputing that there were reasonable grounds to suspect that Mr Mooney's death may have been the result of murder. Otherwise, such a question would not have been open for consideration at the coroner's inquest. Nor would a lengthy article have been published in the Age, referring expressly to the involvement of the Homicide Squad who, it is reported, "had its reasons" to travel to Hamilton to investigate Mr Mooney's death, once it was ascertained that he had died as a result of strychnine poisoning. In those circumstances, in my view, I consider that a jury could reasonably conclude that the article imputed, to the ordinary reasonable reader, that there were reasonable grounds to suspect that Mr Mooney's death had resulted from an act of homicide, rather than from accident or suicide.

24. The question, whether a jury could reasonably conclude that the ordinary reasonable reader would have understood that it was the plaintiff who was the subject of that reasonable suspicion, is not as clear cut. There is, I consider, some force in the submission by Mr Wheelahan, in particular, that it is apparent from the article that the plaintiff was overseas at the time Mr Mooney purchased the poison, which he used to try to eradicate possums on his property. That factor may ultimately persuade a jury to conclude that the article was not understood, by the ordinary reasonable readers of it, to bear the meaning pleaded in imputation (a). However, in my view, that consideration, and the other matters argued by Mr Wheelahan, do not necessarily lead to the conclusion that a jury could not reasonably conclude that the article was imputing that the plaintiff was reasonably suspected of having murdered her husband. There are a number of other aspects of the article which, in combination, could reasonably justify a jury concluding that, notwithstanding the point made by Mr Wheelahan, the article bore the meaning pleaded in imputation (a).

25. First, the article does make it clear, on a repeated basis, that the plaintiff felt little or no affection towards her husband during his life, that she regarded him as "superfluous", and that, on his death, she felt no grief. The article states that the plaintiff's relationship with her husband had deteriorated as a result of the pressure of Mr Mooney's building work and as a result of the plaintiff's "restless quest for the next challenge". The suggestion in the article that the plaintiff considered her husband to be "superfluous" not only creates the impression that she is an unusually callous and materialistic person, but also has sinister undertones in the context of an article concerning the otherwise unexplained death of the plaintiff's husband as a result of poisoning.

26. Secondly, in this context, I consider that the reference to the incident relating to the sauce could be reasonably regarded by the jury not to be an irrelevant detail included in the article for no apparent purpose. Rather, a jury may fairly consider that the reference to that incident was intended to convey something sinister relating to the sauce, which had been left in the plaintiff's home before her departure for overseas. The article stated that after the plaintiff had left for overseas, her estranged husband moved from the cottage on the property back into the home, and lived there on his own. The statement in the article, that the deceased man's brother-in-law did not think much of the incident relating to the sauce bottle "at the time", may be understood, by a jury, as indicating that a fact which, at one time seemed irrelevant, may have had significance in the death of Mr Mooney.

27. The third relevant aspect of the article concerns the reference to the telephone call by the plaintiff to some friends, just one week after Mr Mooney's funeral, in which the plaintiff is reported to have stated that when she looked up the symptoms of pneumonia on the internet, she discovered that they were the same symptoms as strychnine poisoning. Although the article proceeds to state that later it was found that "the boys" had told the plaintiff that Mr Mooney had been using strychnine, nevertheless the reference to that conversation may be considered by a jury to indicate that the plaintiff, before the pathologist's report had been completed, had a consciousness that her husband had died from strychnine, and that she was concerned to divert suspicion from herself by attributing her husband's death to accidental causes.

28. Fourthly, as pointed out by Mr McGarvie, the article does not, in any way, identify any potential candidate, other than the plaintiff, for being the subject of suspicion in respect of the death of Mr Mooney. While the article, in more than one place, relates the troubled nature of Mr Mooney's marriage to the plaintiff, and gives some point to the lack of feeling by the plaintiff for her husband, before and after his death, it does not intimate that any other person could have been the subject of suspicion in causing Mr Mooney's death. That circumstance, combined with the reference to the incident relating to the sauce, and the insinuation that the plaintiff knew her husband had died from strychnine poisoning, and combined with the allegations in the article relating to the plaintiff's lack of appropriate feeling towards her husband, are, in my view, sufficient to entitle the jury to reasonably conclude that the article did impute that the plaintiff was the subject of reasonable suspicion relating to her husband's death.

29. None of the above matters, to which I have referred, directly meet the argument, which was at the centre of Mr Wheelahan's submissions, namely, that the article stated that Mr Mooney had purchased poison at the Condah Hotel when his wife was overseas. That circumstance may, ultimately, persuade a jury that an ordinary reasonable reader would not have understood the article as bearing the imputation pleaded in paragraph 5(a) of the statement of claim. However, bearing in mind the principles relating to the mental processes of the ordinary reasonable reader, to which I have referred, I do not consider that a jury would be acting unreasonably, if it were to conclude that, notwithstanding the point made by Mr Wheelahan, the overall thrust of the article was to impute that the plaintiff was reasonably suspected of being involved in the murder of her husband. Accordingly, I am of the view that the article, which is the subject of the claim, is capable of bearing the meaning specified in sub-paragraph (a) of paragraph 5 of the statement of claim.

30. I turn, then, to the second submission made by Mr Wheelahan and Mr O'Meara, on behalf of the defendants, in respect of imputation (a). Mr Wheelahan submitted that the imputation is pleaded in a manner which is so imprecise as to be embarrassing. In particular, he referred to the following aspects of the imputation: the use of the concept of "reasonable grounds", which he

submitted was uncertain; the casting of the imputation in the passive, rather than active, voice; the use of the phrase that the plaintiff "may have been" (rather than "had been") involved in her husband's murder; and the use of the imprecise term "implicated", rather than, for example, "criminally involved". In respect of the last point, Mr Wheelahan submitted that a person may be "implicated" in a murder in an innocent sense, for example as a witness to such a crime. In that respect, he referred to some dicta in the judgment of Hedigan J in *Buckley v John Fairfax Publications Pty Ltd*[9].

31. On the other hand, Mr McGarvie submitted that the imputation is neither imprecise nor uncertain. He submitted that any imprecision had resulted from the fact that the article contains the relevant imputation by way of insinuation, rather than express or direct statement. In that respect, he referred to a passage from the judgment of Hedigan J in *Buckley's case*[10], in which his Honour observed that where a publisher uses loose, imprecise or ambiguous language, the court may have to exercise a wider degree of latitude when considering the framing of the imputation. Mr McGarvie submitted that the use of the term "implication" could only entail an allegation that the plaintiff was criminally involved in the murder.

32. In my view, imputation (a) is not so imprecise or uncertain, as to be liable to be struck out. In other contexts, it has been accepted that a publication may be capable of bearing an imputation that a plaintiff is reasonably suspected of a particular criminal offence.[11] In particular, in *Ronci v Nationwide News Pty Ltd*[12], Hasluck J refused to strike out an imputation of suspicion on reasonable grounds, which was pleaded, by the plaintiff, to have arisen from an article reporting that the plaintiff's husband had shot himself in her presence, giving rise to a question as to her entitlement to the proceeds of a life insurance policy. The effect of those authorities is that it may be acceptable, in an appropriate case, to plead a suspicion, based on reasonable grounds, as an imputation arising from published material.

33. Further, I do not consider that the use of the phrase "may have been", rather than "had been", gives rise to any uncertainty or imprecision. Conversely, the use of the pluperfect "had been" would not have invested the imputation with any greater degree of precision. Further, contrary to the submissions of Mr Wheelahan, in my view the pleading that the plaintiff may have been "implicated" in her husband's death could not, in its context, be sensibly understood to be a plea that she was innocently involved. After all, imputation (a) is intended to be an imputation of a defamatory meaning. In any event, to allege that a person has been "implicated" in her husband's murder is, ordinarily, to convey that that person was criminally involved in the death. Thus, I do not consider that the imputation is so imprecise or uncertain as to render it liable to be struck out. I agree with Mr McGarvie that such imprecision, as there may be in the drafting of the innuendo, is a product of the manner in which it is implied in the article.

Imputation (b)

34. Mr Wheelahan attacked the second imputation – contained in paragraph 5(b) of the statement of claim – on the basis that it contained hyperbole, and was uncertain of meaning. I accept that in one respect that criticism is correct, and, it would seem to me, was so accepted by Mr McGarvie in the course of argument. In my view, the use of the word "voracious" is inappropriate. While, ordinarily, a judge should be chary of critiquing the phraseology employed in pleading an imputation, nevertheless the adjective "voracious" is ordinarily used to describe matters such as appetite. Ultimately, Mr McGarvie conceded that it was unlikely that, if he were to open the plaintiff's case to a jury, he would use the same language in outlining the second imputation. Accordingly, the words "and voracious" should be struck out of imputation 5(b), but the plaintiff should be given leave to amend that imputation by re-pleading a more appropriate adjective.

35. At one point, Mr Wheelahan submitted that the use of the two adjectives ("cold-hearted" and "voracious") was too wide because the words had no point of reference. However, it is clear that they are pleaded to attribute those particular qualities to the plaintiff, because she had married her husband for personal gain, rather than love. In that sense, it is, in my view, permissible for the plaintiff to plead appropriate adjectives in her imputation, to describe the qualities ascribed to her by the article as a consequence of the allegation that she had married her husband for gain rather than for affection.

Imputation (c)

36. Mr Wheelahan submitted that the imputation in paragraph 5(c) of the statement of claim should be struck out, so as to remove the allegation that the plaintiff was a "cold hearted" mother. However, in my view, the article is capable of giving rise to the imputation that the plaintiff was not only a cold hearted wife, but also a cold hearted mother, arising from her lack of grief relating to the death of her husband. The article referred to the plaintiff's lack of emotion at her husband's funeral, to her failure to erect a headstone on the grave, and to her failure to commemorate her husband's birthday, shortly after his death. While the prime thrust of those parts of the article was to impute that the plaintiff was a rather heartless widow, the conduct so attributed to the plaintiff would, in my view, also be reasonably capable of giving rise to the imputation that the plaintiff, in that way, was being cold hearted to the children of her husband and herself. Indeed, in the course of submissions, Mr Wheelahan accepted that if the imputation pleaded in paragraph 5(c) were understood as being tied to the plaintiff's reactions to her husband's death, then that imputation would be appropriate to be left to the jury.

Conclusion

37. Accordingly, for the foregoing reasons, I reject the application by the defendants that paragraphs 5(a) and 5(c) of the statement of claim be struck out. I uphold the submission on behalf of the defendants that the words "and voracious" should be struck out of the imputation pleaded in paragraph 5(b), and I give leave to the plaintiff to re-plead paragraph 5(b) in accordance with these reasons for decision.

38 I shall hear counsel on the question of costs.

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[1] *Jones v Skelton* (1963) 63 SR (NSW) 644; [1964] NSWR 485, 491 (PC); *Favelle and Anor v Queensland Newspapers Pty Ltd and Anor* [2005] HCA 52; (2005) 221 ALR 186, [9]; (2005) 79 ALJR 1716.
[2] *Lewis v Daily Telegraph Limited* [1963] 1 QB 340; [1964] AC 234, 259 to 260 (Lord Reid), 277 (Lord Devlin); [1963] 2 All ER 151; [1963] 2 WLR 1063.
[3] *Lewis v Daily Telegraph Limited* (above), 258 (Lord Reid).
[4] Footnote (above) 258 (Lord Reid).
[5] *Morgan v Odhams Press Limited* [1971] 2 All ER 1156; [1971] 1 WLR 1239, 1245; *Lang v Australian Consolidated Press Limited* [1970] 2 NSWR 408, 412.
[6] *Morgan v Odhams Press Limited* (above) 1270 (Lord Pearson).
[7] *Mirror Newspapers Limited v Harrison* [1982] HCA 50; (1982) 149 CLR 293, 301; (1982) 42 ALR 487; (1982) 56 ALJR 808 (Mason J, with whom Wilson J agreed).
[8] [1997] NSWCA 17; (1998) 143 FLR 180; (1998) 43 NSWLR 158, 165 to 166; [1998] Aust Torts Reports 81-462.
[9] (Unreported, Supreme Court of Victoria, 18 June 2001, page 13).
[10] Footnote above, page 14.
[11] See for example *Ronci v Nationwide News Pty Ltd* [2001] WASC 239, [41][58] (Hasluck J); *Channel 7 Adelaide Pty Ltd v DJS* [2006] SASC 10, [27] (Debelle J), [41] (Gray J); (2006) 94 SASR 296.
[12] Footnote above.

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