Supreme Court

New South Wales

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| Case Name: | O’Brien v Australian Broadcasting Corporation |
| Medium Neutral Citation: | [2016] NSWSC 1289 |
| Hearing Date(s): | 9, 10, 11, 12, 13, 16 November 2015 |
| Decision Date: | 15 September 2016 |
| Before: | McCallum J |
| Decision: | Judgment for the defendant |
| Catchwords: | DEFAMATION – Media Watch programme analysing articles written by a journalist about the results of tests for toxic substances – imputations that the journalist engaged in trickery by misrepresenting the location of the tests and that she created unnecessary concern in the community by irresponsibly failing to consult experts in the preparation of her article – defences of fair comment at common law and statutory defence of honest opinion – whether defamation conveyed as the comment or opinion of the presenter – defence of truth – whether imputations substantially true – defence of contextual truth – whether open to defendant to rely on an alternative, fall-back imputation pleaded by the plaintiff – whether open to plaintiff to rely on an imputation of which she complained but which was proved true – consideration of the decision of the Queensland Court of Appeal in Mizikovsky – whether because of the substantial truth of the contextual imputations the (untrue) defamatory imputation did not further harm the plaintiff’s reputation – defence of qualified privilege at common law – whether the Media Watch programme was published on an occasion of qualified privilege at common law |
| Legislation Cited: | Defamation Act 2005 (NSW), ss 22, 25, 26, 31<br>National Environment Protection Council Act 1994 |

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|  | (Cth), s 14(1)(d)<br>Supreme Court Act 1970 (NSW), s 90 |
| Cases Cited: | Adam v Ward [1917] 309<br>Bashford v Information Australia (Newsletters) Pty Ltd (2004) 218 CLR 366<br>Bickel v John Fairfax & Sons Ltd [1981] 2 NSWLR 474<br>Born Brands Pty Ltd v Nine Network Australia Pty Ltd [2014] NSWCA 369<br>Carleton v ABC [2002] ACTSC 127<br>Channel Seven Adelaide Ltd v Manock (2007) 232 CLR 245; [2007] HCA 60<br>Dank v Nationwide News Pty Ltd [2016] NSWSC 156<br>Greek Herald Pty Ltd v Nikolopoulos (2002) 54 NSWLR 165; [2002] NSWCA 41<br>Hall v TCN Channel Nine Pty Ltd [2014] NSWSC 1604<br>Harbour Radio Pty Ltd v Ahmed (2015) 90 NSWLR 695; [2015] NSWCA 290<br>McMahon v John Fairfax Publications Pty Ltd (No 6) [2012] NSWSC 224<br>Kelly v Fairfax Media Publications Pty Ltd (No 2) [2014] NSWSC 166<br>Merivale v Carson (1887) 20 QBD 275<br>Mizikovsky v Queensland Television Ltd [2013] QCA 68<br>Roberts v Bass (2002) 212 CLR 1; [2002] HCA 57<br>Rose v Allen & Unwin Pty Ltd [2013] NSWSC 991<br>Smith's Newspapers Ltd v Becker (1932) 47 CLR 279; [1932] HCA 39<br>Toogood v Spyring (1834) 1 CM&R 181 at 193; 149 ER 1044 |
| Category: | Principal judgment |
| Parties: | Natalie O'Brien (plaintiff)<br>Australian Broadcasting Corporation (defendant) |
| Representation: | Counsel:<br>T Molomby SC, C Dibb (plaintiff)<br>P Gray SC, MA Polden (defendant)<br><br>Solicitors:<br>Mitry Lawyers (plaintiff)<br>Australian Broadcasting Corporation (defendant) |

File Number(s): 2013/357528

## JUDGMENT

1 HER HONOUR: These are proceedings for defamation arising out of a segment of the *Media Watch* programme presented by Mr Paul Barry. As the name suggests, the *Media Watch* programme is dedicated to critique of the media, promoting itself as "Australia's leading forum for media analysis and comment". Its website boasts "an unrivalled record of exposing media shenanigans" since the programme first went to air in 1989.[1]

2 The plaintiff, Ms Natalie O'Brien, is an experienced investigative journalist. The matter complained of criticised two articles written by her which were published in *The Sun-Herald*. The articles reported the alleged discovery of toxic substances "at levels well above health limits" near the Orica industrial site in Hillsdale in the State of New South Wales. Ms O'Brien contends that the *Media Watch* programme accused her of trickery by misrepresenting the location of the tests and of creating unnecessary concern in the community by an irresponsible failure to consult experts in her preparation of the articles.

3 The segment of *Media Watch* sued on by Ms O'Brien was broadcast twice on ABC television (on 29 and 31 July 2013) to estimated audiences of 1.142 million and 69,000 respectively.[2] A video and a transcript of the broadcast were also placed on the ABC's website and remain on that site.

### Circumstances in which the matter complained of was published

4 It would ordinarily be logical in a defamation judgment to address the question of defamatory meaning first. In the present case, the complexity of the issues demands the explanation of some context.

5 As already noted, Ms O'Brien is an investigative journalist. She gave evidence that she writes mainly investigative pieces about the environment, immigration and refugees. The prospect of a story about the Orica site in Hillsdale was drawn to Ms O'Brien's attention in about January 2013 by a member of the Greens, who informed her that there was "a pollution issue" in the Botany area

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[1] Exhibit A
[2] Exhibit Q

around the Orica site. She wrote a number of articles about the issue at that time. She became aware that the local residents were frustrated with Orica's response to the issue and were pushing for off-site testing to be done by someone they perceived to be independent.

6 Ms O'Brien began researching the issue to see what she could find out about Orica and the Botany area. It was in that context that she first contacted Mr Andrew Helps of Hg Recoveries Pty Ltd. She had been told that Mr Helps had been asked by the residents to "put together a proposal"[3] to test the area around the Orica site "for any mercury that had travelled offsite from the Orica plant".[4]

7 Ms O'Brien knew Mr Helps had provided a "commercial proposal for testing" so she made some inquires of him about what his company did, who was involved and what his experiences had been. Mr Helps told Ms O'Brien that he had a permit for "feral mercury recovery" in relation to an area in Victoria and either had obtained or was in the process of seeking a second permit in Tasmania (she was not sure). Mr Helps told Ms O'Brien that he had a "long history in environmental management" and that he was "an environmental disaster management expert". He said he had many years' experience working in Australia and overseas and that his partner in the business, Mr Ian Brown, was an industrial chemist.[5] Ms O'Brien knew that Mr Helps himself was not a chemist.

8 It must have been clear to Ms O'Brien from that preliminary information that Mr Helps had a commercial interest in securing a retainer to undertake the testing he was proposing for Hillsdale. At some point in early 2013 she had obtained a copy of a draft scope of work he had provided to Hillsdale residents for a preliminary survey of the extent of mercury pollution in the area. In that proposal, Mr Helps suggested a budget of $400,000 for the work (with a $70,000 "mobilisation fee" to be paid prior to the commencement of any work).[6]

[3] T24.8
[4] T25.20
[5] T24.23
[6] Exhibit 5, tab 1; T129

9 In about April 2013, Mr Helps and Mr Brown took some soil samples on behalf of the residents of Hillsdale and sent them for testing at a Sydney laboratory. On 11 April 2013, after receiving the results, Mr Helps sent an email to Mr Gifford, the Chief Environmental Regulator of the Environmental Protection Authority (the EPA), asserting that he had strong evidence to suggest that hexachlorobenzine was leaking from the Orica site. EPA documents state that the information provided to the EPA by Mr Helps did not include sample locations or other "contextual information", which made it difficult for the EPA to assess the concerns raised. Accordingly, the EPA felt compelled to take its own samples of the same area.[7]

10 Mr Helps informed Ms O'Brien of the results of his tests, telling her that he had found "some spikes of certain substances in the soil which he thought was an indicator that there might be some serious problems". He spoke to her at that time about writing a story. She said "let's wait til the EPA does their testing as well".[8]

11 Two days after sending his email to the EPA expressing concerns about hexachlorobenzine, Mr Helps sent a further email to Mr Gifford suggesting that there would be reputational damage for Orica and the EPA which could be rectified if they agreed to the Community's request for further testing and agreed to contract Hg Recoveries to carry out that work immediately.[9] The EPA did not pursue that proposal.[10]

12 It is necessary to explain the geography of the area in question. Denison Street in Hillsdale runs north/south, roughly parallel to Rhodes Street. On the west side of Denison Street is the Orica industrial site. On the east side of Denison Street is a residential area bounded on the north by a long stretch of land which, for present purposes, may be described (loosely) as a huge battle axe shaped block. Adopting that description, the handle of the axe is a long stretch of grassed land owned by Sydney Water and leased to Botany Council (referred to as the "Sydney Water easement land"). The Sydney Water

[7] Exhibit 5, tab 41
[8] T33.20
[9] Exhibit 5, tab 11
[10] Exhibit 5, tab 12

easement land runs between Denison Street and Rhodes Street. The axe-head is a separate piece of land known as “Grace Campbell Reserve” owned by Botany Council, within which there is a child play equipment area.

13 The southern end of Grace Campbell Reserve abuts Grace Campbell Crescent, which falls roughly half-way between Denison Street and Rhodes Street. To be clear, it is important to note that the play equipment area is wholly contained within Grace Campbell Reserve (the land owned by Botany Council). Grace Campbell Reserve is separate from but adjacent to the much larger and longer area known as the Sydney Water easement land. However, there are no dividing fences between those areas.

14 In May 2013, the EPA issued a press release[11] stating that it had received information from a member of the public in April raising concerns that hexachlorobenzine (HCB) was present “on the nature strip outside the boundary of Botany Industrial Park, Matraville” (in Denison Street). As explained above, the person who provided that information to the EPA was Mr Helps.[12] The press release reported that, in response to the concerns raised, the EPA had tested the soil for HCB “at the reported location on Denison Street, near the Sydney Water Corporation easement”. The soil had been sampled at 15 separate locations in the general area (two further samples were taken as controls). The press release reported that all 15 results were “well below the national health inspection levels” and that no further investigation was required. It also reported that the samples were analysed for “a range of other contaminants”, concluding as follows:

> The results indicated other potential contaminants were detected on the Sydney Water easement that may need further investigation. While the EPA does not consider that these levels, if representative for the property, pose a health risk, it has referred these results to Sydney Water for further investigation.

15 The report of the test results attached a copy of a map showing the 15 sites tested (each marked with a red dot). A copy of the map was obtained by Ms O’Brien.[13] The map shows that the testing was mainly concentrated in the area of Denison Street and on the Orica industrial site on the west side of the street.

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[11] Exhibit E

[12] Email dated 11 April 2013 from Mr Helps to the EPA, exhibit 5, tab 10.

[13] Exhibit K

Six of the EPA samples were taken from the Sydney Water easement land close to Denison Street and some distance away from Grace Campbell Reserve.[14] Presumably, the reason the tests focussed on that area was that it was the area from which Mr Helps said he had taken his samples on behalf of the residents (which is what prompted the EPA testing in the first place).

16 Mr Helps told Ms O'Brien that he had seen the EPA test results and that "he and the residents wanted to know what the other contaminants of concern were, in fact they wanted to see the test sample data".[15] They obtained the test results through a freedom of information process. Mr Helps provided Ms O'Brien with some material setting out his analysis of those results (which Ms O'Brien understood to have been prepared with the assistance of Mr Brown, the industrial chemist). After discussing that material with Mr Helps and Mr Brown, Ms O'Brien made a number of attempts to obtain an opinion about the analysis. However, no-one wanted to be quoted.

17 Ms O'Brien was able to obtain an on-the-record quote from Dr Lloyd-Smith. Dr Lloyd-Smith is the "Senior Advisor, National Toxics Network Inc" but is a lawyer, not a chemist. Her title, "Doctor" was earned by the completion of a PhD in Law. Ms O'Brien thought the PhD was in "environmental disputes"[16] but knew Dr Lloyd-Smith had no academic qualification in science and was not a toxicologist.

18 Ms O'Brien wrote two articles about those matters, published on 7 and 14 July 2013 respectively.[17] The articles were drawn primarily from the information Ms O'Brien had received from Mr Helps. The first, headed "Toxic Substances Found in Reserve", reported that the EPA had been "accused of covering up the discovery of some of the most poisonous substances on earth at levels well above health limits, alarming residents whose children use the tested area as a playground". Those words alone plainly represented that the tested area is used by local children as a playground.

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[14] Exhibit B
[15] T34.33
[16] T190.30
[17] Exhibits C and D

19 The article was illustrated by a photograph of children playing in the play equipment area contained within Grace Campbell Reserve. The caption read, "At risk: children play in a park adjacent to Grace Campbell Circuit at Hillsdale, where toxic metals and chemicals were discovered". That additional material reinforced the representation that the toxic substances were found in a park where children play, as depicted in the photograph.

20 Ms O'Brien's second article, headed "Cancer chemicals detected, yet park gets all-clear" reported on the results of the further testing undertaken by Sydney Water following the publication of the EPA results. The article said that new tests had revealed "hotspots of contamination containing two carcinogenic chemicals". The article concluded by noting, with apparent scepticism, that Sydney Water "claimed the area had a 'clean bill of health'".

**The matter complained of**

21 The *Media Watch* programme made two broad criticisms of the reporting of those matters, the first directed at two television stations that had picked up Ms O'Brien's first story and run with it; the second directed at Ms O'Brien's articles.

22 The first part of the programme opened with what Mr Barry described as "a wonderful example of copycat journalism … which turns out to be the blind leading the blind". The broadcast showed an image of the opening passage Ms O'Brien's "exclusive" story (the first of her two articles) followed by an analysis of two television news items evidently drawn from that article. The main focus of that segment of the programme was to deride the television stations for the formulaic similarity of their stories and their uncritical reliance on Ms O'Brien's article.

23 The first part concluded by quoting the following confused assertion by the journalist from Channel Seven: "*The EPA admits the soil underneath the playground was never part of the tests*".

24 The *Media Watch* programme then turned its focus to an analysis of Ms O'Brien's article. The relevant extract is lengthy but it is important to set it out in full:

> Now wait a moment. Did you catch that last bit? Let's just have another listen.

"*[Channel Seven journalist]: The EPA admits the soil underneath the playground was never part of the tests.*

*Channel Seven News, 7th July, 2013*"

The EPA admits the playground wasn't tested? Shouldn't that be the Sun-Herald? After all, they did splash the playground picture, which kind of makes you think that might be the story, and the article does say:

"*… children use the tested area as a playground.*

*Sun- Herald, 7th July, 2013*"

But the truth is the tests were conducted some distance away, close to a busy road, as you can see on the map.

And it gets a lot worse than this little sleight of hand, because we believe the central claims of Natalie O'Brien's story are just wrong.

"*What the tests found*

*Mercury: Significant levels (NSW limit is zero)*

*Sun-Herald, 7th July, 2013*"

We're assured that's wrong.

"*Lead: up to three times the NSW limit*

*Sun-Herald, 7th July 2013*"

We're assured that is wrong too.

"*Chromium: twice the NSW limit*

*Sun-Herald, 7th July, 2013*"

And we're assured that that too is false.

So why believe us? Well, for a start we have gone over the figures very carefully. And we think they're wrong. We've also talked to the EPA, that's the Environmental Protection Authority, and they think they're wrong.

But best of all, we've done what The Sun-Herald should have done which is rely on the experts.

Professor Jack Ng of the National Research Centre for Environmental Toxicology in Queensland told us the Sun-Herald's claims were:

"*Misleading … and not representative of the test results*

Professor Jack Ng, National Research centre for Environmental Toxicology, Statement to Media Watch, 29th July, 2013.

Professor Wayne Smith, director of Environmental Health in NSW, who is also a professor at Sydney and Newcastle universities went a bit further, telling us *The Sun Herald's* claims were:

"*Ridiculous and alarming*

*Dr Wayne Smith, Director of Environmental Health, NSW Health, Statement to Media Watch, 28th July, 2013"*

And adding that the claim that the NSW limit for Mercury is zero was

"*A complete fabrication*

*Dr Wayne Smith, Director of Environmental Health, NSW Health, Statement to Media Watch, 28th July, 2013*"

As soon as the Sun-Herald article was published, the EPA held a press conference and issued a media release denying the claims.

It also wrote a letter to the paper stating that the key claims were not true: that the playground had not been tested and that they had not found mercury, lead and chromium 'above NSW health limits'.

Their letter was published in the paper next week, but not on page three, and without this summary:

"*The Sun Herald has clearly presented a story which is factually wrong and in doing so has created unnecessary concern in the community.*

*EPA, Letter to Sun-Herald, 12th July, 2013"*

By this stage, 14th July, Botany Council had received results from its own expert report on that playground.

After 182 pages of painstaking analysis it gave the park an all-clear and concluded:

"*… surface soils as present on the Grace Campbell Reserve do not contain levels of environmental contaminants that would be considered to pose a potential health risk to Park users.*

*City of Botany Council, Environmental Assessment of Surface Soils at Grace Campbell Reserve Hillsdale, 10th July, 2013"*

So, collapse of story.

But there was no space for this news in the Sun-Herald.

However, there was room to run the playground picture again under another Natalie O'Brien article reporting that Sydney Water's experts had also concluded there was nothing to worry about.

Only, that's not quite how the Sun-Herald spun the story.

"*Cancer chemicals detected, yet park gets all-clear*

*Alert: Children playing near the Hillsdale park that was tested.*

*Sun-Herald, 14th July, 2013*"

Now there are a lot of dangerous chemicals in the Botany area. And of course residents have every right to be worried.

But they also have a right to media which tell them the truth. And O'Brien's alarmist articles did not.

The Sun-Herald has still not apologised for this shocking beat up or issued a correction. It should. And it should put it on Page Three where it can be seen.

And as for Channels Seven and Nine who broadcast this scare, here's an idea. Try checking the facts first to see if they stack up.

If you want to know more on this story, those reports from the EPA, Botany Council and Sydney Water are all on our website. As is the Sun-Herald's response.

But for now that's all from me. Goodbye.

## Issues in the proceedings

25 Ms O'Brien contends that the *Media Watch* programme conveyed the following imputations defamatory of her:[18]

(a) that, as a journalist, she engaged in trickery by representing that tests for toxic substances had been conducted in a children's playground, whereas she knew that they had been conducted in an area nearby;

(b) that she created unnecessary concern in the community by irresponsibly failing to consult experts as part of her preparation of an article about toxic substances;

(c) in the alternative to (b), that she acted irresponsibly as a journalist by failing to consult experts as part of her preparation of an article about toxic substances.

26 The ABC denies that the imputations arise from the matter complained of. The defence further asserts that, if the imputations do arise, they are not defamatory of the plaintiff. However, no submissions were put to support that optimistic contention. In addition, the ABC pleads defences of truth, contextual truth, the defence of fair comment at common law (including comment of a stranger), the defence of honest opinion under s 31 of the *Defamation Act 2005* (NSW) and the defence of qualified privilege at common law (including response to attack).

## Defamatory meaning

27 The first task is to determine whether the imputations specified by Ms O'Brien are conveyed by the *Media Watch* programme.

28 As already noted, the matter complained of was broadcast in audio-visual form as well as being posted on the ABC website in both audio-visual and transcript form. It should be noted that the transcript on the ABC website includes an additional heading, "Scary toxic beat-up" which was not included in the matter complained of in its audio-visual form. However, I do not think that gives a different answer to the question of the defamatory meaning of either form of the matter complained of.

[18] Further Amended Statement of Claim filed in Court on 9 November 2015

29 The principal submission put by the ABC on the question of defamatory meaning was that the programme draws a clear distinction between *The Sun-Herald* on the one hand and Ms O’Brien on the other. Mr Gray SC, who appears with Mr Polden for the ABC, identified a number of passages in the matter complained of where the focus of the presenter’s criticism is *The Sun-Herald*. In particular, he submitted that the programme made it “very fairly clear” that the “sleight of hand” referred to at the outset of the lengthy passage set out above was a sin committed by *The Sun-Herald* and not attributed to Ms O’Brien.

30 With great respect to Mr Gray, the submission entailed the fallacy (frequently deployed in proceedings for defamation) of the false dichotomy. It does not follow, from the fact that the programme was critical of *The Sun-Herald* (highly so) that it was not also critical of Ms O’Brien. A fair consideration of the content of the programme produces the contrary conclusion; the programme plainly attributes authorship of the articles to Ms O’Brien and there is no suggestion that the presenter’s criticisms of the articles are not directed at her individually as well as the newspaper for which she writes. In the critical passage relied upon to sustain imputation (a), there is a direct reference to Ms O’Brien:

> And it gets a lot worse than this little sleight of hand, because we believe the central claims of Natalie O’Brien’s story are just wrong.

31 In my view, the ordinary reasonable viewer would clearly perceive Ms O’Brien to be part of the target of the presenter’s criticisms.

32 Separately, Mr Gray focussed on the words of the imputation, “in an area nearby”. He submitted that, whereas the imputation identifies the “trickery” as a misrepresentation of the location on which the tests were conducted in that the plaintiff knew they were conducted “in an area nearby”, the programme asserts not that the tests were “nearby” but that they were a long way away from the children’s playground (“some distance away, close to a busy road, as you can see on the map”). I do not accept that submission. The sting of the imputation is that Ms O’Brien misrepresented the location of the tests in that her article represented that they were conducted on the play equipment area depicted in the photograph, whereas they were not. The *Media Watch* programme makes plain its criticism that the tests were conducted within the vicinity of the

playground but not on it. Whether it is saying the tests were “nearby” or “some distance away”, the point is clear.

33 The burden of the ABC’s submissions on this issue rested on a careful textual analysis.[19] As to the audio-visual broadcast, the ordinary reasonable viewer would not have the opportunity to undertake such an analysis. In any event, I have concluded that, even to a person reading the transcript of the programme rather than seeing it in its audio-visual form, the broad impression created is that captured in the imputation.

34 Mr Gray did not take issue with the proposition that the conduct the subject of Mr Barry’s criticisms (whether it was the conduct of the newspaper or the journalist) amounted to trickery. That aspect of the imputation derives primarily from the use of the expression “sleight of hand” which suggests a form of illusion or deception. However, the context in which that phrase is used must be considered. The full expression is, “and it gets a lot worse than this little sleight of hand”, the feature that was “worse” being that Ms O’Brien’s central claims were “just wrong”. The implication is clear; it is one thing to engage in a little trickery but far worse, in the case of an investigative piece, for a journalist to be wrong.

35 In any event, I am satisfied that the matter complained of does convey imputation (a).

36 As to imputation (b), Mr Gray focused on the fact that, whereas the imputation is that the plaintiff failed to consult experts, the assertion made by the matter complained of is that *The Sun-Herald* failed to “rely” on experts, as follows:

> But best of all, we’ve done what *The Sun-Herald* should have done which is rely on the experts.

37 I accept, as submitted by Mr Molomby SC on behalf of Ms O’Brien, that the distinction between “consulting experts” and “relying on the experts” is in this context a distinction without a difference. Viewed as a whole, the matter complained of plainly asserts that *The Sun-Herald* and Ms O’Brien should have consulted experts before publishing the “alarmist” articles.

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[19] T379.50-T381.5

38 Mr Gray made the further submission regarding imputation (b) that the accusation of creating unnecessary concern is squarely attributed to the fact that the article was factually wrong, not to the failure to consult experts. In my view that is an overly precise analysis of the programme and not one the ordinary reasonable viewer or reader would undertake. I am satisfied that the programme conveyed imputations (a) and (b) specified by the plaintiff.

39 In the circumstances, there is no need for the plaintiff to rely on imputation (c), which is pleaded in the alternative. However, for the purpose of the contextual truth defence (considered below), it is appropriate to record my view that imputation (c) is also clearly conveyed, being wholly comprehended within imputation (b).

40 I am satisfied that imputations (a) and (b) are defamatory of Ms O'Brien.

**Order in which defences should be determined**

41 The truth defences occupied by far the greater portion of the hearing time and were addressed first by each party in closing submissions. I consider it more logical, however, to address the defences of fair comment and honest opinion first.

42 The topic of the order in which the questions of fact raised by defences of truth and comment might be addressed was touched upon in the judgment of the Court of Appeal in *Harbour Radio Pty Ltd v Ahmed*.[20] The plaintiff's claim in that case was tried with a jury. I accept that different considerations arise in that circumstance. There is nonetheless a certain logic in the Court's analysis.

43 As commonly occurs in this jurisdiction, the jury in *Ahmed* was directed to answer a list of questions of fact.[21] Questions 1 and 2 asked, as to each imputation, whether it was conveyed and if so whether it was defamatory of the plaintiff. The Court said that was appropriate.[22]

44 Questions 3 and 4 were addressed, respectively, to the defences of truth and comment. Question 3 asked, as to each imputation, whether the defendant had

[20] (2015) 90 NSWLR 695; [2015] NSWCA 290 (McColl, Basten and Meagher JJA).

[21] As contemplated by s 90 of the Supreme Court Act 1970 (NSW), expressly preserved by s 22(5) of the Defamation Act.

[22] Ahmed at [46]

established that the imputation was substantially true. Question 4 asked, as to each imputation, whether it was conveyed as opinion. In his summing up, the trial judge suggested to the jury that they would find it "logical and helpful" to approach the questions in the order in which they were presented. The Court of Appeal noted, however, that question 3 (whether each imputation was substantially true) would not have arisen in respect of those imputations which were conveyed as an expression of opinion rather than as a statement of fact (question 4). The Court accordingly considered that the manner in which the questions were identified may not have assisted the jury in their task (at [46]).

45 A further matter may be noted in respect of questions in the form of those posed for the jury in *Ahmed*. Question 4 is directed, in terms, to the imputations specified by the plaintiff (that feature of the questions, in turn, appears to have informed the view of the Court in *Ahmed* that the form of the questions may not have assisted the jury). Both the defence of fair comment at common law and the defence of honest opinion under s 31 of the *Defamation Act* are directed to the matter complained of (rather than to the imputations specified by the plaintiff, as in the case of the defences under ss 25 and 26 of the *Defamation Act*). However, as explained by the High Court in *Channel Seven Adelaide Ltd v Manock*,[23] the meaning pleaded by the plaintiff is relevant to the defence,[24] not least because it is the meaning found by the court that is to be scrutinised for its fairness.[25] On that basis I accept that, as occurred in *Ahmed*, a question to be posed for the tribunal of fact is whether the ordinary reasonable viewer would have understood the meaning found to have been conveyed as comment as opposed to fact.

46 However, that is not to say that the form of the imputation is determinative. The care to be taken in that respect was emphasised in *Ahmed* at [44], where the Court said:

> The risk in treating the imputation as the matter which must be identified as an expression of opinion or fact is that the form of the imputation may not accurately reflect the language of the defamatory publication. That is

[23] (2007) 232 CLR 245; [2007] HCA 60
[24] Manock at [80]-[86] per Gummow, Hayne and Heydon JJ (joint judgment); Gleeson CJ agreeing at [2]; Kirby J (who dissented on other grounds) also agreeing at [109]
[25] Manock, joint judgment at [83].

> significant, bearing in mind the contextual nature of the inquiry as to whether a statement is opinion.

47 As already noted, the discussion in *Ahmed* related to a trial with a jury. While it is open to me to take a different course, I consider that the question whether the defamatory meanings I have found would be understood to be expressions of opinion as opposed to statements of fact should logically be determined first.

**Fair comment at common law**

48 The elements of the defence were set out in the ABC's written submissions and were not disputed by Ms O'Brien. The ABC must establish:

> (a) that the words in question are an expression of comment or opinion as opposed to a statement of fact;
>
> (b) that the comment is based on facts truly stated within the matter complained of or else sufficiently identified;
>
> (c) that the opinion is expressed on a matter of public interest;
>
> (d) that the opinion is one capable of being held by an honest person on the facts stated or identified.

49 As I understand the joint judgment in *Manock*, the correct approach to the first question (which, to a degree, is mixed with the second) is to consider whether the matter complained of in its defamatory meaning as found by the tribunal of fact would have been understood, in context, to be conveyed as comment rather than fact. The task is informed by both the meaning found and the context in which that meaning is conveyed.

50 As explained in *Ahmed* in the passage cited above, the form of the imputation must not be permitted to hijack that task. One aspect of that consideration is to recognise that an opinion and its factual premise can logically be combined within the one statement. In proceedings for defamation, an imputation specified in a pleading will often combine a defamatory attribution and a factual assertion on which it is based. A defence of comment would not necessarily fail by reason of the inclusion of a factual component in the imputation. The critical question is whether the defamatory sense of the matter complained of was conveyed as an expression of opinion rather than an assertion of fact.

51 For example, an imputation "that the plaintiff failed to call an ambulance for a person he knew had taken a drug overdose and was thereby responsible for

her death" might (depending on the context) be defensible as comment if the attribution of responsibility for the death was conveyed as comment. It would not matter in that instance that the imputation itself combined fact (the plaintiff failed to call an ambulance for a person he knew had taken a drug overdose) with comment (in my opinion he is to be attributed with responsibility for her death).

52 It is of course legally possible for defamatory matter to be defensible as comment where, if conveyed as fact, the imputation would not be true (for example, taking the same hypothetical facts, if the medical position was that the person who had taken an overdose would have died whether or not an ambulance had been called). It has been noted that "so fortunate an avenue of escape" (a successful comment defence to an imputation that is not true) will rarely protect the style of journalism in which fact and opinion are inextricably intermingled.[26] The critical question is whether there is a clear separation of the facts from the defamatory expressions of opinion.

53 The correct approach to distinguishing what is meant to be understood as fact and what as opinion was explained by Hunt J in *Bickel v John Fairfax & Sons Ltd,*[27] where his Honour said that the material upon which a comment is based is:

> that upon which it purports to be based, in the sense of that which the ordinary reader would have understood from the matter complained of to have been intended by the author to be considered as the basis of his comment.

54 In these proceedings, the ABC's solicitor provided particulars of the material upon which the comment was alleged to be based.[28] However, having regard to the remarks of Hunt J in *Bickel*, I do not think those particulars are to be treated as binding or determinative of that issue. If I am satisfied that the ordinary reasonable viewer would have understood any part of the matter complained of as having been intended by the presenter to be an expression of opinion, it is necessary for me to make my own judgment as to what the viewer would have understood to have been intended to be considered as the basis for that opinion.

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[26] Smith's Newspapers Ltd v Becker (1932) 47 CLR 279; [1932] HCA 39 at 303-304, cited in Manock at [41].
[27] [1981] 2 NSWLR 474 at 492A.
[28] MFI 4.

*Was the imputation of trickery conveyed as comment?*

55 Turning to imputation (a) (that, as a journalist, the plaintiff engaged in trickery by representing that tests for toxic substances had been conducted in a children's playground, whereas she knew that they had been conducted in an area nearby), Mr Molomby submitted that the imputation could not be taken to be comment or opinion because the presenter, Mr Barry, takes as a fact "the business about the photo"[29] (a reference to the plaintiff's evidence, considered in more detail below, that she had no control over the choice of photograph or the caption).

56 I accept that the *Media Watch* programme conveyed, as fact, that the photograph contributed to the misrepresentation as to the true location of the tests (attributing responsibility for that aspect of the article to Ms O'Brien). In my view, that is clearly how the viewer would have understood the following part of the programme:

> Now wait a moment. Did you catch that last bit? Let's just have another listen.
>
> "*[Channel Seven journalist]: The EPA admits the soil underneath the playground was never part of the tests.*
>
> *Channel Seven News, 7th July, 2013*"
>
> The EPA admits the playground wasn't tested? Shouldn't that be the Sun-Herald? After all, they did splash the playground picture, which kind of makes you think that might be the story, and the article does say:
>
> "*… children use the tested area as a playground.*
>
> *Sun- Herald, 7th July, 2013*"
>
> But the truth is the tests were conducted some distance away, close to a busy road, as you can see on the map.

57 In my view, the ordinary viewer would have understood those statements to have been intended by the presenter to be considered as the basis for the next remark, in which that misrepresentation was described as a "little sleight of hand":

> And it gets a lot worse than this little sleight of hand, because we believe the central claims of Natalie O'Brien's story are just wrong.

58 Importantly, however, in my view the ordinary viewer would have understood the characterisation of the misrepresentation as a "sleight of hand" to be the

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[29] T442.37

presenter’s comment or opinion regarding the nature of the conduct revealed by the facts stated. The sting of the imputation I have found conveyed lies in the allegation of “trickery” deriving from those words. That the tests were not undertaken on the playground equipment area depicted in the photograph is not in contest; the defamatory sting complained of by Ms O’Brien lies in the suggestion that she is to be criticised for deliberately deceiving viewers on that issue by representing otherwise. I am satisfied that the ordinary reasonable viewer (or reader of the transcript) would have understood the attribution of trickery to be conveyed as comment or opinion, not fact.

59 Specifically, the reader would have understood the presenter to be stating (as fact) that Ms O’Brien wrote a story about toxic substances found in a park where children play; to be stating (as fact) that the story was illustrated with a photograph of children playing on the play equipment area; to be stating (as fact) that the tests were conducted some distance away from the play equipment area as shown on the map and to be making the comment or expressing the opinion, based on those facts, that her conduct in presenting an article in that form amounted to a sleight of hand or a form of journalistic trickery.

*Was the imputation of irresponsible journalism conveyed as comment?*

60 As to imputation (b) (that the plaintiff created unnecessary concern in the community by irresponsibly failing to consult experts as part of her preparation of an article about toxic substances), Mr Molomby submitted that the viewer would understand the failure to consult experts as the factual foundation for the statements made (in other words, the viewer would understand that the assertion of failure to consult was an assertion of fact, not comment). I agree. However, for the reasons already explained, I do not think the fact that the plaintiff’s formulation of the imputation includes a factual component is fatal to the defence. In my view, the sting of the imputation is the attribution of creating unnecessary concern by an irresponsible failure to take a particular step (consult experts when writing in a complex field). Focusing on the sting of the meaning found, the critical question is whether the ordinary reasonable viewer (or reader of the transcript) would have understood that meaning to be conveyed as comment rather than fact.

61 I am satisfied that the viewer (or reader) would understand that attribution to be conveyed as the comment or opinion of the presenter. Indeed, in my view, the matter complained of provides a textbook illustration of the operation of the defence of fair comment. The structure of the programme is to present, factually, something that was reported in the media; to present, factually, what is said to be wrong with it and to pass comment on the appropriateness of the relevant conduct by reference to a normative standard for the media. The programme makes several comments as to what *The Sun-Herald* “should” have done or “should” do. The tone of the programme is the tone of critique. With great respect to Mr Barry, his manner of presentation is, dare I say, opinionated. I am satisfied that the ordinary reasonable viewer (and reader) would have understood his remarks, in their defamatory meaning, as his comment or opinion, not fact.

62 Specifically, the reader would have understood Mr Barry to be stating (as fact) that Ms O’Brien prepared an article reporting that toxic substances had been found at levels that pose a risk to the public; to be stating (as fact) that she failed to consult experts as part of her preparation of that article; to be stating (as fact) that she got it wrong and to be making the comment or expressing the opinion, based on those facts, that her conduct was irresponsible and created unnecessary concern in the community.

*Were the comments based on facts truly stated?*

63 Mr Molomby submitted that, if the defamatory meaning of the programme is to be understood as comment or opinion, it was not based on true facts. He cited a number of reasons for concluding that the defendant has failed to discharge the onus of proving that element of the defence.

64 First, Mr Molomby submitted that the ordinary reasonable viewer would take the material on which the comment was based to include what was set out from lines 15 to 44 of the programme, the truth of which has not been proved. That is the part of the programme dealing with the “copycat journalism” (as Mr Barry put it) of Channel Seven and Channel Nine. I am not persuaded that the ordinary reasonable viewer or reader would take that material to be part of the basis for Mr Barry’s opinion regarding the underlying articles written by Ms

O’Brien. In my assessment, the programme presented two related but distinct criticisms, the first regarding the copycat journalism of the television stations; the second relating to the story from which they were drawn (Ms O’Brien’s articles). Logically, the manner in which other media outlets reacted to Ms O’Brien’s articles could not inform an assessment of the way in which she prepared them.

65 The second point made by Mr Molomby requires more thought. He submitted that the whole criticism of Ms O’Brien’s article (as captured in imputation (a)) was anchored on the choice of photograph, implying a responsibility in the plaintiff for that choice. Mr Molomby submitted that, on the evidence, that is wrong. In my respectful opinion, the submission confused action with responsibility.

66 The evidence given by Ms O’Brien was that, when an article is illustrated with a photograph, the journalist plays no part in its selection or in the wording of the caption;[30] those are evidently tasks for the sub-editor. However, it would be wrong to think, on that basis, that Ms O’Brien was completely distanced from the process in the present case. A few days before the article was published, she attended the area where she understood the testing had been undertaken, having arranged to meet a newspaper photographer and local residents there. She said:[31]

> A. I'd arranged for our photographer to take photographs. I'd contacted the residents and said, "I'm going down to have a look at the site. Can you meet me down there," because I want to talk to them - interview them about it. "Bring the kids with you." And so we'd all arranged to meet at the site and have a look at where the tests had been carried out.

67 It is clear from that answer that the presence of local children at the time the photographer attended was deliberate on Ms O’Brien’s part.

68 Ms O’Brien had the map of the area where the tests had been undertaken with her during that visit. She gave the following evidence as to her discussion with the photographer about the map:[32]

> Q. Did you say anything to him about the use of any photo?

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[30] T50
[31] T43.10
[32] T49.27

> A. Yes. We walked over to - I had the map and I found the residents, they were all together, I think they'd found him because I was a bit late. So we all walked over to the area to look at the tested site and he took photos looking at where we thought some of those tests were taken. And I said to him - he wanted to continue taking photographs while I interviewed the residents and I said, That's great, but if you've taken photos around any of the other area, I don't want to ask the kids to come and pose for a photograph on this area because it would be irresponsible. I can't say to the kids, Come and pose up a photo on, you know, what I know to be contaminated, so I said to him, If you take photographs in the other areas of the park, you must make sure you put in your caption that it's next to where the tests were done, make sure that you make that distinction.

69 It is clear from that answer that Ms O'Brien knew the photographer would be taking photographs of children in areas of the park other than the tested sites. Indeed, she appeared to be suggesting in that answer that she deliberately kept the children away from the tested sites because she understood those areas to be "contaminated". It is also clear that Ms O'Brien took it upon herself to explain to the photographer what the caption should say. Ms O'Brien agreed (in the face of overwhelming evidence) that she wanted a photograph of children playing "in the park area".[33] However, she was reluctant to concede that she appreciated the article would probably be illustrated by a photograph of children playing in the play equipment area.[34] I am satisfied that she must have appreciated that likelihood.

70 More importantly, it is clear from Ms O'Brien's evidence that she was intimately involved with the process of obtaining photographs that would illustrate her story. She attended the site with the photographer and a copy of the map. She arranged for children to attend when the photographer was there. There is no suggestion that the photographer had seen the EPA results or spoken to Mr Helps. He could only have obtained the information for the caption from her. Perhaps most significantly, the caption is entirely consistent with the content of the article written by Ms O'Brien.

71 For those reasons, I am satisfied that, although the ultimate choice of photograph and caption was made during the sub-editorial process and not by Ms O'Brien, she was responsible for that combination of material in the sense attributed to her by the *Media Watch* programme.

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[33] T261.30

[34] T259-T261

72 In my assessment, the attribution of trickery (imputation (a)) purported to be based on the following facts stated in the matter complained of:

(a) Ms O'Brien wrote an exclusive story, published in *The Sun-Herald* on 7 July 2013, which claimed that toxic metals had been discovered in a reserve in Botany Bay;

(b) the article represented that the metals had been discovered at levels well above health limits;

(c) the article represented that the metals had been discovered by testing an area used by children as a playground;

(d) the article represented that the playground area that had been tested included the area depicted in the photograph published with the article;

(e) in fact, the tests were conducted some distance away from that area, as depicted on the map displayed in the broadcast;

73 As to imputation (b), the plaintiff's argument was less clear. Mr Molomby submitted[35] that the viewer would very likely understand that the material on which the comment was based was at least to some extent implied. He submitted that the defence could not be established on the strength of implied material, it being a requirement of the defence that the foundation for the comment is either expressly stated or sufficiently identified in the matter complained of.

74 I do not think the suggestion of irresponsible journalism would be understood by the ordinary reasonable viewer to be based on implied material or any material not stated in the programme itself. On the contrary, in my view, the premises for the comment are clearly identified within the matter complained of. In particular, the matter complained of in my view would have been understood to state as fact (in addition to the facts set out at [72] above):

(a) that Ms O'Brien failed to consult experts as part of her preparation of the story;

(b) that the assertions made in the story (that the metals had been discovered at levels well above health limits) were factually wrong;

(c) that, by reason of being factually wrong in that way, the story created unnecessary concern in the community.

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[35] At T444.42

75 The programme also set out, as fact, the content of what “the experts” say as to the assertions made in the story. In my view, the ordinary reasonable viewer or reader would understand the presenter to be making the comment, on the basis of those stated facts, that the failure to consult experts was irresponsible and caused unnecessary concern in the community.

76 For the reasons addressed more fully below (in the discussion of the truth defence), I am satisfied that each of the stated facts set out above is true. Accordingly, I am satisfied that the defamatory meanings captured in imputations (a) and (b) did amount to comment based on facts truly stated.

*Were the comments fair?*

77 In my view, analysed in the manner set out above, the comments of the presenter were objectively fair,[36] being amply supported by the facts stated. As noted in the ABC’s written submissions, the requirement of fairness is given a broad definition: the defence extends to protect “independent, bold, even exaggerated criticism”.[37] In my assessment, Mr Barry’s criticism of *The Sun-Herald* and Ms O’Brien represented an honest opinion, being well within the bounds of what could fairly be said by way of comment or opinion on the facts stated.

*Public interest*

78 The comments plainly related to a matter of public interest; Mr Molomby did not contend otherwise.

79 For those reasons, in my view, the defence of fair comment at common law is made out in respect of both defamatory meanings found. There having been no attempt by the plaintiff to prove any matters such as to defeat the defence, the plaintiff’s claim must fail on that basis.

**Honest opinion under s 31 of the Defamation Act**

80 The ABC also relies on defences of honest opinion under s 31 of the *Defamation Act*. The defence as pleaded invoked each of the three grounds for the defence under that section, contending that the comment was that of the

[36] Manock at [83]
[37] Merivale v Carson (1887) 20 QBD 275 per Lord Esher MR at 280-281

ABC, its servant or agent (Mr Barry) and that of a person other than the ABC or Mr Barry (the experts named in the programme).

81 Mr Molomby did not address any separate reason why the statutory defence should not succeed. For the reasons I have stated in respect of the common law defence, I am satisfied that the statutory defence is also made out.

**Truth**

82 In case those conclusions are wrong, it is necessary to consider the defence of truth. The ABC pleads the defence of truth to each of the imputations I have found conveyed. The onus is on the ABC to establish on the balance of probabilities that each of those imputations is substantially true.[38]

*Is imputation (a) substantially true?*

83 Imputation (a) is that, as a journalist, the plaintiff engaged in trickery by representing that tests for toxic substances had been conducted in a children's playground whereas she knew that they had been conducted in an area nearby.

84 The imputation raises three elements for proof:

> (a) whether the article represented that tests for toxic substances had been conducted in a children's playground;
>
> (b) whether the plaintiff knew that the tests had in fact been conducted in an area nearby;
>
> (c) whether, in the circumstances, the plaintiff engaged in trickery.

85 I do not have any doubt that the article represented that tests for toxic substances had been conducted in a children's playground. To repeat the words of the presenter, Mr Barry, "they did splash the playground picture, which kind of makes you think that might be the story". The photograph of the two children playing on the play equipment took up half the space of the article and carried the compelling caption:

> At risk: children play in a park adjacent to Grace Campbell Circuit at Hillsdale, where toxic metals and chemicals were discovered.

86 The caption is unambiguous. It asserts that toxic substances were discovered in a park and that the photograph shows children playing in that park. The

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[38] Section 25 of the Defamation Act

content of Ms O'Brien's article clearly confirms that impression not only in the words quoted by Mr Barry in the *Media Watch* programme ("children use the tested area as a playground") but also in the balance of the article, the whole focus of which is the accusation that the EPA is covering up its discovery of dangerous substances in an area where children play. The article reports that "shocked residents" knew nothing about the "discovery at the Grace Campbell Reserve"; it quotes a resident saying it was "disgraceful" that the discovery had been "hidden from residents for so long"; it quotes a "local mother" expressing concern "about the effects on children who have been playing at the park"; it includes the warning from Mr Helps that "a baby needed to ingest only a pinhead sized piece of soil contaminated with lead for it to cause a major problem" and the further warning that "pregnant women are most at risk"; it includes a further warning from the senior advisor to the National Toxics Network that "small children should not be exposed to any levels of the chemicals and metals identified in the EPA test result" and it concludes by asking why the EPA omitted to test for another "serious indicator". The threat to children playing in the park was the story.

87 It is also clear that Ms O'Brien knew the tests had been conducted in an area nearby, not in the children's playground depicted in the photograph. As already noted, she had a copy of the map which she took with her when she went to visit the site. She undoubtedly knew the precise location of the test sites the subject of the EPA report. She knew that none of those test sites was in the play equipment area depicted in the photographs used to illustrate her two articles.

88 The harder issue is to determine whether, in the circumstances, the ABC has established as a matter of substantial truth that Ms O'Brien engaged in trickery as a journalist. I have understood the term "trickery" to mean that, in order to establish that she did, the ABC would have to establish some element of dishonesty or an intention on Ms O'Brien's part to mislead her readers.

89 The ABC's submissions on this issue made much of what Ms O'Brien was said to have "known" at the time she wrote her article. Those submissions in large measure were based on what information she had in her possession. However,

in considering whether it is established that she engaged in trickery, it is necessary to make an assessment as to what she made of that information at the relevant time. On the strength of Ms O'Brien's evidence, which extended over days, it is my firm impression that, at the time she was preparing the article, she had been persuaded by Mr Helps that the results of the EPA testing revealed real cause for alarm among residents.

90 On my understanding of the expert evidence (considered below), that understanding was wrong. However, it is relevant in the assessment whether, in all the circumstances, it can be concluded that Ms O'Brien intended to deceive her readers, that is, whether she deliberately set out to misrepresent the true location of the tested areas.

91 I am not persuaded that Ms O'Brien had any such state of mind. Rather, I apprehend she thought her article would convey important information to the public about substances found in an area she regarded to be adequately defined as "the park". It is my impression that Ms O'Brien did not herself analyse or have any real understanding of the EPA report or the regulatory regime; she was content to rely on Mr Helps and Mr Brown for that purpose. Her answer set out above as to what she told the photographer is perhaps telling in that context; she said she thought it would be "irresponsible" to ask the children to pose for photographs at the precise point where the tests were taken because those areas were "contaminated" (that evidence may have entailed a degree of hindsight reasoning; a contemporaneous record suggests that she wanted a photograph of local residents, including children, "at the area where the samples were taken"[39]).

92 Importantly, I doubt whether Ms O'Brien had any appreciation of the limited significance of the EPA's findings. She simply accepted, uncritically, the alarmist interpretation put on them by Mr Helps and Mr Brown, who she knew were actively pursuing a lucrative contract to undertake further testing. A factor evidently contributing to her perception of the significance of the results was that she considered the whole of the grassed area made up of the Sydney Water easement land and Grace Campbell Reserve to be an area where

[39] Exhibit 5, tabe 30

children played. She said that she had “seen kids kicking their soccer balls off the fences at the back of the park”[40] in areas which, according to the marks on the map, were close to the tested sites.[41] Whatever the position according to legal title, it was her understanding that the whole area was considered by local residents to be Grace Campbell Reserve.[42] That understanding, together with her lack of understanding of the proper application of the NEPM (addressed below), conduced her to believe that the presentation of the article with a photograph of children playing in “the park” would be fair.

93 For those reasons, I am not persuaded that the misrepresentation made by the article concerning the site of the tests was deliberate or mischievous on Ms O’Brien’s part. Rather, it appears to have been due to a combination of inattention to important detail and exuberance for a good story. On that basis, I am not satisfied that the imputation of trickery is substantially true.

*Is imputation (b) substantially true?*

94 Imputation (b) is that the plaintiff created unnecessary concern in the community by irresponsibly failing to consult experts as part of her preparation of an article about toxic substances.

95 The elements of the imputation are:

(a) that the plaintiff failed to consult experts as part of her preparation of the article;

(b) that, in the circumstance, her failure to consult experts was irresponsible;

(c) that, by reason of those matters, the plaintiff created unnecessary concern in the community.

*The national regime*

96 Before turning to consider the proof of those elements, it is necessary to explain what was required to be understood in order to analyse the significance of the EPA report.[43]

97 As already explained, the EPA tests were carried out in response to concerns raised by Mr Helps that the organic compound hexachlorobenzine (HCB) was

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[40] T46.35.

[41] Exhibit B is the map marked by the plaintiff at T47-48; exhibit K is the EPA test site map.

[42] T66.33.

[43] Exhibit 4, tab A.

present on the nature strip outside the Orica industrial site. Mr Helps had taken samples of soil from that site and raised the concern, based on his analysis of one sample, in his email to the EPA dated 11 April 2013. At the time he sent the email, Mr Helps had not confirmed the presence of hexachlorobenzine but reasoned towards its likely presence based on “a major chlorine spike” in the sample, his analysis of other samples and HCB’s “persistence in the environment”.

98 On 15 April 2013, in response to the concerns raised, the EPA took fifteen soil samples (together with two duplicates for use as controls) which were sent for testing for a large number of organic substances (including HCB) and metals (including chromium, lead and mercury).

99 The results of those tests were reported to the EPA in the document I have referred to as the EPA report. The report is not readily comprehensible to a lay person; it simply sets out a list of the substances tested for, grouped by substance type (organics, metals and inorganics) and subdivided according to the method of measurement of the substance in question. In short, it is no more than a list of chemical substances and measurements. In order to understand the significance of the report, it is necessary to have a detailed understanding as to how site contamination is assessed, including an understanding of the regulatory regime.

100 Australia has a national system for assessing site contamination. The national system is set out in a statutory instrument, the National Environment Protection (Assessment of Site Contamination) Measure 1999 (known as the NEPM).

101 To explain the application of the NEPM, the ABC tendered an export report[44] prepared by Prof Brian Priestly, a research scientist. Prof Priestly holds a Bachelor of Pharmacology obtained from Sydney University in 1963, a Masters of Pharmacology obtained from Sydney University in 1965 and a PhD obtained from Sydney University in 1968. His relevant experience brought to the task required of him as an expert witness in these proceedings includes 12 years of leadership of the Australian Centre for Human Health Risk Assessment at Monash University, more than 40 years’ experience with Government expert

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[44] Exhibit 9.

committees and panels assessing chemical toxicity and chemicals risk management, peer-reviewed recognition as a fellow of the Australian College of Toxicology and Risk Assessment (a professional organisation Prof Priestly helped to found and for which he served as inaugural president) and knowledge of the toxic chemicals likely to be found around the Orica Botany Industrial Park through peer review of health risk assessments relating to that site and membership of independent expert panels convened by Orica to assist local community reference groups to understand the pollution issues in that area.

102 Interestingly, Prof Priestly was approached by Ms O'Brien as an expert when she was preparing her earlier articles about the Orica site in January 2013. However, she did not attempt to contact him for the July articles.

103 Prof Priestly was not required for cross examination by Ms O'Brien in these proceedings.

104 Prof Priestly explained that the NEPM was first made by the National Environment Protection Council (a statutory authority established by s 14(1)(d) of the *National Environment Protection Council Act 1994* (Cth)) in 1999. It is publicly available. The NEPM was amended in April 2013 and was adopted by the EPA in New South Wales on 16 May 2013. Accordingly, at the time of publication of Ms O'Brien's articles, the revised NEPM was operative in New South Wales and provided the regulatory basis for contaminated site assessment in this State.

105 The NEPM is a lengthy document contained in 22 volumes. Its stated purpose is to establish "a nationally consistent approach to the assessment of site contamination to ensure sound environmental management practices by the community which include regulators, site assessors, environment auditors, land owners, developers and industry." The NEPM sets out a policy framework together with schedules identifying the general process for the assessment of site contamination (schedule A) and general guidelines (schedule B). Schedule B contains 9 further schedules which occupy the majority of the NEPM (volumes 2 to 21). Schedule B1 provides general guidelines in relation to

investigation levels for soil, soil vapour and groundwater in the assessment of site contamination.

106 A number of different investigation levels are explained in schedule B1 (health investigation levels, ecological investigation levels and groundwater investigation levels). These proceedings are concerned with the proper interpretation of the EPA results by reference to the health investigation levels, known as HILs.

107 As explained by Prof Priestly, the NEPM outlines the basis for establishing HILs for 41 separate substances. It establishes HILs for four different "soil exposure scenarios":

- HILA for residential dwellings with gardens or accessible soil;
- HILB for residential dwellings with minimal access to soil (high rise flats etc);
- HILC for public open spaces;
- HILD for commercial/industrial buildings.

108 Prof Priestly's report emphasised that the HILS established in the NEPM do not state a dividing line between "safe" and "unsafe" exposure to the substances in question. He said "they are conservatively set using estimates of potential ingestion, skin contact and dust inhalation of contaminated soil".

109 Prof Priestly set out the HILs established for the three toxic metals referred to in Ms O'Brien's article, as follows:

| **Metal** | **HILA** | **HILB** | **HILC** | **HILD** |
|---|---|---|---|---|
| Mercury* | 40 | 120 | 80 | 730 |
| Lead | 300 | 1200 | 600 | 1500 |
| Chromium VI | 100 | 500 | 300 | 3600 |

110 A footnote to the table explained that the values for mercury related to inorganic forms of mercury. Prof Priestly stated that there are separate (lower)

HILs for methylmercury and that, where elemental mercury is present or suspected to be present, a site-specific assessment is required.

111 Ms O'Brien said that she had looked at the NEPM before 7 July 2013 (the date of her first article).[45] She thought she had downloaded "the whole thing". It seems unlikely that she would have downloaded all 22 volumes; she may have been referring to schedule B1 (80 pages, contained in volume 2), although it would have been difficult to understand the application of the guidelines set out in schedule B1 without also considering at least the overarching explanation contained in volume 1.

112 Ms O'Brien's answers given in cross examination in respect of the four HILs set out in schedule B1 suggest that she did not have a close understanding of their application. She seemed reluctant even to accept their application,[46] even though the position had been clearly explained to her in at least two documents from the EPA.[47]

113 It is difficult to imagine the amount of work and expertise that must have gone into the promulgation of the NEPM. It reflects highly specialised and complex principles. My own consideration of that document has persuaded me that one would not lightly venture an opinion as to the significance of a report in the form of the EPA report without consulting an independent expert in that field.

*Did the plaintiff fail to consult experts?*

114 Ms O'Brien's articles quoted Mr Helps and Dr Lloyd-Smith, neither of whom is even a scientist, let alone one with appropriate academic qualifications and experience in the specialised field of assessment of site contamination. Ms O'Brien gave evidence that she also spoke to Mr Brown, the industrial chemist who works with Mr Helps. She did not nominate any other expert she consulted in her preparation of the articles.

115 In considering whether, in the circumstances, it is true to say that Ms O'Brien failed to consult experts, it is necessary to begin by considering what is meant in this context by the term "experts". I appreciate that journalists are not bound

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[45] T73.43
[46] T78.41-T80.10
[47] Exhibit 5, tabs 30 and 49

by a code of conduct of the kind that applies in the case of expert witnesses in proceedings before the court. Nonetheless, it is plain from Mr Barry's presentation on the *Media Watch* programme that the substance of his accusation was the allegation of a failure to consult appropriately qualified, independent experts. The meaning of the imputation is appropriately informed by that context.[48]

116 The accusation was conveyed by the following words in particular:

> "But best of all, we've done what The Sun-Herald should have done which is rely on the experts.

117 As submitted by Mr Gray on behalf of the ABC, the words "<u>the</u> experts" are significant. I consider that those words would have been understood by the ordinary reasonable viewer to mean the kind of well-educated, independent brainiacs who can provide reliable opinions as to the kinds of complex questions addressed in the articles.

118 Understood in context, the sting of the imputation, in my view, is not that Ms O'Brien failed to consult any person with any knowledge of that field at all, but that she failed to consult an appropriately qualified, independent expert who would prevent her from misunderstanding the issues upon which she was reporting. Without overlooking the fact that the ABC bears the onus of proof on this issue, it is convenient to begin with a consideration of Ms O'Brien's position.

119 Mr Molomby opened with the proposition that, whereas the *Media Watch* programme accused Ms O'Brien of failing to consult experts, her article itself referred to the fact that she did use two experts (Dr Lloyd Smith and Mr Helps). Mr Molomy quipped "that's rather the sort of thing that *Media Watch* tends to take other people to task for". He contended that the evidence would show the ABC's criticisms of those two experts to be "rather misconceived".

120 In her evidence, Ms O'Brien sought to defend the view that each of those persons was appropriately qualified as an expert to found the assertions made in her articles. However, she acknowledged that, to her knowledge, Mr Helps

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[48] Greek Herald Pty Ltd v Nikolopoulos (2002) 54 NSWLR 165; [2002] NSWCA 41 at [27] per Mason P, Wood CJ at CL agreeing at [31]; at [43] per Young CJ in Eq.

had been extremely critical of the EPA.[49] My own assessment of his correspondence in Exhibit 5 is that he is very clearly not someone who could conceivably be regarded as having the independence required of a true expert. Contrary to the promise of the opening address, the evidence did not establish the ABC's position to be misconceived.

121 A further significant difficulty for the plaintiff's case was that the defendant's expert evidence in the proceedings was unchallenged (Prof Priestly was not cross-examined) and was not met with any expert evidence called on behalf of the plaintiff. Mr Molomby was accordingly left, in closing address, to rest on the onus of proof, submitting (correctly) that the defendant has to prove that the people Ms O'Brien did consult (Dr Lloyd Smith, Mr Helps and Mr Brown) are not experts. He submitted that Mr Brown at least must be regarded as an expert because of his qualification as an industrial chemist. I do not accept that submission; his qualifications were simply not at the level required for this task.

122 As to Mr Helps, Mr Molomby submitted that he is appropriately regarded as an expert owing to his significant experience in the field of contamination.

123 The ABC's case has persuaded me that neither Mr Helps nor Mr Brown was an appropriately qualified expert for Ms O'Brien to rely upon for the purpose of her preparation of her articles, particularly the article dated 7July 2013. Nor was the lawyer, Dr Lloyd-Smith. Acknowledging that I am not an expert in this field myself, my own assessment (informed by the uncontested report of Prof Priestly) of the information Mr Helps was providing to Ms O'Brien in the period leading up to her publication of that article has persuaded me that Mr Helps may have had an inadequate understanding of the chemistry or the regulatory regime (or both). Alternatively, he may have understood those matters well, but simply had an obstinate view as to the application of the NEPM which lay outside mainstream thought. That is not a criticism in itself; Galileo suffered from the same curse.

124 However, one thing is clear. It was not wise for an investigative journalist to rest on Mr Helps's views alone. It is my assessment of the evidence that he was not a reliable source for the assertions made in Ms O'Brien's articles. I am

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[49] T132.10

also satisfied that he did not have the independence required of an expert; he had a commercial interest in talking up the risk of contamination and clearly held the EPA in contempt. Ms O'Brien appears, to a degree, to have been infected by that attitude.

125 I am satisfied that, in a relevant sense, Ms O'Brien failed to consult experts in the preparation of her articles.

*Was the failure to consult experts irresponsible in the circumstances?*

126 A significant consideration in the assessment of this issue is that Ms O'Brien's first article was factually wrong in important respects. The main punch of the article was the contention that the EPA had been "accused of covering up the discovery of some of the most poisonous substances on earth at levels well above health limits". As explained in Prof Priestly's report, that statement was factually wrong in that it misstated the proper application of the NEPM to the results obtained; furthermore, it misconceived the purpose of HILs, which are not "health limits" at all but, rather, conservatively-set criteria used to assess the need for further investigation.

127 Ms O'Brien's article contained a prominent graphic which included an image of a warning sign with a skull and cross bones. A large amount of evidence in the proceedings was directed to ascertaining who was responsible for the graphic. I do not have any doubt that it was prepared by reference to information conveyed to the relevant sub-editors by Ms O'Brien which she in turn had obtained from Mr Helps. I do not accept her suggestions to the contrary.

128 The graphic made the following assertions:

> What the tests found:
>
> ! Mercury: significant levels (NSW limit is zero)
>
> 3 x Lead: up to three times the NSW limit
>
> 2 x Chromium: twice the NSW limit

129 The graphic attributed the source of that information as being the EPA. Ms O'Brien accepts that was wrong. Prof Priestly further explained that each of the individual propositions is wrong. He was asked to state his opinion as to whether the EPA report contained or conveyed results to the effect that the EPA had discovered the toxic metals, mercury, lead or chromium, at levels well

above health limits in any of three specified areas (the area the subject of the EPA report; Grace Campbell Reserve in Hillsdale or “a children’s playground in a park adjacent to Grace Campbell Circuit in Hillsdale”).

130 He said that the HIL applicable for the area where the EPA tests were taken is HILC for public open spaces. Even in her evidence at the hearing, Ms O’Brien took issue with that approach, although no expert witness was called by her to gainsay it. Her position was based on the fact that the EPA press release[50] sets out the HIL levels for residential land (HILA).

131 Ms O’Brien refused to accept that, in order to write an article expressing views of the kind expressed in her article, one would need to know the applicable HIL according to the NEPM. She said:[51]

> I needed to know what the EPA was doing. I’m not the expert, so I had to have a look at what they’d done. I started learning about these levels from the EPA’s press release. I mean, I knew a little bit about it, but when they put that out, I had a look at it, and they said that they’d compared things to “residential”, so I thought they had.

132 It may be accepted that the reference in the press release to the “health-based investigation levels for residential use” may have created a measure of confusion. That is precisely the kind of issue as to which it was important and necessary to consult an expert. Importantly, the press release also said “all 15 results were well below the national health inspection levels and no further investigation is required”. A lay person could not second-guess that statement simply by taking the reference in the press release to “health based investigation levels for residential land”, a copy of the EPA results and a copy of the NEPM and nutting it all out. At some point in that analysis, whether one was inclined to accept the contents of the press release or analyse them with scepticism, one would wish to have the benefit of expert assistance. Ms O’Brien’s article openly attacked the EPA’s assertions, levelling an accusation of a cover up. It is the kind of accusation that must be founded on careful, open-minded investigation producing a high level of understanding of the subject matter.

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[50] Exhibit E

[51] T77.5

133 As already noted, the approach adopted by Prof Priestly, which not contested by any competing expert evidence in these proceedings, was that the appropriate HIL for the area tested by the EPA was in fact HILC for public open spaces. Adopting that measure, Prof Priestly explained that, with the exception of one single lead value of 1000 mg/kg,[52] none of the values obtained in the EPA tests exceeded the HILC for any of the metals and that most were below the HILA values as well.

134 Prof Priestly noted that, in the EPA results, "neither mercury nor chromium are speciated, so it is not possible to determine whether they represent inorganic, organic or elemental mercury, or chromium VI (the more toxic form) or chromium III". As to mercury, Prof Priestly addressed that uncertainty by comparing the results with the HIL for inorganic mercury, reasoning that any elemental mercury deposited via vapours from the nearby industrial site is likely to have been oxidised over time to inorganic Hg++. He said:

> Furthermore, unlike inorganic mercury, elemental mercury is very poorly absorbed after oral ingestion (the primary route used for determining the HIL) and inhalation of mercury vapours from contaminated soil would be a relatively insignificant exposure pathway in this scenario.

135 As he was not required for cross-examination, I was unable at the hearing to expand my understanding of that issue. As I understand the report, Prof Priestly considered it appropriate to assume that the EPA test results reported levels of inorganic forms of mercury, not elemental mercury (the suspected presence of which would have required a site-specific assessment). Furthermore, Prof Priestly plainly considered the presence of elemental mercury to be unlikely and not to be a significant exposure risk.

136 Prof Priestly concluded that Ms O'Brien's article dated 7 July 2013, so far as it concerned toxic pollution, was factually wrong, saying:

> The factual errors relate mainly to contentions that levels of toxic chemicals found in the soil samples reported by the EPA represent a health risk to the community, or more particularly to children who may visit playgrounds in the area. The EPA samples appear to have been taken around a road adjacent to the Orica Botany Industrial Park and not, as inferred, in children's playgrounds in the vicinity. The extent and frequency with which children may play around the roads/verges where the samples were taken is unknown to me. However, the fact that the measured concentrations do not exceed HILC values of the

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[52] Sample SS05 reported on page 13 of the EPA report, exhibit 4, tab A.

> three substances (mercury, lead and chromium), suggest that such exposures would not represent a health risk where children regularly play.
>
> The most important false statement in the article is the contention that there are no 'safe' levels of exposure for some of the cited substances and that the reported soil concentrations for three substances (mercury, lead and chromium) exceed health-based 'limits'. Human health risk assessment (HHRA) processes can establish a 'safe' level of exposure for even highly toxic substances. The conservatively set NEPM-derived HILs represent health-based guideline values for soil contamination that are intended to provide guidance on exposure levels that should not produce adverse health effects with a lifetime of constant exposure. The HILs are not 'health-based **limits** as such, since they represent a soil-based exposure that, if exceeded, may require further investigation. The use of the term 'health-based limits' in the article implies that any exceedance represents an immediate or delayed threat to health, and this is simply not true.

137 I accept, as submitted by the ABC, that a consideration of those results, as helpfully explained by Prof Priestly, confirms that, with the one exception in the case of a lead result at the far western end of the Sydney Water easement land (near Denison Street), none of the levels obtained in the EPA results was above the HILC level for that substance and most were well below the HILA level for residential dwellings. According to the approach prescribed in the NEPM, a single sample exceeding the applicable HIL would not be significant and, in any event, HILs provide levels, not "health limits". As already noted, they are not accurately described as "health limits". The concentrations found by the EPA do not indicate a health risk to the community or to children.

138 Mr Helps' analysis of the EPA results was vastly different. It is difficult to understand why Ms O'Brien did not make certain to obtain an independent expert's comments on that analysis. She should have appreciated that Mr Helps bore some animus towards Mr Gifford, the Chief Environmental Regulator of the EPA. The hostility is amply revealed in Mr Helps's correspondence.[53] Ms O'Brien initially did not accept that she knew Mr Helps was "strongly hostile" towards Mr Gifford.[54] However, she later conceded that his correspondence expressed a negative view of the EPA, Orica and Mr Gifford[55] but, still later, would not accept that Mr Helps was "anti-Gifford".

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[53] Exhibit 5, tabs 23, 27 and 36
[54] T131.47
[55] T152.5

139 Ms O'Brien also had information from which she ought to have appreciated that Mr Helps' expertise had been doubted by others. She knew Orica was critical of his proposal for Hillsdale.[56] She also knew that Orica had requested information about Hg Recoveries' project experience and credentials but that had not been provided by Mr Helps.[57] She knew from the minutes of the Orica Botany Groundwater Clean-up Project Community Liaison Committee (to which she had access) that, on a number of occasions, Mr Helps had committed to providing information to that committee about results he had obtained from a mercury survey in Bendigo but that Mr Helps had consistently failed to produce those results to the committee, as recorded in several action items in the minutes.[58] Although Ms O'Brien did not attend those meetings, she accepted that she had "read somewhere that they were waiting for it, or something like that".[59]

140 Perhaps most importantly, a close analysis of Mr Helps's written communications sent to Ms O'Brien[60] ought to have brought home to her the need to check his contentions with an independent expert. Apart from the partisan, at times offensive tone of the correspondence, there were glaring inconsistencies which called for explanation. Mr Helps's treatment of mercury (the element after which his company is named) would have been particularly confusing. As noted in the table set out above, the HILA level for inorganic mercury is 40 mg/kg. For methylmercury it is 10 mg/kg and, in the case of the presence or suspected presence of elemental mercury, a site-specific assessment is required. In his initial letter and spreadsheet dated 18 June 2013 (sent to Ms O'Brien on 23 June 2013),[61] Mr Helps treated the HILA level for "mercury" (undefined) as being 15 mg/kg (that was the level for methylmercury under the 1999 NEPM; in fairness to Mr Helps it should be observed that the amendment was only adopted in May 2013 but the point is Ms O'Brien should have been concerned by the anomaly).

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[56] T133.41
[57] T134.28
[58] Exhibit 5, tab 2 (action #4); tab 8, tab 16
[59] T137.45
[60] Exhibit 5, tabs 15, 29, 36 and 42
[61] Exhibit 5, tab 15

141 The correct levels set out above were recorded in a later letter he sent on 30 June, copied to Ms O'Brien on 2 July 2013.[62] However, in a further email to Ms O'Brien dated 3 July 2013 attaching a further spreadsheet,[63] he treated the HILA level for "mercury" (now characterised as "elemental mercury") as being "zero" mg/kg. That is the proposition that found its way into Ms O'Brien's first article, which asserted that there is "no safe level for mercury". Mr Helps reiterated that contention in an email sent to Ms O'Brien on 5 July 2013 in which he provided her with some quotable quotes.[64] In that last email, he asserted that "the HILs have a zero limit on elemental mercury".

142 I am satisfied on the evidence before me that that is wrong. The true position is that the NEPM does not address elemental mercury, the guideline being that, in the case of the presence or suspected presence of elemental mercury, a site-specific assessment is required. Contrary to what appeared to be Ms O'Brien's misunderstanding during cross-examination, that is not the same thing as saying the HILs have a zero limit on elemental mercury. The shift in position within a period of weeks as reflected in that correspondence suggests either that Mr Helps did not appreciate the difference between inorganic mercury, methylmercury and elemental mercury, or that he was uncertain as to which was referred to in the EPA results (as was Prof Priestly, who noted that the results were not "speciated" and addressed that uncertainty in the conservative manner explained above). In either case, there was no warrant for the bold assertions made in the correspondence.

143 Finally, Ms O'Brien had a detailed response to the propositions contended for by Mr Helps in an email she received from the EPA on 5 July 2013.[65] In the circumstances, to put the matter frankly, it screamed off the page that Mr Helps's views were out of line with a substantial number of people who plainly had no less expertise than Mr Helps. Further, as already noted, Mr Helps had a commercial interest in mobilising support for the propositions for which he was contending.

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[62] Exhibit 5, tab 29
[63] Exhibit 5, tab 36
[64] Exhibit 5, tab 42
[65] Exhibit 5, tab 49

144 It is plain from Ms O'Brien's correspondence that she appreciated the desirability of obtaining an opinion from an independent expert. She made a number of efforts to secure an appropriate contact.[66] Finally, she reverted to Mr Helps for further suggestions.

145 I am satisfied that the failure to consult an appropriately qualified and independent expert was irresponsible in the circumstances. I reach that conclusion with some regret because I have little doubt that Ms O'Brien believed she was being given reliable information by a person experienced in this field. Mr Helps did not give evidence but there is every indication in the written material before the court that he would have presented as a passionate and well-meaning advocate for the residents of Hillsdale.

146 However, my assessment of Ms O'Brien's evidence has persuaded me that she accepted what was said to her by Mr Helps without understanding it herself and without consulting someone who did. In doing so, she lent her good reputation as a journalist to an uninformed or misconceived interpretation of an important report. The article made serious and alarming allegations. On my assessment of the evidence, had Ms O'Brien consulted an expert in the field of site contamination assessment who was truly independent (in place of her uncritical acceptance of the opinions of a man who had a vested interest in whipping up community support for further testing), I think she would have been dissuaded from making those allegations. In the circumstances, I am persuaded to the unhappy conclusion that her failure to consult experts was irresponsible.

*Did the plaintiff create unnecessary concern in the community?*

147 I am satisfied that, by her failure to consult experts (whose assistance would undoubtedly have modified the message of the article), Ms O'Brien created unnecessary concern in the community. Whilst there is no direct evidence from any particular concerned member of the community, that is the overwhelming likelihood, having regard to the content of the article.

148 For those reasons I am satisfied that imputation (b) is substantially true.

[66] Exhibit 5, tabs 18, 19, 20, 21, 22, 25

## Contextual truth

149 In light of my conclusion that imputation (b) is substantially true but imputation (a) is not, and in case I am wrong in any of the conclusions reached thus far, it is necessary to consider the defence of contextual truth under s 26 of the *Defamation Act*. That section provides:

> It is a defence to the publication of defamatory matter if the defendant proves that:
>
> (a) the matter carried, in addition to the defamatory imputations of which the plaintiff complains, one or more other imputations ("contextual imputations") that are substantially true, and
>
> (b) the defamatory imputations do not further harm the reputation of the plaintiff because of the substantial truth of the contextual imputations.

150 The defendants pleaded the following contextual imputations:

> A. The plaintiff published an alarmist article, which falsely stated that the Environment Protection Authority had discovered the toxic metals mercury, lead and chromium at levels well above health limits in an area used as a children's playground;
>
> B. The plaintiff created grave concern in the community by publishing an alarmist article which incorrectly claimed that the Environment Protection Authority had discovered some of the most poisonous substances on earth at levels well above health limits, in an area used as children's playground;
>
> C. The plaintiff acted unethically as a journalist, by failing to disclose the true location of tests for toxic metals, which she claimed were present at levels well above health limits in an area used as a children's playground; and
>
> D. The plaintiff, as a journalist, presented a story about toxic pollution which was factually wrong, and in doing so created unnecessary concern in the community.

151 In addition to those four contextual imputations, the ABC contends that, as the plaintiff's alternative imputation (c) is no longer relied upon by her (because she has succeeded on imputation (b)), imputation (c) is available to be relied upon as a contextual imputation.

152 The principles relating to that contention are considered in my judgments in *Kelly v Fairfax Media Publications Pty Ltd (No 2)*[67] and *Hall v TCN Channel Nine Pty Ltd.*[68] In *Hall*, I accepted that, in principle, where the plaintiff's alternative imputations reflected varying degrees of seriousness (as opposed to being alternatives of a binary classification), a fall-back imputation might

[67] [2014] NSWSC 166 at [7] to [18]
[68] [2014] NSWSC 1604 at [23]-[27]

become available to the defendant as a contextual imputation. It does not follow, as the ABC's written submissions appear to assume, that an alternative, less serious plaintiff's imputation will invariably be available as a contextual imputation upon the more serious imputation being found in favour of the plaintiff. In the present case, the application of such a principle would make no sense, since the plaintiff's imputation (c) is wholly subsumed within her imputation (b). In that circumstance, the plaintiff's imputation (c) is not capable of being an "other" imputation arising "in addition to" the plaintiff's imputations, as required by s 26. Accordingly, the plaintiff's imputation (c) can be put to one side.

153 As to the contextual imputations pleaded by the ABC, imputations A and B are plainly conveyed. Mr Molomby submitted that those imputations cannot both arise and that "it would have to be one or the other".[69] In my view, contextual imputations A and B are in substance the same. The burden of the attribution is the publication of an alarmist article making false or incorrect claims of the kind identified (which are in substance the same). The additional words in contextual imputation B "created grave concern in the community" add nothing; an alarmist article including the false claims identified would axiomatically create grave concern in the community.

154 For the reasons explained above in my consideration of the truth defence to imputation (b), I am satisfied that the attribution captured in those imputations is substantially true.

155 As to contextual imputation C, Mr Molomby submitted that it could not arise "in addition to" the plaintiff's imputation (a). He submitted that the viewer would see the conduct described in the *Media Watch* programme as one or the other (trickery or unethical conduct as a journalist) but not both. I accept that submission. Trickery as a journalist and unethical conduct as a journalist are separate attributions. However, they cannot both be conveyed at the same time by the matter complained of in the present case. Each rests on the misrepresentation as to the true location of the tests. I have found the higher meaning (trickery) conveyed. I do not think the attribution of unethical failure to

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[69] T441.30

disclose can be conveyed at the same time, as required by s 26. Accordingly, imputation C can be put to one side.

156 As to imputation D, Mr Molomby submitted that it has no attribution of a state of mind of the plaintiff and is therefore “plainly not defamatory”. I do not accept that submission. In my view, to accuse a journalist of presenting a story which was factually wrong and thereby creating unnecessary concern in the community is the kind of accusation that would cause ordinary decent people to think the less of a journalist. In my view, however, the defamatory sting of contextual imputation D is wholly subsumed within B. Accordingly that imputation can also be put aside.

157 To summarise the position:

- the plaintiff’s imputation (a) (that, as a journalist, the plaintiff engaged in trickery by representing that tests for toxic substances had been conducted in a children’s playground, whereas she knew that they had been conducted in an area nearby) is conveyed, defamatory and not true;
- the plaintiff’s imputation (b) (that she created unnecessary concern in the community by irresponsibly failing to consult experts as part of her preparation of an article about toxic substances) is conveyed, defamatory and substantially true;
- the plaintiff’s alternative imputation (c) is not available as a contextual imputation;
- the defendant’s contextual imputation’s A and B, which are the same in substance, are conveyed and are substantially true. They are that the plaintiff published an alarmist article which falsely stated that the EPA had discovered the toxic metals mercury, lead and chromium at levels well above health limits in an area used as a children’s playground and that the plaintiff created grave concern in the community by publishing an alarmist article which incorrectly claimed that the EPA had discovered some of the most poisonous substances on earth at levels well above health limits in an area used as children’s playground;
- contextual imputation C is not available as a contextual imputation.
- Contextual imputation D is not available as a contextual imputation.

158 Unfortunately, there is inconsistent authority as to how s 26 is to be applied in the circumstances. The task under s 26(b) is to determine whether, because of the substantial truth of the contextual imputations, “the defamatory imputations” do not further harm Ms O’Brien’s reputation. The unresolved question is whether “the defamatory imputations” include imputation (b), which is one of

the "defamatory imputations of which the plaintiff complains" (adopting the language of s 26(a)) but which the ABC has proved to be substantially true.

159 My own view is that it makes no sense to allow a plaintiff to meet the defence by relying on an imputation of which the plaintiff complained but which has been proved substantially true. That is what I held in *McMahon v John Fairfax Publications Pty Ltd (No 6)* [2012] NSWSC 224. The Court of Appeal in Queensland subsequently came to the opposite conclusion in *Mizikovsky v Queensland Television Ltd*.[70] After *Mizikovsky* I determined in *Rose v Allen & Unwin Pty Ltd* (in an interlocutory application) that I should be obedient to the determination of that appellate Court,[71] notwithstanding a number of subsequent statements of the New South Wales Court of Appeal suggesting support for the competing view reflected in my approach in *McMahon (No 6)*. The matter of *Rose* then settled before trial.

160 The view that competes with the conclusion reached by the Queensland Court of Appeal in *Mizikovsky* is perhaps best articulated in the judgment of Basten JA in *Born Brands Pty Ltd v Nine Network Australia Pty Ltd* [2014] NSWCA 369 at [86], where his Honour said:

> The reasoning in *Kermode* and *Mizikovsky* (which may not be entirely consistent with each other) appears to assume that the defences in ss 25 and 26 are to be applied sequentially and (at least in the case of *Besser*) in the order in which they appear in the Act. However, there is an alternative reading of the legislation, namely that the tribunal of fact must consider holistically the effect of the defamatory matter on the reputation of the plaintiff, deciding at the end of the day whether, by reference to the imputations pleaded by both plaintiff and defendant, any imputations which have not been shown to be substantially true cause any further harm to the reputation of the plaintiff once the effect of the substantially accurate imputations has been assessed.

161 The issue whether I was bound to apply the decision in *Mizikovsky* arose again in a trial over which I presided early this year. The issue as it arose in that trial was considered in my judgment in *Dank v Nationwide News Pty Ltd*.[72] For the reasons stated in that judgment, I ordered that the questions of fact be determined by the jury in two stages, first, the questions as to publication, whether the plaintiff's imputations were conveyed, whether they were defamatory and whether those as to which there was a truth defence were

[70] [2013] QCA 68
[71] Rose v Allen & Unwin Pty Ltd [2013] NSWSC 991
[72] [2016] NSWSC 156

substantially true, and, secondly, the questions raised by the contextual truth defence. The jury returned with answers to the first round of questions as a result of which it was necessary to determine whether to direct the jury regarding the contextual truth defence in accordance with the decision of the Queensland Court of Appeal in *Mizikovsky*, or, rather, in accordance with the approach I had taken in *McMahon (No 6)*. Forced to the brink in the context of a trial, I recorded my view that the decision in *Mizikovsky* is, with respect, wrong on that issue. I directed the jury that, in determining the third element of the defence (that because of the substantial truth of the contextual imputations, the plaintiff's defamatory imputations do not further harm his reputation), they had to consider all of the evidence that established the substantial truth of the contextual imputations and determine whether because of the substantial truth of those imputations the plaintiff's defamatory imputations, *disregarding any they had found to be substantially true*, did not further harm his reputation. As it happened, the jury found that the contextual imputations were not conveyed and accordingly the ruling was of no consequence in those proceedings; for that reason, the issue was not addressed in the final judgment.

162 Emphasising that it is not necessary to determine the issue in these proceedings (since I am only considering the defence of contextual truth against the risk that I am wrong in my conclusion as to the defences of comment and honest opinion), I would adopt the same approach in this case.

163 Accordingly, the task in the present case is to consider whether imputation (a) does not further harm Ms O'Brien's reputation because of the substantial truth of contextual imputations A and B.

164 Had it been necessary to determine that question, I would have concluded that Ms O'Brien's reputation was not further harmed by the imputation of trickery conveyed by the reference to a "little sleight of hand" in the representation of a children's playground as the area that was tested by the EPA. As asserted by the presenter, Mr Barry, the fact that the central claims of Ms O'Brien's story were "just wrong" made matters "a lot worse". The incorrectness of those central claims was by far the greater focus of the matter complained of and by far the greater focus of the evidence in the proceedings before me. In my

assessment, the imputation of trickery, while serious, did not further harm Ms O'Brien's reputation because of the greater seriousness of Mr Barry's criticisms of the wrong and alarming assertions made in the article concerning the results of the EPA's tests.

**Qualified privilege at common law**

165 In case any of those conclusions is wrong, it is necessary to consider the remaining defence relied upon by the ABC, which is the defence of qualified privilege at common law. A statement of the relevant principles usually begins with reference to the well-known extract from the decision of the English Court of Appeal in *Toogood v Spyring*[73] where it was said that a publication is made on an occasion of qualified privilege where:

> It is fairly made by a person in discharge of some public or private duty whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned … If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society.

166 Reciprocity of duty or interest between the publisher of the matter complained of and its recipients is essential.[74]

167 It is unusual for a mass media defendant to be able to rely upon the defence at common law because the element of reciprocity is ordinarily regarded as being absent; there is rarely a duty to convey defamatory matter to the world at large. Mr Gray relied upon the decision of the Supreme Court of the ACT in *Carleton v ABC* [2002] ACTSC 127 where Higgins J held that the *Media Watch* programme is published on a privilege occasion at common law. Higgins J said at [155] to [159]:

> 155. The central question for the defence of qualified privilege is not about the accuracy of the attribution of "plagiarism" (or "lazy journalism") to the facts of the case. Truth of the accusation is not necessary for the defence to be applicable. The test is whether the subject was a matter of sufficient public interest to make the publication of Media Watch's allegations to the public at large, a privileged occasion at common law.
>
> 156. I am of the opinion that it was.
>
> 157. By definition, the media disseminates information to the public. The standards of and ethics of journalism are fundamental foundations of public

[73] (1834) 1 CM&R 181 at 193; 149 ER 1044 at 1049-50

[74] Adam v Ward [1917] 309 at 334; Roberts v Bass (2002) 212 CLR 1; [2002] HCA 57 at [62]; Bashford v Information Australia (Newsletters) Pty Ltd (2004) 218 CLR 366 at [187] per Kirby J.

> confidence (such as it is) in communications of information and comment by journalists. That the media adheres to high standards of ethics is a vital assumption which our democratic society is entitled to make.
>
> 158. The public is entitled to be protected against both "lazy journalism" and "plagiarism" as much as from misinformation, downright lies or "beat-ups". No-one would doubt that the "Press Council", whether or not its decrees are enforceable, performs a public duty of considerable importance in receiving and dealing with complaints about the media.
>
> 159. So too, it seems to me, does a program like Media Watch, so long as it follows the rules it expects others to follow. It is to be regarded as acting in the public interest by publishing to the general public criticism of and exposure of apparent lapses in journalistic standards.

168 Mr Molomby submitted that I should not follow that decision, submitting that Higgins J was “embarking on a path of intellectual adventurism” in that case. He noted that no later authority has adopted the position accepted by his Honour. More importantly, Mr Molomby noted that, since the decision in *Carleton*, even strong public interest and issues of major public importance have been insufficient to sustain the existence of an occasion of qualified privilege. He submitted that the *Media Watch* programme does not constitute a protected forum within that general jurisprudence.

169 With great respect to Higgins J, in my view Mr Molomby’s submissions on that issue are correct. In my respectful opinion the *Media Watch* programme, while serving as an important check on journalistic standards, cannot be said to be published by the ABC in discharge of some public or private duty. I would reject the contention that the matter complained of was published on an occasion of qualified privilege at common law.

**Response to attack**

170 Finally, the ABC submitted that the media programme on this occasion fell within a particular species of qualified privilege consisting of a response to an attack initiated in the media by the plaintiff. Mr Molomby accepted that the media can enjoy the protection of that form of the privilege where it publishes the response of the person attacked. He submitted, however, that the defence is not available where the media entity launches its own attack on the person who made the initial attack, which was plainly the case here. In my view, Mr Molomby’s submissions on that issue are also correct. Had it been necessary

to decide the issue, I would have rejected the defences of qualified privilege relied upon by the ABC.

**Conclusion**

171 In any event, for the reasons stated above, I am satisfied that the matter complained of is defensible as fair comment on a matter of public interest and honest opinion under s 31 of the *Defamation Act*. On the strength of that conclusion, there will be judgment for the defendant.

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