Claim No: HQ14X00304

Neutral Citation Number: [2014] EWHC 3406 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 October 2014

Before :

HHJ RICHARD PARKES QC
(Sitting as a Judge of the High Court)

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Between :

LOUISA DONOVAN	**Claimant**
- and -	
KATE GIBBONS	**Defendant**

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- -

Jacob Dean (instructed by **Carter-Ruck**) for the claimant
Victoria Jolliffe (instructed by **Payne Hicks Beach**) for the defendant

Hearing date: 14 October 2014

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Judgment

HHJ Richard Parkes QC :

1. This is an unfortunate dispute about a polo pony called Lady Gaga. Louisa Donovan, the claimant, deals in polo ponies through her business AD Pharma Consulting Ltd, trading as PharmaPoloPonies. She sold Lady Gaga to Kate Gibbons, the defendant. Mrs Gibbons wasn't happy with the pony, which she found unsuitable for her children to ride. Mrs Donovan would not take it back. There was deadlock.

2. The upshot was that in February 2013 Mrs Gibbons arranged for her son or husband to upload onto YouTube two videos, entitled Pharma Polo and Pharma Polo 1. They showed a polo pony bucking while being lunged. There would have been no problem with that. But as the videos played, a caption was shown with the words 'Pharmapoloponies.com Louisa Donovan sold this polo pony as being suitable for children. Downright dangerous and a scandal they get away with this'. Later, a third video was uploaded in June of the same year, with the same footage as Pharma Polo and the same caption. They remained accessible until around the end of February 2014.

3. Mrs Donovan says that the videos are defamatory of her. She has sued in libel. Mrs Gibbons says that they are honest comment. Because the videos were available both before and after 1 January 2014, she also says that they are honest opinion under the Defamation Act 2013.

4. That duplication arises because the Act creates a new statutory defence of honest opinion, replacing the common law defence of honest comment or, as it was always known, fair comment. By s16(5), nothing in s3 has effect if the cause of action accrued before the commencement of s3, which was on 1 January 2014. So the common law defence applies for publication up to the end of 2013; and the statutory defence thereafter. Similarly, while there was a common law threshold of seriousness which had to be surmounted before words could be held to be defamatory (see eg *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985), the new Act has, by s.1(1), introduced a statutory threshold of serious harm to reputation which any statement published on or after 1 January 2014 must surmount before it can be held to be defamatory. In any case where the publication complained of began in 2013 and continues into 2014, the court is likely to have to consider the position both at common law and under statute.

5. By consent of both parties, Master Eastman ordered on 28 July 2014 that a judge should determine the actual meaning of the words and pictures complained of, and whether they are allegations of fact or expressions of opinion or comment. Depending on the outcome of that determination, the claimant also asks me to strike out certain paragraphs of the defence of honest comment or opinion.

6. However, it appears that a further question has to be decided, namely whether the words and video complained of are defamatory of the claimant at all. Mr Jacob Dean, for the claimant, told me that until he saw the skeleton argument of Ms Victoria Jolliffe, for the defendant, he had not appreciated that there was any issue as to whether the material complained of was defamatory. That was because it was not denied in the Defence. Ms Jolliffe said that was because paragraph 4 of the Particulars of Claim, which set out the material complained of, does not contend that the material is defamatory. That is true, but the meaning paragraph, paragraph 9, does plead that

the meaning relied on is a defamatory one. So one would have expected a denial. Instead, the Defence simply denies that the words and images bore that meaning, not that they were not defamatory. And there was no application by the defendant for the point to be determined. In those circumstances, Mr Dean was entitled to be a little surprised that the issue was live. He was content nonetheless to deal with it, but when I asked him whether he would be addressing me on serious harm in respect of publication continuing into 2014, he said that was a matter on which he would want to be able to put in evidence, as of course he would be entitled to do, although it will not by any means always be necessary (see eg *Cooke v MGN* [2014] EWHC 2831 (QB) at [43]). Ms Jolliffe, somewhat ungenerously in the circumstances, said that she would want the court to determine the issue of serious harm. It seems to me that it would be quite wrong for me not to allow Mr Dean time to put in evidence on the issue of serious harm, even though it would be limited to publication which continued into 2014. I shall therefore 'park' that issue, as Mr Dean put it, and confine myself to considering the question of whether or not the words are defamatory by reference to the common law.

7. Both counsel submit that this is one of those cases where it is best to determine the issue of fact or comment before the issue of meaning. They rely on the observation of the Lord Chief Justice in *British Chiropractic Association v Singh* [2011] 1 WLR 133 at [32] to the effect that the answer to the question of meaning may stifle the answer to the question of comment or no comment. I think that in truth the three questions (meaning, fact/comment and whether defamatory) are very closely bound up together, and in this case I doubt that it matters very much in which order they are considered, as long as I bear in mind the impact that a decision on one may have on another. I shall follow the order which Mr Dean used in his submissions.

Defamatory or not?

8. Ms Jolliffe suggested that the words were not defamatory at all. She pointed to two routes to that conclusion. One was that the words reflected only on the claimant's company; the other was that they reflected only on the company's product (the pony).

9. The difficulty with the former approach is that the claimant was named as the seller, and that there is no mention in the words of the company. As far as the person watching the video is concerned, she could be (indeed probably would be) taken to be a sole trader, and possibly not even a trader at all.

10. As for the latter argument, Mr Dean submitted that the words and images necessarily imputed that she had sold goods which were below standard and likely to have adverse consequences for the customer. He referred to Tugendhat J's ordering of the varieties of defamatory statement in *Thornton v Telegraph Media Group* at [34], and suggested that on any view the material complained of fell into the category of business or professional defamation which the judge described thus: "Imputations upon a person, firm or other body who provides goods or services, that the goods or services are below a required standard in some respect which is likely to cause adverse consequences to the customer…". It seems to me that Mr Dean's submission is plainly correct. In other words, the material complained of is defamatory of the claimant at least in the sense that it reflects on her business reputation. The further question, whether it also reflects on her in her personal character, remains to be determined.

11. I stress that I am only deciding this issue at common law, not under s1 of the 2013 Act.

Fact or comment?

12. As I have said, the defendant seeks to defend the material complained of as an expression of opinion that it was scandalous that the claimant sold the dangerous pony shown in the video as being suitable for children.

13. Both counsel draw my attention to the case of *Yeo v Times Newspapers Ltd* [2014] EWHC 2853 at paragraphs [84] to [98], where the judge usefully gathered together the relevant principles which apply when distinguishing fact from comment. Among those principles are these:

    (1) The statement must be recognisable as comment as distinct from an imputation of fact: Gatley para 12.7;

    (2) Comment is "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation etc": *Branson v Bower* [2001] EMLR 15 at [26];

    (3) The ultimate determinant is how the words would strike the ordinary reasonable reader: *Grech v Odhams Press* [1958] 2 QB 275, 313;

    (4) The subject matter and context of the words may be an important indicator of whether they are fact or comment: *Singh*, above, at [26], [31].

14. In addition, the comment must indicate, at least in general terms, the facts on which it is based. The Supreme Court made it clear in *Joseph v Spiller* [2011] 1 AC 852 at [104]-[105] that it is not necessary that the reader should be able to judge for himself how far the comment was well founded; but it is necessary that he should be able to understand what the comment is about. A fair balance has to be struck between allowing a critic the freedom to express himself as he will and requiring him to identify to his readers why it is that he is making that criticism. That is particularly important on the internet, where people can make public comment about matters which are far from generally known, and where it will often be impossible for other readers to evaluate the views expressed.

15. Ms Jolliffe makes much of the context of the words and video. Her starting point is the fact that this is a publication on YouTube, which she characterises as being comparable to other popular review sites such as TripAdvisor. She submits that the video and its accompanying words fall into the category of a review, which by its nature is likely to involve opinion and comment. Here, she says, the reader is provided with what is obviously an amateur video of the product; the factual basis for the complaint is explained (i.e. that the seller sold the product as suitable for children); and the opinion is expressed that the product was dangerous (as evidenced by the video), and that it was scandalous that the seller had acted as she had. She argues that the words 'downright dangerous' are not comment on the behaviour of the claimant in behaving as she did (as 'scandal' is) but refer to the pony, and are themselves an expression of opinion.

16. I do not find the review analogy convincing. There is an obvious difference between a review on a site devoted to reviews, like TripAdvisor, where the starting assumption is that the review will be an expression of opinion, and a YouTube posting which is designed to make a free-standing point. Mr Dean invited me to take judicial notice of the sort of material that YouTube contains, which I think he was entitled to do (YouTube being broadly as familiar nowadays as, for instance, the typical contents of a newspaper), but he was also able to show me screenshots of the video, which showed the related YouTube material which the user's computer brought up when the defendant's video was watched: it consisted mainly of clips of polo and football matches.

17. As Mr Dean observes, it is effectively common ground, at least on the pleadings, that the material complained of contains at least one allegation of fact, namely the allegation that the claimant sold the defendant a dangerous pony as being suitable for children. It was argued by the defendant's solicitors in correspondence (letter dated 21 February 2014) that the central factual issue was whether the pony was dangerous to ride, and it is pleaded at paragraph 9.2(3) of the Defence, as part of the particulars of fact supporting the comment, that the pony was dangerous for the defendant's children to ride. However, Ms Jolliffe now seeks (see eg skeleton argument #21) to characterise the dangerousness as part of the comment on the behaviour of the pony rather than as part of the allegation of fact.

18. It seems to me that whether or not the words 'downright dangerous' are comment on the behaviour of the pony as shown in the video or a description of the pony is probably not very important, because, as Mr Dean submits, the person watching the material will have seen at once that the horse was in fact dangerous and unsuitable for children. In other words, whether or not there is <u>comment</u> that the pony is dangerous, the <u>fact</u> of its dangerousness is immediately apparent. With an animal which is sold for use by children, there must, he suggests, be a bright line as to what is dangerous and what is not, and it is perfectly clear on which side of the line this pony falls. There is therefore a defamatory allegation of fact: that the claimant sold a dangerous pony as being suitable for children (ie the 'business' defamation, considered above). That, I think, is correct.

<u>Meaning</u>

19. The criteria for the determination of meaning are very well established. The *locus classicus* is the judgment of Sir Anthony Clarke MR in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 13 at [14]:

> (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naive but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole, and any "bane and antidote" taken together. (6) The hypothetical reader is taken to

> be representative of those who would read the publication in question.

20. However, the second *Jeynes* principle does not mean that the court must always choose the least defamatory meaning available: see *McAlpine v Bercow* [2014] EMLR 3 at [66], where Tugendhat J explained that if there are two possible meanings, one less derogatory than the other, whether it is the more or the less derogatory meaning that the court should adopt is to be determined by reference to what the hypothetical reasonable reader would understand in all the circumstances. Just as it would be unreasonable for a reader always to adopt a bad meaning when a non-defamatory meaning was available, so it would be unreasonable and naive always to adopt the less derogatory meaning.

21. The premise of the exercise is that there is one single correct meaning, as Diplock LJ explained in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 171-2:

> Libel is concerned with the meaning of words. Everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another. The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey. But the notion that the same words should bear different meanings to different men and that more than one meaning should be "right" conflicts with the whole training of a lawyer. Words are the tools of his trade. He uses them to define legal rights and duties. They do not achieve that purpose unless there can be attributed to them a single meaning as the "right" meaning. And so the argument between lawyers as to the meaning of words starts with the unexpressed major premise that any particular combination of words has one meaning which is not necessarily the same as that intended by him who published them or understood by any of those who read them but is capable of ascertainment as being the "right" meaning by the adjudicator to whom the law confides the responsibility of determining it. That is what makes the meaning ascribed to words for the purposes of the tort of libel so artificial.

22. The claimant's pleaded meaning (Particulars of Claim para 8) is that the claimant recklessly and callously placed the safety of children at risk by selling a dangerous pony as being suitable for use with children when she must have known it was not. The defendant's *Control Risks* meaning (Defence, para 8) in support of the plea of comment is that it is scandalous that the claimant sold the dangerous pony shown in the video as being suitable for children. I am not, of course, confined by the meanings pleaded by the parties: *Johnson v League Publications* [2014] EWHC 874 (QB) at [5]. Ms Jolliffe's position is that the material complained of is not defamatory, but that if I find it is, then she takes her stand on the meaning to which I have just referred.

23. Mr Dean submits that the material complained of means more than simply the business imputation which I have already considered, and that there is also a plain attack on the personal character of the claimant.

24. The way in which he puts it is this. The video shows a pony which is obviously dangerous to ride, particularly for children. There is no suggestion in the video or the accompanying text that the pony's behaviour was anything other than its typical behaviour under normal conditions. Of course, the person watching the video will have realised that it could not have been behaving like that on the occasion when it was sold, because in that case, the defendant would not have bought it. But there is no suggestion that it bucked and reared only in exceptional circumstances. That being so, the claimant must have been aware of its behaviour at the time of sale, and must have known that it was not suitable for children. And it was that knowledge, he argues, that merits the adverbs 'recklessly' and 'callously' as descriptors of her behaviour. Moreover, he submits that the use of the word 'scandal', which in normal circumstances smacks of comment, tends to reinforce the conclusion that the seller knew at the time of sale that the pony was dangerous and unsuitable for children. Otherwise there would be nothing particularly scandalous about her behaviour.

25. Ms Jolliffe characterises the words 'dangerous' and 'scandal' as expression of opinion about the safety of the product, published in the context of a customer's review, and submits that there is nothing in the words which of itself imputes a fact about the state of mind of the seller. The reasonable reader would know and appreciate that products, particularly animals, which are sold can later turn out to be unfit for purpose or indeed dangerous. For a consumer to express her dissatisfaction at that state of affairs does not, without more, impute that the seller either knew or must have known that the product was dangerous or unfit for purpose or that she was reckless or callous in the sale. She gave the example of a kettle which, after a couple of days of use, starts sparking dangerously when switched on. If the buyer posted a video of the sparking kettle, saying it was dangerous, plainly there would (without more) be no imputation that the seller knew it was dangerous at the time of sale. The person watching the video would assume that the problem had developed afterwards. I accept that.

26. In this case, the dangerousness of the pony is clear from the videos, which show the animal bucking and rearing. That is a given. Coupled with the first sentence of the words complained of, that tells the viewer that the claimant sold a dangerous polo pony as being suitable for children. As I have said already, I have no difficulty in characterising that allegation as an allegation of fact.

27. Do the videos and text go further, and impute knowledge to the claimant that the pony was dangerous and unsuitable at the point of sale? In my judgment they do. As Mr Dean submits, there is no suggestion in the videos that the behaviour shown was anything other than the characteristic behaviour of the pony. It could easily have been made clear that the animal had appeared to be well behaved when inspected, and that the defendant's son had been able to ride it without difficulty; but no attempt to explain that was made. The obvious conclusion is that the behaviour shown was characteristic of the animal. If it was characteristic, then the seller would have been aware of it. By contrast, Ms Jolliffe's kettle example would raise no equivalent imputation of awareness on the seller's part, because there would be no reason to suppose that the problems would have existed at the time of sale and been known to the seller. Mechanical and electrical faults may develop at any time; whereas the

character of an animal tends to be settled. Moreover, I agree with Mr Dean that the use of the word ‘scandal’ tends, if anything, to reinforce the conclusion that the seller must have known at the time of sale that the pony was dangerous and unsuitable for children.

28. That being so, in my view the ordinary reasonable person watching the video will have concluded that the claimant had sold the defendant a dangerous pony as being suitable for children, even though she must have known that it was in fact wholly unsuitable for them. That conduct would plainly entail a reckless preparedness to put the children at risk. I regard the adverb ‘callously’ as pleader’s rhetoric, but that apart, I find that the true meaning of the material is that pleaded by the claimant. In that meaning, it is of course unarguably defamatory of the claimant in a personal, as well as a business, sense.

29. Again, I stress that I am not deciding the s.1 ‘serious harm’ issue which applies to publication in 2014.

30. I should mention Ms Jolliffe’s submission that if it is right that the words bear a meaning which carries a statement about the claimant’s state of mind, then that meaning can only arise as an inferential deduction or conclusion, and is therefore properly characterised as comment. She argues that the court should be very slow to deprive the defendant of a comment defence by deriving a factual assertion about the state of mind of a trader from criticism of their product or service by a consumer. That last point, so far as it takes her, is no doubt right, but I do not accept her submission that the imputation of the claimant’s knowledge is an inferential deduction which should be characterised as comment. It is not, as she herself accepted in argument, an expression of opinion by the defendant: it is part of the intrinsic meaning of the material. In fact, Ms Jolliffe submitted that it would be an opinion formed by the reader. That, on analysis, is surely no more than a concession that the material complained of would have been understood in the sense which I have found it to bear.

<u>Application to strike out</u>

31. In the light of my conclusions, it is not necessary for me to go on to consider Mr Dean’s application to strike out paragraphs 9.2(4) and 9.20-9.29, and paragraph 9.16, of the plea of comment.