Case No: HQ02X03779
Neutral Citation No: [2003] EWHC 1565 QB

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01 July 2003

Before :

THE HONOURABLE MR JUSTICE EADY

Between :

SARA KEAYS	**Claimant**
- and -	
(1) GUARDIAN NEWSPAPERS LIMITED	**Defendants**
(2) ROGER ALTON	
(3) CAROL SARLER	

Mr David Price for the Claimant
Ms Heather Rogers (instructed by **Lovells**) for the Defendant

Hearing date : 17 June 2003

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
Mr Justice Eady

Mr Justice Eady :

1. On 31 December 1983 Miss Sara Keays gave birth to a daughter, Flora, whose father was Mr Cecil Parkinson, at that time a well known Conservative politician. He is now a life peer, aged over 70 and no longer in the public eye.

2. Unfortunately, when she was very small, Flora suffered brain damage which gave rise to special educational needs. It is not disputed that throughout her life she has received continuous love and devoted care from her mother. She has never met Lord Parkinson but he has, I understand, always provided for her financially.

3. During the time when Flora was growing up, there were from time to time various injunctions in place restricting publicity about her. First, a *contra mundum* injunction was granted in March 1993 with the object of prohibiting any reporting which identified her.

4. Later, in September of the same year, an *in personam* injunction was granted against Miss Keays restraining her from discussing or communicating information about Flora (other, of course, than for ordinary social or domestic purposes). This was following remarks she chose to make on a live television programme about Flora and her father. In the light of the continuing *contra mundum* order, she recognised that she had thereby put herself in contempt of court and duly apologised.

5. During 1995, Miss Keays permitted Flora to be filmed while attending the Feuerstein Institute in Jerusalem with a view to the broadcast of a programme about her. She sought to vary or discharge the subsisting injunctions, so as to permit such a broadcast. Her application was refused by Cazalet J and that refusal was upheld on 31 July 1995 by the Court of Appeal: *Re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam. 1. As is very well known, that decision was based on the Court's *parens patriae* jurisdiction and was taken not so much for the protection of the administration of justice but in accordance with the Court's quasi-parental responsibilities in a context where, under the Children Act 1989, the interests of the child were paramount.

6. There matters were to rest until she came of age at her 18th birthday on 31 December 2001. In anticipation of that anniversary, when the publicity restrictions would cease to have effect, Miss Keays arranged for Flora and herself to be recorded during November and December 2001 (including on the birthday itself) in preparation for the broadcast of a television programme, made by Twenty Twenty Productions. It was in fact broadcast by Channel 4 on 10 January 2002, following a letter (dated the previous day) confirming the agreement for Miss Keays' participation.

7. This was by no means the only publicity following the birthday. On 21 December 2001 Miss Keays entered into an agreement with Associated Newspapers to co-operate "fully and exclusively" in the publication in the Daily Mail of a three-part

series, which was described in broad terms as being 'about the story of you and your daughter Flora". The tone and content of the articles were to be "balanced and sympathetic". Miss Keays was to receive £100,000 on publication and, in addition, 50% of the proceeds of any syndication. Accordingly, the Daily Mail articles were published on Saturday, 5 January 2002, and on the following Monday and Tuesday. Meanwhile, syndicated articles appeared in the News of the World on Sunday, 6 January.

8. The general flavour of what was published may be gauged from the headlines. On the front page of the Saturday edition, the coverage was introduced by a red "EXCLUSIVE" tag and the words, "After a scandalous 18-year legal battle, Lord Parkinson's illegitimate daughter can finally break her silence: THE GIRL CECIL TRIED TO HIDE". There was further material inside on pages 2, 8, 9, 10, 11 and 12. Lord Parkinson was described as a "Tory grandee", who had tried to keep Flora hidden for 18 years, in a leader headed "This obscene perversion of the law". There was a two-page spread (on pages 8 and 9) under the headline "How could he hurt such a lovely girl?" A sub-heading asserted "For 18 years, Tory grandee Cecil Parkinson forced his daughter Flora Keays to live in the shadows. Today, freed at last from draconian gagging orders that disgrace our legal system and should shame him, this brave young woman can tell her story for the first time". Introducing the next two-page spread (pages 10 and 11) was the heading "The courts were determined to gag me, all I wanted to do was look after the child I loved".

9. On the Monday, there were two more double-page spreads on pages 24, 25, 26 and 27. There was a headline spread across two pages saying "My nightmare fight for Cecil's daughter" and Miss Keays was described again as having been "gagged by Tory grandee Cecil Parkinson" for 18 years. There was said to have been "a scandalous 18-year legal battle" and Miss Keays is quoted as saying "I was told there were people who wanted to have me bumped off". On the same day, there was a commentary on page 11 headed with the words "Cecil's shame is worsened by Flora's readiness to forgive him".

10. On Tuesday, there was another two-page spread on pages 28 and 29 under the heading "Dad was so wrong to silence me". The sub-heading again refers to Lord Parkinson having gagged his "courageous daughter" for 18 years, and attributes to her the words "I feel upset and angry ...now I want to save other children from the terrible things I have endured". There is a continuation over to page 30 with a further heading "THE GIRL CECIL TRIED TO HIDE".

11. The coverage was interspersed with various photographs made available by Miss Keays in accordance with her contract.

12. Meanwhile, on the Sunday, the News of the World published a "3 PAGE SPECIAL ON MP'S SHAME". Headlines included "I'M THE LOVECHILD CECIL TRIED TO HIDE" and "LUST, LIES AND CRUELTY".

13. On the same day, the Sunday Express also had a two-page spread under the words "To this day, Tory Cecil Parkinson has not met his daughter Flora, but surely he'd be so proud of all she has achieved".

14. It was against this background that there appeared in the Observer on the following Sunday, 13 January 2002, an article by Carol Sarler in the "Comment" section of the newspaper, at the foot of page 25, under the heading "The mother of all women scorned". There followed the sub-heading "Nearly two decades on, the vituperative Sara Keays has enlisted her damaged daughter to her cause". The article is in the following terms:

> "WHAT A PREPOSTEROUS piece of work is Miss Sara Keays, prowling print and airwaves with the finest furies of a woman scorned as, nearly two decades after the event, she manages to excise yet another pound of Parkinson flesh. Or, as Edwina Currie once put it, rather more succinctly: "What a right cow!".
>
> This is a woman who, for 12 years, had an affair with a married colleague, became pregnant, and then, in the same-old-same-old, found that Cecil Parkinson declined to leave his wife and family or to have contact with their baby.
>
> Boy, did she spit. She even gave "her side of the story" to the *Times* 18 years ago, thus introducing the august organ to its first kiss-and-tell, and was mightily rewarded: Parkinson resigned his Cabinet position and was never again to be referred to as a future Prime Minister. For most women, that would have been satisfaction enough; Miss Keays, however, is not most women.
>
> Parkinson proved to be as good as his caddish word; he has never met his child, Flora – though he has, all along, provided financially for her. He also did the child one extra favour, even if his motive at the time was not exactly altruistic: in an effort to guarantee the silence of the vituperative Keays, he gained a gagging order to prevent mother or daughter talking publicly throughout Flora's childhood.
>
> That, as it would turn out, was a blessing. Flora succumbed both to epilepsy and autism and is permanently brain-damaged. Yet in 1995 her mother actually allowed a television crew to film her having treatment, and it was only papa's gag that prevented Flora and her piteous mental ill-health being dished up for the nation's entertainment. At least in the short term.
>
> LAST WEEK, however, Flora came of age so the gag ran out of time. And barely had the candles blown out on the cake than both she and mummy were polished and preened and posing for newspapers left and right, while on Thursday night a television

show gained prime time for its intrusion into a damaged young girl's life.

Never mind that Flora was so shyly stricken by the sight of one newspaper interviewer that she sought literally to hide behind her mother's back; never mind that her brain damage is so extensive that she believes the blood in *Casualty* is real; never mind that she found her own puzzled question broadcast to a prurient audience: 'What's an affair?' She is, technically at least, an adult so she – and Sara – can do as they wish. Flora's eagerness to please her mother is as touching as it is unsurprising; beyond doubt, Miss Keays has worked with real passion to overcome her daughter's setbacks and their relationship is close. So when her mother asks her, on camera, if she minds being on camera, Flora's acquiescence is a foregone conclusion – though whether she really wanted to spend her eighteenth birthday holed up in a hotel bedroom, paid for by 'a national newspaper', we can never properly know.

Sara Keays's justification for the intrusive spectacles is breathtakingly disingenuous. 'Media interest has been intensified by the injunction', she says, 'And with her eighteenth birthday approaching, publicity would be inevitable'.

Actually no, it wouldn't be. Frankly, if we had to follow up on every bastard child of every politician of every persuasion, we would run out of life. It's noteworthy that only eight years ago serving Conservative Minister, Tim Yeo, fathered another illegitimate daughter by another colleague – yet who, today, could name either mother or child?

But then, Yeo's mistress has not spent the past few months as has Keays, negotiating deals with newspapers, with production companies, with photographers, with *Woman's Hour* and the rest of the mob; just as with her *Times* piece all those years ago, still claiming she only wants to put her side and still knowing that each time she does, every item of promotion will begin: 'Flora Keays, the abandoned child of Lord Parkinson...' thus reminding the world, yet again, What Daddy Done Wrong.

She plays a clever game, mind, does Sara. She doesn't actually badmouth Parkinson – well, not much; mostly she lets poorly Flora do that bit. The girl says: 'If he loved me, he would want to see me', and tells us that there wasn't a birthday card, even for her eighteenth, 'though Mummy told me not to expect one'. You can bet she did.

When Sara Keays elected to become a single mother, she had an obligation to her child to help her to feel as cherished as is possible. A million women before her have learned the little fibs to explain away the absent father: 'He loved us but he had

> no choice.' 'He'd be with us if he could be.' Dammit: 'He died a war hero,' if all else fails. If we can ease the ills of childhood with a few tales of Santa Claus and tooth fairies, then why not add a few more of a man that your child is never going to meet anyway?
>
> YET ALTHOUGH it is arguably even easier than usual to fib to a child like Flora, Sara was shamelessly filmed telling her: 'He didn't want to have anything to do with us'. And when Flora asked if he came to see her when she was born she, along with a few million viewers, was told: 'He chose not to.'
>
> If stoical, slow, sweet Flora was thus left feeling that maybe the absence was caused by some defect of hers, she was certainly not assured otherwise.
>
> Let us be clear here: this is neither defence nor excuse for Lord Parkinson. He is a selfish adulterer, as surely as Miss Keays is a well of apparently limitless bitterness, and in a just world they probably deserve each other. But on the distasteful showing of the past week, we are left to wonder whatever poor Flora did to deserve either of them."

15. It is this article that forms the subject-matter of a claim for libel by Miss Keays to which she attributed the following natural and ordinary meanings:

    i) The Claimant has cynically exploited her vulnerable handicapped daughter by deliberately and detrimentally exposing her to maximum media attention in order to further her vituperative campaign of revenge against Lord Parkinson;

    ii) The Claimant lied when she claimed that her justification for engaging the media was that publicity was inevitable when Flora turned eighteen and the injunction ended, when in truth her motivation was as set out in (i) above;

    iii) The Claimant gave a "kiss and tell" story to The Times newspaper in which she disclosed intimate details about her affair with Lord Parkinson, in order to exact revenge upon him.

16. The matter came before me on 17 June and Mr David Price, on Miss Keays' behalf, sought permission to amend the particulars of claim to add the words "sexually explicit" in sub-paragraph (iii) between "intimate" and "details". It has now occurred to Miss Keays, apparently, that it is implicit in a "kiss and tell" story that the details would or could be "sexually explicit". Ms Heather Rogers, appearing for the Defendants, expressed some scepticism about this – not least because the allegedly "kiss and tell" story was published in The Times newspaper some 18 years before. Nevertheless, it seemed to me that this is a conceivable meaning and I gave permission.

17. The primary application before me, however, was made on the Defendants' behalf. It is an important part of their case that they are entitled to the protection of the defence of fair comment on a matter of public interest. The comment or comments sought to be defended are identified by yellow highlighting in a copy of the article attached to the defence, which covers the majority of the article. Alternatively, they wish to defend, if necessary, the Claimant's meanings as themselves being fair comment, although their primary case is that the words do not bear those meanings.

18. The application before me is strictly confined to one issue. I should make it clear that I am invited to rule, and to rule only, at this stage, that the words complained of are *only* capable of being regarded as comment and that they are, correspondingly, incapable of being classified as factual in character or susceptible to a plea of justification. The test to be applied is not controversial. I must ask myself whether a jury would be perverse to come to any other conclusion: *Branson v. Bower* [2001] EMLR 32, CA and *Alexander v. The Arts Council of Wales* [2001] 1 WLR 1840.

19. I am not being asked to determine meaning. Nor am I asked to rule on the objective test for fair comment; that is to say, whether it would be perverse for a jury to hold that the comments are not such that an honest person could express them in the light of the facts known by the Defendants at the date of publication: cf. *Branson v. Bower* [2002] QB 737, QBD.

20. It is, I believe, also acknowledged by both sides that I should come to a decision on "fact or comment" purely by reference to the Observer article itself, and not taking into account any of the earlier coverage to which I have referred as background: see *Telnikoff v. Matusevitch* [1991] 1 QB 102, CA, and [1992] 2 AC 343, HL. I should naturally take account of the pleaded meanings but it would not be appropriate to consider them in isolation. That would be artificial. I should, as always, address the whole of the words complained of in their context. I am concerned with how the article would be construed by a reasonable reader of the Observer article on 13 January 2002 and, of course, with whether a hypothetical jury would be perverse to take a different view.

21. True, the article is in pungent and offensive terms, but it is recognised that hard-hitting comments may be made on matters of public interest without the author being hobbled by the constraints of conventional good manners: see e.g. *Branson v. Bower* [2002] QB 737 at [25].

22. It has long been recognised that "... the crank, the enthusiast may say what he honestly thinks as much as the reasonable man or woman who sits on a jury": *Silkin v. Beaverbrook Newspapers* [1958] 1 WLR 743, 747, *per* Diplock J. More recently, in the context of the European Convention, it has been re-affirmed that the rights guaranteed under Article 10(2) apply not only to "information" or "ideas" that are favourably received, or regarded as being inoffensive or as a matter of indifference, but also to those that "offend, shock or disturb".

23. In any event, I am not at present concerned either with whether the objective test for fair comment has been fulfilled or with malice. The offensiveness of the piece is irrelevant to my present task.

24. Mr David Price naturally accepts that an author's inference as to someone's state of mind, or motivation, is capable of being comment and defended accordingly: see e.g. *Branson v. Bower* [2001] EMLR 32. He merely submits that this is not such a case.

25. Mr Price emphasises that it is the obligation of the relevant commentator to make clear that the content of his or her communication is comment rather than fact: see e.g. *Telnikoff v. Matusevitch* [1992] 2 AC 343, 352-353, *per* Lord Keith. Here, of course, the article in question was placed fairly and squarely in the "Comment" section of the newspaper and, submits Ms Rogers, is as plain as can be a hard-hitting reaction to the saturation coverage of the previous week. It does not purport to be an investigative piece, or to state conclusions based upon some unique psychological insight into Miss Keays, or to be based upon information deriving from her or from any other independent research. She argues that it is not, and does not purport to be, anything more than a combination of comment and inference from what has been available to the mass of readers and viewers over the previous week.

26. One of the meanings Miss Keays relies upon is to the effect that she "lied", but in the context that is manifestly tied to the observation in the middle of the piece that her explanation for the blaze of publicity was "disingenuous". It is, of course, often the case that an allegation of lying will be naturally characterised as factual and defensible only on the basis of a plea of justification. It is to be noted, for example, that in *Nilsen & Johnsen v. Norway* (2000) 30 EHRR 878 one of the defamatory phrases under consideration was "deliberate lie". In that context, it was held that the allegation was required to be proved as a fact but, as it happened, there was no factual basis for it. As always, however, much depends on context. The use of the word "disingenuous" was here founded upon Miss Sarler's general, and to some extent speculative, proposition that publicity would *not* have been "inevitable" had Miss Keays chosen to remain silent and keep a low profile. Readers would be in a position to form a judgment of their own about that. Would publicity have been "inevitable" if Miss Keays had not sold her story and not permitted Flora to be interviewed?

27. Mr Price urged me to take a principled approach to this question and not to indulge in "palm tree justice". I should not indulge in a mini-trial, but rather confine myself strictly to the four corners of the article without reference to the background facts (including the recent newspaper and television coverage). I am sure he is right about this general approach, save to say that one can probably also take into account anything which genuinely forms part of everyone's stock of "common knowledge". In this case, the matter is quite straightforward because the article refers to the earlier coverage. That is what it is all about.

28. Mr Price added that, although judges are regularly testing the capability of words to bear certain meanings in a libel context, it is much rarer for them to shut out the prospect of a jury trial on the comment/fact issue. Judges should not be too ready, he

argues, to pre-empt the jury, and indeed he made the submission that a judge, when asked to do so, should remember that jurors may not have the same analytical skills as professional lawyers and allow for the possibility that they might be looser in what they are prepared to categorise as fact or comment.

29. I am quite sure that judges should not treat jurors in this way when it comes to matters of analysis as opposed to impression. It is naturally recognised that there is room for a wide range of interpretation on the meaning of newspaper articles or television broadcasts: see e.g. *Skuse v. Granada Television* [1996] EMLR 278. It may be that an ordinary fair-minded reader would read in an implication more readily than a lawyer, and might indulge in a certain amount of "loose thinking", as the Court of Appeal there recognised. That is in the context of ascertaining meaning. On the other hand, that is not the same as saying that jurors should be permitted to apply a different test as to what is comment, and what is fact, from that applied by judges. They should be applying the same test (according to directions that are given by the judge). At this stage, the question I have to ask is whether, on the appropriate test, a jury would be perverse to classify the defamatory allegation(s) in this article as factual (in whole or in part).

30. Mr Price also argues that what is objectionable, according to English and European jurisprudence, is any rule which requires defendants, and especially journalists, to "prove" opinions as though they were capable of objective verification: see e.g. *Nilsen & Johnsen v. Norway* (2000) 30 EHRR 878 and *Branson v. Bower* [2002] QB 737 at [27]. He submits that this would not be the position on the present case. It is all very well, he submits, to recognise that inferences as to states of mind *can* be characterised as comment, but the court should not assume that they always are.

31. He reminded me that in the context of criminal law it is a daily occurrence for jurors to infer the necessary *mens rea*, as a matter of fact, from the surrounding circumstances. Jurors are directed in such a context however, that they should only draw such an inference from surrounding circumstances if they are satisfied that no other reasonable explanation is available. In fair comment, for reasons of public policy and especially because of the high importance attached to free speech, a defendant does not have to surmount such a high hurdle. If the allegation is classified as fact, then the burden will be to prove it only on the balance of probabilities. If, on the other hand, the inference as to a claimant's motivation, or other state of mind, is properly regarded as opinion, all that is required is that it should pass the objective test and, if malice is raised as an issue, be honestly expressed. For these reasons one needs to be wary of analogies with the criminal law.

32. It was very much at the centre of Mr Price's submissions that the allegations about Miss Keays' motivation (e.g. to the effect that she was being vengeful or enlisting her daughter's support to embarrass Lord Parkinson) were to the effect that a verifiable state of affairs existed – which could be held to be either true or untrue. That does not, however, address the undoubted principle that the law of fair comment permits people to hold different opinions about human motives. In *Branson v. Bower*, for example, it was contemplated that a journalist could express the opinion that Mr

Branson was deluding himself if he believed that his second lottery bid was prompted solely by altruistic and saintly considerations.

33. If Mr Price were asserting that, in the context of defamation, one *must* adopt the proposition in *Edgington v. Fitzmaurice* (1885) 29 Ch.D. 459 that "the state of a man's mind is as much a fact as the state of his digestion", then he would plainly be wrong. If he is, on the other hand, merely saying that allegations about states of mind are sometimes capable of being characterised as fact rather than comment, that is uncontroversial. What he fails to do, in my judgment, is to demonstrate what is materially different about Miss Sarler's conclusions as to Miss Keays' motivation from Mr Bower's observations on the subject of Sir Richard Branson's. In each of these cases, the writer was not simply asserting the relevant state of mind but also identifying what it was that gave rise to that conclusion.

34. In this case, after hearing from Miss Keays, a jury could possibly come to a different conclusion about her motives, or about her dominant motive, from that expressed by Miss Sarler. But that is nothing to the point. It is elementary that a defendant does not have to persuade a jury to agree with her in order to avail herself of the fair comment defence.

35. The question at this stage is whether it is obvious, and beyond question, that Miss Sarler was expressing an inference as to what had driven Miss Keays to generate the media publicity, following Flora's birthday, rather than (say) seeking to protect her privacy. Whether her inference is "right" or not is beside the point. It is also irrelevant at this juncture whether she was expressing her conclusions honestly in the light of her knowledge on 13 January 2002. The question is whether the article carries an unmistakable badge of comment.

36. Mr Price added that judges should be especially wary of coming to such a conclusion because malice is notoriously hard to prove, and particularly so in the context of fair comment following the judgment of Lord Nicholls in *Albert Cheng* [2001] EMLR 777. Therefore, he argues, the only real protection now left for reputation is that decisions should not be made too early or too lightly, on any given publication, to the effect that it is only recognisable as comment. I respectfully agree that such decisions should not be made lightly, and proper regard should always be paid to the qualified right to trial by jury in defamation cases, which is accorded by s.69 of the Supreme Court Act 1981. That is not to say, however, that judges should be timorous in cases where the unmistakable badge of comment is there to be seen because, in such cases, it is not a question of discretion; it is the judge's positive duty to prevent the issue going forward: cf. *Alexander v. The Arts Council of Wales* [2001] 1 WLR 1840.

37. Mr Price argues that I should resist the blandishments of Ms Rogers who is, he submits, inviting me to shift the balance further away from the protection of reputation and in favour of freedom of speech. I am not sure why. Both advocates referred, quite properly, to European jurisprudence in the course of their submissions, but Ms Rogers was not submitting that English law, as it stands, is in some way inconsistent with the provisions of Article 10. She was taking her stand squarely on

existing English principles, as recently confirmed and illustrated in *Branson v. Bower* by the Court of Appeal and also in *Albert Cheng* (there being no suggestion that the law applicable in Hong Kong differed in any material way from that of England and Wales).

38. I was invited to bear in mind a passage in *Kemsley v. Foot* [1952] AC 345 at 356 (as I was also in *Branson v. Bower* prior to giving my judgment of 21 November 2000). What Lord Porter said on that occasion was as follows:

> "The question, therefore, in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject-matter of the action, and I find my view well expressed in the remarks contained in Odgers on Libel and Slander (6th ed, 1929), at p.166. 'Sometimes, however,' he says, 'it is difficult to distinguish an allegation of fact from an expression of an opinion. It often depends on what is stated in the rest of the article. If the defendant accurately states what some public man has really done, and then asserts that 'such conduct is disgraceful,' this is merely the expression of his opinion, his comment on the plaintiff's conduct. So, if without setting it out, he identifies the conduct on which he comments by a clear reference. In either case, the defendant enables his readers to judge for themselves how far his opinion is well founded; and, therefore, what would otherwise have been an allegation of fact becomes merely a comment. But if he asserts that the plaintiff has been guilty of disgraceful conduct, and does not state what that conduct was, this is an allegation of fact for which there is no defence but privilege or truth. The same considerations apply where a defendant has drawn from certain facts an inference derogatory to the plaintiff. If he states the bare inference without the facts on which it is based, such inference will be treated as an allegation of fact. But if he sets out the facts correctly, and then gives his inference, stating it as his inference from those facts, such inference will, as a rule, be deemed a comment. But even in this case the writer must be careful to state the inference as an inference, and not to assert it as a new and independent fact; otherwise, his inference will become something more than a comment, and he may be driven to justify it as an allegation of fact".

39. Here, not only was the article in the "Comment" section of the newspaper but Miss Sarler was obviously making her observations on the topical subject of the media publicity of the previous week. It was all in the public domain and that was the subject of her article. In short, she was not asserting any of her inferences "as a new and independent fact". Any reader would be aware that this was so, and would be in a position to check her inferences and observations and come to their own conclusions. As Lord Nicholls noted in *Albert Cheng*, "The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being

made. The reader or hearer should be in a position to judge for himself how far the comment was well founded".

40. As to "kiss and tell", it is also clear that Miss Sarler is attaching that label to the material published in The Times nearly twenty years ago. It is her evaluation of the material Miss Keays then provided.

41. My attention was drawn by Mr Price to an old Australian case referred to in Gatley on Libel and Slander (9th Ed) at para 12.6, called *Clark v. Norton* [1910] VLR 494, 499, Cussen J, who there explained the notion of "comment" as "something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc". He argues that it is for the jury to decide what can or cannot be "reasonably" inferred. That is, of course, only if there is room for two views on the particular words complained of.

42. Ms Rogers draws an analogy with the approach taken in *Branson v. Bower* [2001] EMLR 32 at [8]. It had there been concluded, at first instance, that it would have been obvious to readers of Mr Bower's article "... from the nature of the allegations, relating as they do to the Claimant's state of mind, that Mr Bower cannot have direct knowledge and that he must accordingly have been expressing his own views and inferences". The Court of Appeal did not express any disagreement with that. Ms Rogers submits that it is an approach which applies "with even greater force" to the observations of Miss Sarler in the Observer.

43. It is relevant to bear in mind that the Strasbourg Court in *Nilsen and Johnsen v. Norway* at [50] took the view that several of the statements with which they were concerned, imputing improper motives or intentions to the individual concerned (Mr Bratholm), should not be regarded as allegations of fact requiring the makers to prove their truth. "From the wording of the statements and the context, it was apparent that they were intended to convey the applicants' own opinions and were thus rather akin to value judgments". It is clear that the European Court regards it as a very important safeguard for journalists' rights under Article 10 that they should not be required by domestic law to attempt to prove "value judgments" as being objectively valid. It is perhaps worth identifying the four allegations which the Court in that case characterised in that way. They are to be found at [25]:

> "1.1 He describes Professor Bratholm's recent report on police brutality at Bergen police department as 'pure misinformation intended to harm the police'....
>
> 1.3 There must be other ulterior motives. It appears as if the purpose has been to undermine confidence in the police...
>
> 2.2 In my view, one is faced with a form of skulduggery and private investigation where there is good reason to question the honesty of the motives.

> 2.3 The Norwegian Police Association will not accept ... private investigations on a grand scale made by dilettantes and intended to fabricate allegations of police brutality which are then made public."

44. It seems to me to be clear that this broad and liberal approach to the expression of opinion should inform the exercise I am now embarked upon. What is more, such an approach is consistent with the judgments in the Court of Appeal in *Branson v. Bower* [2001] EMLR 32 at [8] where it seems to have been accepted that "... if a journalist makes inferences as to someone's motives, that may be treated as the expression of an opinion even though the inference drawn may be to the effect that there exists a certain state of affairs (including a state of mind)".

45. Another aspect of the Strasbourg Court's decision in *Nilsen & Johnsen*, at [52], was considered by counsel in argument. Ms Rogers pointed out that it had been considered relevant that the complainant (Mr Bratholm) had readily participated in public debate and was, for that reason, required to exhibit a "greater degree of tolerance" to criticism. The makers of the relevant statements (the applicants) were speaking as elected representatives of the national and local police association, on behalf of their members, and felt entitled to "hit back in the same way" to counter attacks on the police working methods.

46. It was also pointed out in *Jerusalem v. Austria* (Appn 26958/95, 27 February 2001) at [38] and [39] that politicians "... inevitably and knowingly lay themselves open to close scrutiny of word and deed by both journalists and the public at large". Nevertheless, private individuals too will lay themselves open to such scrutiny if they voluntarily enter the arena of public debate, and then need to show "... a higher degree of tolerance to criticism when opponents consider their aims and means employed in that debate".

47. Although Ms Rogers placed reliance on this particular passage, and the policy underlying it, Mr Price submitted that it had no bearing on the narrow issue that I have to resolve on the present application. In particular, in relation to *Nilsen & Johnsen*, he argued that English law would make adequate provision for the elected police representatives by affording them a defence of qualified privilege in accordance with the "reply to attack" line of authorities. Moreover, the fact that Miss Keays had entered the public domain, as Miss Sarler records in her article, may have a bearing on such issues as the objective test, malice or damages but, Mr Price submits, it could hardly affect the interpretation or construction of the words complained of for the purpose of determining whether they are fact or comment.

48. I am not sure that this consideration is wholly irrelevant. It appears to me to be part of the context against which the judgment has to be made. One factor which appears to weigh in favour of construing Miss Sarler's observations as comment, or as being analogous to value judgments, is that she is on the face of the article responding to a corpus of published work emanating from Miss Keays. The very fact that Miss Keays launched a barrage of material about herself and her daughter for public consumption naturally invites comment upon the subject-matter and upon the appropriateness of

what she has done. As Lord Porter observed in *Kemsley v. Foot* [1952] AC 345, 355-356, "if an author writes a play or a book or a composer composes a musical work, he is submitting that work to the public and thereby inviting comment." The point is not perhaps of major significance, but that context of "response to published work" would incline the reader towards interpreting what Miss Sarler had to say as "deduction, inference, conclusion, criticism, remark, observation, etc." (see the words of Cussen J cited above).

49. Although I have considered the arguments, and the principles of law, in some detail, I regard this as a very clear case. Miss Sarler's article is *par excellence* a comment piece, and was indeed so labelled. She was obviously drawing an inference from the subject-matter of her observations, namely the media coverage promoted by Miss Keays. Where a journalist draws such an inference about a state of mind which she cannot, in the nature of things, verify, then it will generally be clear to any reasonable reader that it does not purport to be an objective statement of fact capable of verification. It was clear in this case, and anyone who was to classify the defamatory imputations as factual, and as requiring objective verification, would indeed be perverse.

50. Anyone who chooses to enter the public arena invites comment and often this will include scrutiny of and comment about motives. Such persons cannot expect as of right to be taken at face value. It is sufficient protection in such circumstances for personal reputation that any adverse comments should be made in good faith, and that the words should be subjected, at the appropriate stage, to the objective test of whether the inferences or deductions *could* be drawn by an honest person with knowledge of the facts: see e.g. Lord Nicholls in *Albert Cheng* at [41] and [45].

51. I therefore uphold the Defendants' submissions and rule accordingly.