Section 6

Grounds of Appeal

1. The Judge was wrong to determine that the single "right" meaning of "tried to strangle" was tried to kill by strangulation because the Appellant was alive and had red marks around her neck. In particular, his reasoning was contradicted by the material adduced by the Appellant as to the usage of the words and equivalent words.

2. The Court of Appeal was wrong to hold that "the issue is not whether we would have come to the same or a different conclusion had we been trying the case at first instance". The law of defamation proceeds on the basis of a single right meaning. If the Court of Appeal would have come to a different conclusion to a judge, it must substitute its determination for that of the judge if it is likely to have a material impact on the outcome of the claim.

3. If the Appellant succeeds on the meaning of tried to strangle, the justification defence necessarily succeeds. Alternatively, the Judge was wrong to permit the Respondent to depart from his pleaded case with the consequence that the Appellant became liable in defamation because, in the Judge's opinion, the publication complained of as a whole suggested that the Respondent was "dangerous" and this was an exaggeration. Further, such a characterisation is a pure value judgment and it is contrary to Article 10 of the European Convention of Human Rights to require a defendant to prove the truth of a value judgment.

The criteria for permission to appeal

4. For the reasons set out below, the proposed appeal raises two arguable points of law of general public importance on the judicial determination of defamatory meaning: firstly, the admissibility, treatment and weight to be given to external material relating to the usage of the words complained of or equivalent words; and secondly, the standard of appellate review on a determination of meaning.

The importance of a determination of meaning

5. A particular set of words and its context may give rise to a range of possible meanings. It remains a rule of the law of defamation however, that the entire claim must proceed upon a single defamatory meaning (the "right" meaning) chosen from that range. Historically, there would be two stages to the selection of the right meaning. The judge would exclude any "incapable" meanings i.e. those which were the product of an unreasonable construction of the words. The jury would then select the right meaning from the available capable meanings. This meaning should reflect the most likely way in which the words would have been understood by the reader.

6. The single meaning rule is an aspect of the "archaic and artificial character of the tort of defamation" (see Diplock LJ in *Slim v Daily Telegraph Limited* [1968] 2 QB 157 at 171F and 172C). It is one of the features of defamation law that puts a defendant at a disadvantage compared with defendants of other tortious causes of action. For example, the defamation defendant acquires no benefit from her intended meaning, even if she has not been careless in her choice of words.

7. The determination of meaning is often determinative of the outcome of the claim. If the meaning upheld by the court is materially more serious than that intended by the defendant a truth defence will not succeed even if the defendant can prove the truth of her intended meaning. This is likely to result in the payment of damages and the costs of the claim and an injunction to prevent her from repeating the words complained of. If the meaning found by the court is not the right meaning, the result will be a serious and unjustified interference with the defendant's right to freedom of expression and a false public vindication for the claimant.

8. As observed by Longmore LJ in *Cruddas v Calvert* [2014] EMLR 5 (at [19]): "It is an important aspect of the law of libel that it should be open to a defendant to justify a lesser defamatory meaning than that alleged by a claimant if that is the right meaning to be given to the article". The court should ensure that, so far as possible, it arrives at the right meaning. The costs and court resources in determining meaning, at first instance or on appeal, are generally a fraction of those in litigating other aspects of a defamation claim that may flow from it.

9. A dispute on meaning may arise where, as here, a defendant describes accurately and in good faith an act carried out by the claimant, but the claimant alleges that the words used impute to him a particular mental state and hence a criminal offence more serious than the act sought to be described by the defendant.

10. Allegations involving domestic violence and sexual harassment are the most likely to give rise to such a dispute. The law of defamation may have reached such a level of abstraction that the victim of such an act can be liable in damages to her aggressor if she frames her truthful description of what happened in words that inadvertently give rise to an imputation as to his state of mind that she is unable to prove. But it is all the more important to ensure that her words do, in fact, bear the inadvertent meaning to an ordinary reader. A defamation case is not to be equated with a criminal trial. The ordinary reader will not be focussed on establishing the precise *mens rea* of the aggressor. The victim may not know it. What is relevant to both is the nature of the act.

11. Until relatively recently the determination of meaning was generally made by a jury, able to bring their combined life experiences to the task. In this context, it is important to bear in mind that the question is not "What does this statement mean?" but rather, "What do I think the defendant is intending to communicate?"

12. The Defamation Act 2013 abolished the statutory right to trial by jury (in section 69(1) of the Senior Courts Act 1981), cementing the trend in practice in invoking the exceptions in section 69. While there are some clear advantages in dispensing with a jury in defamation claims, there are obvious risks in placing the determination of the "right" single natural and ordinary meaning in the hands of one lawyer from a relatively narrow pool of other lawyers with very similar life experiences. It is therefore vital that there are appropriate safeguards in place to prevent the court upholding a more serious meaning than that which the words actually bore when used by the defendant.

External material evidencing usage of the words complained of

13. There is a long-standing rule that no evidence is admissible of how the words complained of were in fact understood by the publishees.[1] Gatley on Libel and Slander 12th edition at [33.7] states: "If the claimant relies on the natural and ordinary meaning of the words, no evidence is admissible by the defendant (or the claimant) as to their meaning". No authority is cited for this wider proposition.

14. It was not the practice to provide the jury with any material evidencing the usage of the words, because the jury was taken to constitute the ordinary reader. The function of a judge in determining meaning is different: he or she does not assume the role of the ordinary reader, but instead tries to ascertain what such a reader would understand to be the defendant's intention in using the words. A judge is one step removed from a juror in the exercise.

15. There is no rule of law that prevents a defendant from putting external material evidencing usage before a judge in order to demonstrate that her use of the words is consistent with it. Insofar as Sharp LJ suggested that the Appellant ought not to have done so in the present case, she was mistaken. It is a potentially valuable safeguard to prevent a judge from pursuing a line of reasoning that is contrary to how the relevant words are, in fact, used and understood.

16. The need for, and if so, the weight to be given to such material will vary from case to case. In the present case the Judge had available material adduced by the Appellant which demonstrated that the reasoning necessary to arrive at the Claimant's more serious meaning – "tried to strangle" could only mean "tried to kill" if the victim is alive and her breathing was constricted – was flawed. This material included the statutory offence of, "attempt[ing] to choke, suffocate, or strangle" in section 21 of the Offences Against the Persons Act 1861, the CPS policy for prosecuting cases on domestic violence and references in family cases and media reports to "tried to strangle" in circumstances which did not import an intent to kill. Strangling is a well-known form of domestic abuse, which in common with other forms, is based on control and dominance with the purpose of obtaining the victim's future or continued subservience. The words, "he tried to

[1] See, for example, *Hough v London Express Newspaper Ltd* [1940] 2 KB 507 at 515.

strangle me" are a common way of a victim describing a violent constriction of the throat that has prevented her from breathing but, self-evidently, has not resulted in her death.

17. The material adduced on usage became particularly significant once the Judge had referred to the Oxford English Dictionary definitions of "strangle" at the start of the trial. These are: "1(a):To kill by external compression of the throat. 1(b): To constrict painfully (of the neck or throat)". The Judge added: "You might from that gain the primary and the secondary definition, and fit it into the context of a message which said he "tried" to do something".

18. Following this observation, the Appellant also drew the Judge's attention to the offence in section 14(1) of the 1861 Act ("attempt to …. suffocate or strangle … with intent to murder") and the decision of *R v Grimwood* [1962] 2QB 621. Lord Parker CJ identified the issue on appeal as follows: "The only question that arises in this case is as regards the judge's direction on the question of intent to murder. That there was an attempt to strangle and an attempt to suffocate is quite clear and admitted..". The section was repealed in 1967. But there is no suggestion that there has been any material change in usage and the Appellant had already provided evidence of contemporary usage in similar terms.

19. It is not necessary to resort to a dictionary to be aware that strangling is a violent act that involves the painful constriction of the throat which restricts breathing. Sometimes it can lead to death, and frequently it does not, irrespective of the intention of the aggressor. The two definitions are not inconsistent.

20. Further, a dictionary can only give definitions of a single word, whereas the relevant issue in this case was the meaning of a particular phrase ("tried to strangle me") in the context of a domestic dispute. The Judge considered external material for the meaning of one word only ("strangle"), while failing to address the material exemplifying the usage of the phrase as a whole, which flatly contradicted his reasoning. In order to reject the Appellant's case on meaning the Judge had to deal with this material.

21. The Court of Appeal also failed to address the material, it would appear, on the basis that it considered it to be inadmissible.

The standard of appellate review

22. In the recent case of *Bukovsky v Crown Prosecution Service* [2018] EMLR 5 the Court of Appeal considered the appropriate standard of appellate review on a judicial determination of meaning. The rival approaches, derived from a paragraph in Duncan & Neill on Defamation (2015) 4th edition (at [5.25]), were said to be that either the court could, "… simply substitute its own view if it disagrees with the judge" (A), or alternatively it could, "interfere only when 'quite satisfied' that a judge's determination of meaning was wrong and that some other meaning clearly applied" (B).

23. After reviewing the authorities the Court rejected the 'quite satisfied' test noting (correctly) that, "[i]f the Court concludes that a decision on meaning is wrong, why should it not proceed on that basis?"[2]

24. It decided to adopt a position described as somewhere between A and B. "[The court] should proceed cautiously before substituting its own views on meaning and only do so when satisfied that the judge is wrong, not least because meaning is very often a matter of impression, because experienced defamation judges are well practiced at applying the relevant tests for determining meaning and because it is plainly undesirable for the Court of Appeal to approach the issue on appeal simply on the basis that they might have formed a different view from the judge."[3]

25. It is submitted, for the reasons set out below, that the correct test is simply whether the judge's determination was wrong. This requires the Court of Appeal to make its own determination of the right meaning and ask itself whether it is materially different from the judge's.

[2] At [38]
[3] At [39]

25.1. The law proceeds on the basis of a single right meaning with important consequences arising from it. If there is a stark difference between the rival meanings and the court is of the opinion that the appellant's was right, by necessary implication, the court believes that the judge was wrong to accept the respondent's.

25.2. The words, "act cautiously" and, "when satisfied" (in the passage cited above) add nothing. The court should always act cautiously, and there is no practical difference between "satisfied" and "quite satisfied".

25.3. The Appellant accepts that "it is plainly undesirable for the Court of Appeal to approach the issue on appeal simply on the basis that they *might* have formed a different view from the judge" [emphasis added]. The court will only allow an appeal if they *would* have formed a different view from the judge. Permission to appeal will only be granted where there is a real prospect of such an outcome which is likely to impact materially on the claim.

26. The correct approach is not as stated by the Court of Appeal in the present case: "the issue is not whether we would have come to the same or a different conclusion had we been trying the case at first instance".[4] The appellate court must come to its own conclusion on meaning in order to determine whether the judge was wrong.

27. It is insufficient for the Court of Appeal to rely simply on the Judge having cited and applied the general principles of construction for determining meaning and having arrived at a conclusion that (in its opinion) was "plainly open to him". Such an approach is redolent of the exercise formerly undertaken by judges and appeal courts when considering whether words were *capable* of bearing a meaning, so that the range of possible meanings (and only that range) could be put before a jury for selection of the one right meaning. However where, as here, the exercise is that of selecting the single meaning, whether the judge has

[4] At [19]

chosen the right or the wrong meaning is central to any appeal and cannot be ducked by the Court of Appeal.

David Price QC

Jonathan Price

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