HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, CALLINAN AND HEYDON JJ

JOHN FAIRFAX PUBLICATIONS PTY LIMITED APPELLANT

AND

RENE RIVKIN RESPONDENT

John Fairfax Publications Pty Ltd v Rivkin
[2003] HCA 50
10 September 2003
S353/2002

ORDER

1. *Appeal allowed.*

2. *Order that there be a new trial on imputations 1(a), 1(b), 3(c)(i), 3(c)(ii), and 3(d).*

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with T D Blackburn and A T S Dawson for the appellant (instructed by Freehills)

T E F Hughes QC with T D F Hughes for the respondent (instructed by Gilbert & Tobin)

CATCHWORDS

John Fairfax Publications Pty Ltd v Rivkin

Defamation – Appeal – Where jury found that matter did not convey any of the imputations pleaded – Whether jury's findings on particular imputations were ones which no reasonable jury properly instructed could reach – Scope of new trial where some only of the jury's findings were unreasonable.

Practice and procedure – Order of addresses – Where plaintiff addressed jury first and defendant followed – Where trial judge refused plaintiff leave to address in reply – Whether trial judge erred in exercise of discretion – Whether order of addresses governed by rules of court or inherent jurisdiction of court.

Appeal – Defamation – Whether jury's findings on alleged imputations were ones which no reasonable jury properly instructed could reach – Relevance of brevity of jury's retirement and universally unfavourable answers to alleged imputations.

Defamation Act 1974 (NSW), s 7A.
Supreme Court Act 1970 (NSW), s 102.

1 GLEESON CJ. The facts are set out in the reasons for judgment of Callinan J, with which I agree. I would make the following additional observations.

2 The issue before the Court of Appeal was fairly expressed in the notice of appeal to that Court as being whether each of the answers given by the jury to the questions submitted was an answer that no reasonable jury properly directed could have given. It is not uncommon, and not inappropriate, for judicial reference to such an issue to be accompanied by admonitions intended to remind appellate courts of a need for restraint. Sometimes such restraint is said to be necessitated by a practical consideration: juries, unlike trial judges sitting alone, do not give reasons for their decisions, and their decisions are, to that extent, unexaminable. Sometimes it is said to reflect deference to the constitutional role of the jury, and to its representative function. In defamation actions in New South Wales, that function is now considerably restricted, but at least it survives to the limited extent exemplified in the present appeal. It is to the practical consideration that I wish to return.

3 Comments about the difficulty of challenging a jury's decision are often made in a context in which the jury has returned a single inscrutable verdict. That is not quite the present case. Here the jury gave answers to a number of questions. In each case, the question was divided into two parts: whether the matter published by the appellant of the respondent conveyed a certain imputation; and, if so, whether the imputation was defamatory. The jury returned a negative answer to the first part of each question.

4 As the reasoning of the Court of Appeal demonstrates, the strength of the respondent's case in relation to the alleged imputations varied. The most serious alleged imputation was that the respondent was criminally liable in respect of the murder of a young woman whose body was found at the base of a cliff. The finding that the matter published did not convey that imputation was reasonably available to the jury. The articles treated the whole matter of the young woman's death as a mystery. The possibility that she was the victim of homicide, was presented as an open question. It appeared from the articles that the respondent had never even been questioned by the police about the matter. On the other hand, the jury's answer in relation to another of the imputations presents a challenge even to the most adroit rationalisation.

5 One of the publications, in the course of paragraphs bearing the headline "Death of a Model", reported an unqualified and uncontradicted assertion that the deceased was suspicious of the respondent because he "used to hang out with a whole stack of people at [a] cafe which ... has a reputation for being a hangout for ex-drug dealers ... [and] [s]ome of [the respondent's] closest cronies are ... have certain criminal backgrounds or are rumoured to have it". The pleaded imputation was that the respondent was a close associate of criminals. The negative answer to the question whether the matter published conveyed that

imputation is, to use a familiar simile, like the thirteenth stroke of a clock: not only wrong in itself; but such as to cast doubt on everything that went before[1].

6 While the same test is to be applied to each answer - whether it was an answer that no reasonable jury properly directed could have given - restraint on the part of an appellate court is likely to wane when one of the answers is of that quality. When an appellate court is reviewing a trial judge's findings of fact, it may conclude that a particular finding is so glaringly improbable that the level of scrutiny to which all the findings are to be subjected should be intensified. Put another way, the benefit of a doubt that might be given to a trial judge's findings in one context might be forfeited in another. The same may happen if, because a jury has answered a number of questions, there is a better than usual opportunity to assess its form.

7 It does not follow, however, that it is unnecessary to deal with the appellate challenge, on its merits, in the case of each individual answer. In the present case, the Court of Appeal so completely lost confidence in the manner in which the jury addressed its task that the Court concluded that there should be a new trial on all questions. That was partly because the Court of Appeal took a more favourable view of some aspects of the respondent's case than I would take. What is said above in relation to the murder imputation is an example.

8 I agree that there is no basis for interfering with the trial judge's discretionary decision as to the order of address by counsel.

9 I agree with the orders proposed by Callinan J.

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1 Hardy, *Far from the Madding Crowd*, (Claremont Classics 1999) at 183; Herbert, *Uncommon Law* (Eyre Methuen 1977) at 28.

10 McHUGH J. The principal issue in this appeal is whether the Court of Appeal of the Supreme Court of New South Wales erred in holding that no jury could reasonably find that two publications sued upon as being defamatory of the plaintiff did not contain certain imputations concerning him. If the Court of Appeal did not err in so holding, a second issue arises. It is whether that Court erred in holding that there should be a general new trial concerning all imputations pleaded in respect of those articles and another article even though the Court held that the jury acted reasonably in finding that the articles did not contain many of the imputations pleaded.

11 In my opinion, the Court of Appeal erred in holding that no reasonable jury could find that the two articles did not contain the relevant imputations.

Statement of the case

12 Rene Rivkin, "a stockbroker, a company director and a prominent member of the business and financial community in Australia", sued John Fairfax Publications Pty Limited for damages for defamation in the Supreme Court of New South Wales. He sued on three separate publications. The first was an article in The Australian Financial Review dated 21-22 February 1998. The second was an article in The Sydney Morning Herald dated 25 February 1998. The third was an article in The Sydney Morning Herald dated 5 March 1998.

13 He alleged that each of these articles, in their natural and ordinary meaning, contained defamatory imputations against him. He also alleged that the article of 25 February 1998 had an extended meaning (a true innuendo) to those persons who had read The Australian Financial Review article. John Fairfax admitted that it had published the articles and that at least one person who read the article of 25 February 1998 had also read The Australian Financial Review. But it denied that the articles contained the imputations that Mr Rivkin alleged or that the imputations were defamatory.

14 In accordance with the requirements of s 7A of the *Defamation Act* 1974 (NSW), a jury was empanelled and asked to answer a series of questions as to whether the articles contained the imputations alleged and, if so, whether they were defamatory. Because of the limited role of the jury in such a proceeding, no oral evidence was called. Indeed, the only evidence before the jury were copies of the three articles. After a retirement of two hours, the jury held that Mr Rivkin had not established that any of the articles contained any of the imputations alleged. It made no findings as to whether or not those imputations were defamatory, if they had been made. As a result of the jury's answers, the trial judge entered a verdict for John Fairfax.

15 Mr Rivkin appealed to the Court of Appeal of New South Wales against the entry of the verdict for John Fairfax. His principal ground of appeal was that "each of the answers given by the jury to the questions submitted to them was an

answer that no reasonable jury properly directed could have given." The Court of Appeal (Grove J, with whom Meagher JA and Foster AJA agreed) held that nine answers given by the jury were reasonably open to them but that no jury could reasonably have given six of the answers. Despite finding that nine of the jury's answers were reasonable, the Court ordered a new trial on all questions. It did so for two reasons. First, the Court held that Mr Rivkin's counsel should have been given a right of reply to the address of counsel for John Fairfax. Secondly, it held that the "constant rejection of the cause of a litigant in many cases in defiance of reasonableness" indicates "that the jury has misapplied itself to its task."

16 By special leave, John Fairfax now appeals to this Court against the orders of the Court of Appeal and asks that the order for a new trial of the action be set aside and the verdict entered at the trial be restored.

Setting aside a civil jury's verdict

17 In determining whether a civil jury acted reasonably in reaching its verdict, an appellate court must approach the case on the basis most favourable to the respondent to the appeal. The question for the appellate court is not whether the verdict is right or appears to be right but whether in the light of the evidence the verdict shows that the jury failed to perform its duty[2]. As long as the verdict cannot be described as irrational, it must stand[3]. As Else-Mitchell J pointed out in *Carr v Sydney City Council*[4], an appellate court is not entitled to set aside a jury's verdict because the court regards the verdict "as illogical, unsatisfactory or different from that which it would itself have reached". These principles apply to appeals in defamation actions as well as to appeals in other common law actions[5].

18 Because the issue of libel or no libel is usually a matter of "impression"[6], however, appellate courts set aside jury verdicts on the ground of unreasonableness, even less frequently than they set them aside in other actions. The need for restraint is heightened by the knowledge that the meaning of a

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2 *Mechanical and General Inventions Co v Austin* [1935] AC 346; *Hocking v Bell* (1945) 71 CLR 430 at 498-499; *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 227.

3 *David Syme & Co v Canavan* (1918) 25 CLR 234 at 239.

4 (1963) 80 WN (NSW) 397 at 404.

5 *Christie v Robertson* (1889) 10 LR (NSW) 157 at 160; *Ryan v Ross* (1916) 22 CLR 1 at 19.

6 *Lewis v Daily Telegraph* [1964] AC 234 at 260 per Lord Reid.

publication and whether it is defamatory depends on whether ordinary reasonable readers would think it had the meaning alleged and, if so, whether that meaning is defamatory. It is for the jury to say what the words of the publication would mean "to ordinary men and women going about their ordinary affairs"[7]. Juries are more likely than judges to be able to assess the reactions of ordinary reasonable readers. At all events, the collective impression of a jury is more likely to be representative of the community's impression of the publication than the collective impression of a panel of appellate judges, however experienced or learned the panel may be. The New South Wales Parliament has certainly taken that view. In that State, judges decide every issue in a defamation action except meaning and defamation. Given the enactment of s 7A of the *Defamation Act*, the need for appellate restraint is even greater now than it was in 1990 when Kirby P said "judges must exercise care and restraint in invading the functions reserved by Parliament to juries"[8].

19 Occasions for invading the jury's function occur even less frequently when the jury has found that a publication is not defamatory. Rarely have appellate courts set aside a jury's finding that a publication was not defamatory. So rarely has it been done that in 1928 in *Lockhart v Harrison*[9], Lord Buckmaster could say "such cases occur so rarely that within the last century there are only two to which our attention has been drawn in which this power has been exercised." There have not been many since.

20 It is only when the publication contains a "plain and obvious defamation incapable of any innocent explanation"[10] or where the words are "necessarily"[11] defamatory that an appellate court is entitled to find that no reasonable jury could have failed to find the meaning alleged or that it was defamatory. As Chief Justice Darley observed in *Kelly v Daily Telegraph Newspaper Co*[12], if the words of the publication have "any possible construction which can be put upon them, susceptible of an innocent meaning, then the verdict of the jury for the defendants

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7 *Lewis v Daily Telegraph* [1964] AC 234 at 266 per Lord Morris of Borth-y-Gest.

8 *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 88.

9 (1928) 139 LT 521 at 523.

10 *Lockhart v Harrison* (1928) 139 LT 521 at 523.

11 *Geach v Hall* (1890) 16 VLR 386 at 389, 391, 392; *Blashki v Smith* (1891) 17 VLR 634 at 636, 638; *Rofe v Smith's Newspapers Ltd* (1927) 27 SR (NSW) 313 at 316, PC; *Thompson v Truth & Sportsman Ltd (No 1)* (1929) 31 SR (NSW) 129 at 134-135.

12 (1897) 18 LR (NSW) 358 at 361.

is conclusive and cannot be disturbed." Hence, an appellate court can set aside a verdict of no libel on the ground of unreasonableness only when the words of the publication are not capable of any but a defamatory meaning[13]. Only when the defamation is "clear and beyond argument"[14] can an appellate court set aside a jury's finding that the publication does not have the meaning alleged or that the meaning alleged is not defamatory.

21 Mr Hughes QC, counsel for Mr Rivkin, argued – faintly I thought – that, because the appeal was brought to the Court of Appeal under s 102 of the *Supreme Court Act* 1970 (NSW)[15], his client "did not have to surmount such a high bar" to have the jury's answers set aside. Mr Hughes argued that the appeal was "an appeal stricto sensu" and was not comparable with "the common law remedy of motion for a new trial in the exercise of a common law court's supervisory jurisdiction." The short and obvious answer to these contentions is that the principles to which I have referred have been applied, if they have not been developed, for more than a century by appellate courts hearing appeals under statutory enactments[16].

22 Accordingly, if the articles have rational meanings other than those asserted by Mr Rivkin, the jury's answers to the questions must be upheld and its verdict restored. Similarly, the jury's answers to any particular question must stand unless the article can have no meaning other than that contended for by Mr Rivkin.

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13 *Doyle v McIntosh* (1917) 17 SR (NSW) 402.

14 *Broome v Agar* (1928) 138 LT 698 at 702; *Cairns v John Fairfax & Sons Ltd* [1983] 2 NSWLR 708 at 716-717.

15 "Where, in any proceedings in the Court, there is a trial of the proceedings or of any issue in the proceedings with a jury, an application for:

....

(b) a new trial ...

shall be by appeal to the Court of Appeal."

16 See eg *Capital and Counties Bank v Henty* (1882) 7 App Cas 741; *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68; *Lockhart v Harrison* (1928) 139 LT 521; *Ryan v Ross* (1916) 22 CLR 1.

The tests for meaning and defamation

23 Traditionally, courts have accepted that juries are more likely to find a publication defamatory than a judge. Lord Devlin famously said[17]:

> "[T]he layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory."

24 Consequently, for the purposes of a defamation action, the natural and ordinary meaning of words contains "all such insinuations and innuendoes as could reasonably be read into them by the ordinary man"[18]. Lord Reid said[19]:

> "The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs."

25 A reader may be acting reasonably even though he or she engages in "a certain amount of loose thinking"[20]. This is because, as Lord Reid also pointed out[21]:

> "The ordinary reader does not formulate reasons in his own mind: he gets a general impression and one can expect him to look again before coming to a conclusion and acting on it. But formulated reasons are very often an afterthought."

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17 *Lewis v Daily Telegraph* [1964] AC 234 at 277.

18 *Lewis v Daily Telegraph* [1964] AC 234 at 280 per Lord Devlin.

19 *Lewis v Daily Telegraph* [1964] AC 234 at 258.

20 *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1245; [1971] 2 All ER 1156 at 1163; *Steele v Mirror Newspapers Ltd* [1974] 2 NSWLR 348 at 373; *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 641; *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386.

21 *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1245; [1971] 2 All ER 1156 at 1163; *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 641.

26 However, although a reasonable reader may engage in some loose thinking, he or she is not a person "avid for scandal"[22]. A reasonable reader considers the publication as a whole[23]. Such a reader tries to strike a balance between the most extreme meaning that the words could have and the most innocent meaning[24]. The reasonable reader considers the context as well as the words alleged to be defamatory[25]. If "[i]n one part of [the] publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and antidote must be taken together.[26]" But this does not mean that the reasonable reader does or must give equal weight to every part of the publication[27]. The emphasis that the publisher supplies by inserting conspicuous headlines, headings and captions is a legitimate matter that readers do and are entitled to take into account[28]. Contrary statements in an article do not automatically negate the effect of other defamatory statements in the article[29].

27 The rule that the publication must be read as a whole is particularly important where the publication reports a defamatory statement by a third party. The general rule is that a person who publishes the defamatory statement of a third party adopts the statement and has the same liability as if the statement originated from the publisher[30]. Accordingly, it is not the law that a person

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22 *Lewis v Daily Telegraph* [1964] AC 234 at 260.

23 *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646; *Australian Broadcasting Corporation v Comalco Ltd* (1986) 12 FCR 510; *Morosi v Broadcasting Station 2GB* [1980] 2 NSWLR 418(n).

24 *Lewis v Daily Telegraph* [1964] AC 234 at 259-260.

25 *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68 at 72, 78; *English and Scottish Co-operative Properties Mortgage & Investment Society Ltd v Odhams Press Ltd* [1940] 1 KB 440 at 452.

26 *Chalmers v Payne* (1835) 2 Cr M & R 156 at 159 [150 ER 67 at 68]; *Bik v Mirror Newspapers Ltd* [1979] 2 NSWLR 679 at 682, 683-684; *Monte v Mirror Newspapers Ltd* [1979] 2 NSWLR 663 at 671.

27 *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646.

28 *Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646.

29 *Savige v News Ltd* [1932] SASR 240; *Hopman v Mirror Newspapers Ltd* (1960) 61 SR (NSW) 631; *Sergi v Australian Broadcasting Commission* [1983] 2 NSWLR 669.

30 *"Truth" (NZ) Ltd v Holloway* [1960] 1 WLR 997 at 1002-1003.

reporting the defamatory statement of another is only liable if he or she adopts the statement or reaffirms it[31]. But, as Griffith CJ pointed out in *Ronald v Harper*[32], although as a general rule a person who repeats a defamation adopts it as his or her own statement, it is not "a rule of invariable application". The context of the statement may show that it is refuted or undermined by other parts of the publication. In *Bik v Mirror Newspapers Ltd*[33], the plaintiff claimed that he was defamed by a report of parliamentary proceedings that disclosed that a witness at a coronial inquiry had alleged that the plaintiff had designed a faulty crane that led to a fatality. But the report also stated that, in answer to a question, the Minister of Justice "completely cleared"[34] the plaintiff. The New South Wales Court of Appeal unanimously held that the report was incapable of a defamatory meaning concerning the plaintiff.

28 The above principles and considerations are as relevant in determining whether the jury's answers in the present case were reasonable as they are when a court has to consider whether words are capable of a defamatory meaning. But in a case where the jury has returned a finding of no imputation or no libel, they have less force than in a case where the jury has found the defamatory meaning alleged and pleaded. They indicate the outer limits of meaning and defamation; they give far less assistance in determining whether the jury was bound to find the defamatory meaning alleged and pleaded.

The Australian Financial Review article of 21-22 February 1998

29 The Australian Financial Review article, like the two articles in The Sydney Morning Herald, was concerned with the death of Ms Caroline Byrne whose body, according to the articles, was found at the foot of a 30 metre cliff at The Gap "a well-known Sydney suicide spot, almost three years ago." Mr Rivkin alleged that The Australian Financial Review article contained four imputations. The Court of Appeal held that it was open to the jury to find reasonably that the article did not have two of the imputations pleaded. But it held that it was unreasonable for the jury to find that the article did not have the other two imputations pleaded. Those two imputations were:

> "1(a) that the Plaintiff's participation in the affairs of Offset Alpine Press Group had diminished his reputation as a sagacious and astute stockbroker;

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31 *Wake v John Fairfax & Sons Ltd* [1973] 1 NSWLR 43 at 49-50.

32 (1910) 11 CLR 63 at 77.

33 [1979] 2 NSWLR 679.

34 [1979] 2 NSWLR 679 at 681.

1(b) that in May 1995 the Australian Securities Commission had reason to suspect that the Plaintiff had engaged in unlawful conduct in connection with the affairs of Offset Alpine Press Group."

Imputation 1(a)

30 The Australian Financial Review article stated that the Senior Deputy State Coroner had returned an open verdict on Ms Byrne's death "finding that she either jumped, slipped or was pushed from the top of the cliff on the night of June 7, 1995." The article was headed "It's a BAD BUSINESS". Above that headline was a drawing outlining a body lying prostrate. The outline and the heading occupied about 75 per cent of the page.

31 The article stated that Ms Byrne had been referred to a psychiatrist by her general practitioner two days before her death "complaining of depression, though the doctor stressed at the inquest that she did not feel Byrne was suicidal." It went on to state that inquiries by The Australian Financial Review raised the possibility that an Australian Securities Commission interrogation of her boyfriend the day before her death may have contributed to her depression. The boyfriend was identified as Mr Gordon Wood. The article said that on May 31 1995, Wood and his employer, "high-profile investor Rene Rivkin", had been served with an order by the Australian Securities Commission "to submit to a formal examination by an ASC legal team." It claimed that the Australian Securities Commission had questioned Wood and Rivkin on 6 June "over the recent trip the two had taken to Zurich, and in connection with its investigation of secret holdings in Rivkin's Offset Alpine Press Group by mystery Swiss investors." The article said that, during Wood's employment, Mr Rivkin's fortunes were on the rise and that he had controlled Offset Alpine, a public company, since the 1980s. But it said that, although the company was virtually moribund by 1992, on two occasions since then its share price had been galvanised. It then stated:

> "But Rivkin's reputation as a canny and astute broker took a battering in May 1995 when the ASC took legal action to freeze a major part of Offset Alpine's share register."

32 This paragraph is central to Mr Rivkin's claim that the article contained imputation 1(a). But the imputation differs in a major respect from the text of the article. The imputation asserts that the plaintiff's participation in the affairs of Offset Alpine "had diminished his reputation as a sagacious and astute stockbroker". The jury were entitled to take the view that this imputation meant that, as at the date of the article – 21-22 February 1998 – Mr Rivkin's reputation as a sagacious and astute stockbroker had been diminished by his participation in the affairs of Offset Alpine. But the relevant paragraph said no more that his reputation as a canny and astute broker had taken a battering in May 1995. It said nothing as to whether the battering had resulted in any permanent

diminution of his reputation. Moreover, other parts of the article suggested that Mr Rivkin had been cleared of any wrongdoing. The article expressly stated:

> "No charges were ever laid, and no negative aspersions were ever drawn about any of those investigated by the ASC."

33 The article was also open to the construction that the investigation into Mr Rivkin had been the product of a mistaken communication by Mr Phillip Croll, the Managing Director of his broking house to the Australian Stock Exchange. The article declared:

> "After the ASC froze the shares on May 3, Croll told the ASC that he had misunderstood the relationship, and that Rivkin did not control the accounts. 'I think you'll find that a little bit of knowledge can be a dangerous thing,' Croll told the *AFR* on May 9 about his mistake.
>
> This would have been a tense time for all concerned. It was difficult for the Swiss companies, which were forbidden by Swiss law from disclosing the real identity of their clients. It was tense for the real owners of the shares, who were risking the loss of their entire investment to the ASC by instructing the Swiss companies not to name them.
>
> It also must have been a tense time for Rivkin and his personal assistant Gordon Wood, not merely because it now seemed that, *unbeknownst to Rivkin*, his company had had a covert takeover, but also *because thanks to Croll's misunderstanding Rivkin himself had become a major focus* of the ASC inquiry." (emphasis added)

34 Because of these two matters – no reference to permanent diminution and Croll's misunderstanding – it was open to the jury to conclude that the article did not carry an imputation that Mr Rivkin's "participation in the affairs of Offset Alpine Press Group had diminished his reputation as a sagacious and astute stockbroker." The Court of Appeal's discussion of this imputation was brief. Grove J said:

> "The argument of [John Fairfax] provided no answer to that of [Mr Rivkin] as it was based upon construction of a selected portion only of the matter complained of."

35 The discussion did not refer to any of the matters to which I have referred as indicating that it was open to the jury to conclude that the article did not bear the imputation alleged. The Court of Appeal erred in holding that the jury's negative answer to this imputation was unreasonable.

Imputation 1(b)

36 Imputation 1(b) was cleverly drawn to anchor its content to May 1995. No doubt that month was chosen because it was during that month that Mr Rivkin – according to the article – was summonsed for a Section 19 examination. However, the article does not state in terms that the Australian Securities Commission suspected that Mr Rivkin "had engaged in unlawful conduct in connection with the affairs of Offset Alpine Press Group". And the jury were entitled to reject the proposition that this imputation arose by inference or insinuation. Immediately after the paragraph stating that "Rivkin's reputation as a canny and astute broker took a battering in May 1995", the article declared that, in the Federal Court on 3 May 1995, the Australian Securities Commission had revealed that the major beneficiaries of Offset Alpine's change in fortune were two Swiss companies. The article said that those companies "by ignoring Australian reporting requirements, secretly owned 38 per cent of the company, hidden in five Australian nominee companies (which, like Rivkin, were unaware of the size of the total holding)." Because of this statement, it was reasonably open to the jury to take the view that the Australian Securities Commission had summonsed Rivkin to investigate the circumstances of the Swiss companies and his knowledge of their activities. The jury were not bound to find that the Australian Securities Commission "had reason to suspect that the Plaintiff had engaged in unlawful conduct in connection with the affairs of Offset Alpine Press Group". That was a construction that was open to the jury, but it was not a necessary construction of the article as a whole. In *Lewis*[35], Lord Morris of Borth-y-Gest pointed out that it "is a grave thing to say that someone is fraudulent". It is also "a grave thing to say" that the controller or an officer of a public company has engaged in unlawful conduct in relation to the affairs of that company. Accordingly, the jury were acting reasonably in refusing to find that the defendant was asserting that the Australian Securities Commission suspected that Mr Rivkin had engaged in unlawful conduct.

37 The Court of Appeal's reasons do not mention that the article was capable of an innocent construction besides the construction alleged by Mr Rivkin. Those reasons do not refer to another construction open to the jury – the Australian Securities Commission had summonsed Mr Rivkin to investigate the circumstances of the Swiss companies and his knowledge of their activities. The Court of Appeal's reasons in respect of this imputation pay insufficient attention to – indeed they do not mention – the principle that an appellate court is entitled to set aside the jury's answers or verdict only when the plaintiff's construction is the only one reasonably open. The Court of Appeal erred in holding that the jury's answer to question 1(b) was unreasonable.

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35 *Lewis v Daily Telegraph* [1964] AC 234 at 267.

The Sydney Morning Herald article of 25 February 1998

38 On the front page of The Sydney Morning Herald article dated 25 February 1998 was a caption stating:

> "CAROLINE'S WORLD
>
> AND THE RIVKIN LINK"

It was accompanied by a photograph of Mr Rivkin smoking a cigar. The article itself was on page 11 and took up most of the page. It had a heading "DEATH OF A MODEL". Above this heading in smaller type were the sentences: "When the body of Sydney model Caroline Byrne was found at the bottom of The Gap, many who knew her refused to believe it was suicide. BEN HILLS looks at evidence presented to the Coroner." The article referred to the Coroner being unable to determine how Ms Byrne had died and that he had left open three possibilities: "suicide, murder or an accident." The article declared that there were three theories concerning Ms Byrne's death: "Suicide; Murder 1; and Murder 2."

39 Suicide was the first theory discussed. The article mentioned that Ms Byrne's mother had "killed herself with an overdose of drugs and alcohol, apparently as a result of depression". It said that nine months later:

> "Caroline herself, mourning her mother, tried to commit suicide by taking sleeping pills and lying in a bath full of water. That attempt failed as (according to Wood) did a later attempt to jump off a building. Caroline had consulted a psychiatrist and been prescribed medication."

40 It went on to say that:

> "Adding strength to the suicide theory, Caroline went to her GP, Dr Cindy Pan, two days before her death complaining that she had been feeling depressed for a month, and particularly in the previous week. Pan referred her to a psychiatrist (the appointment was for the afternoon she went missing) saying that the cause of the depression was unknown, but insisting that Caroline had 'no thought of self-harm'."

41 The article also referred to a "14-page posthumous case analysis" by a psychiatrist who declared that, on the evidence of Ms Byrne's father and friends, the risk of her committing suicide was low, that it rose to moderate on Dr Pan's evidence and that it rose to high on Gordon Wood's version of events.

42 Discussion of the Murder 1 theory began by stating that the case had been "written off as just another suicide at The Gap". But after pressure from Ms Byrne's father, the Coroner had ordered police to re-open inquiries. The

article said that Wood, who had denied ever being near The Gap on the afternoon of Ms Byrne's death, had been identified by two witnesses as one of two men whom they "had spotted [with] a woman with a 'very striking appearance, like a model' walking and chatting with two men" in that area. The other man was identified as "a Melbourne model-booking agent."

43 The article also said that police and Caroline's relatives were puzzled by Wood's behaviour after he "awoke in front of the TV to find her missing". He had picked up Ms Byrne's father and her brother and had driven to The Gap "where, after searching for some time, he said he spotted her leg and sandshoe by the weak light of a torch he borrowed from two rock fishermen." When questioned by police, "he said he had been led to the body by 'some kind of spiritual communication'." The article said that the Coroner had described Wood's account as a "glaring inconsistency" and had found "'another anomaly' in the way Wood later lied to a number of Caroline's friends, telling them that she had been killed by a car."

44 The article then set out parts of a transcript of an interview between Detective Wyver and Wood that had been tendered as an exhibit at the coronial inquest which "showed one possibility the police were exploring." According to the article, the interview recorded:

> "Wyver: Now, I have been informed that on the day of Caroline's death she did not in fact attend work, but she made surveillance of you and in the course of this surveillance she caught you and Rene [Rivkin] having homosexual intercourse. What can you tell me about that?
>
> Wood: Absolute lies.
>
> Wyver: OK, and then I have been informed that as a result of that an argument between her and you ensued. Is there anything ...
>
> Wood: No.
>
> Wyver: ... and that you went to The Gap and you threw her over The Gap.
>
> Wood: No, that's not correct, not correct."

45 The article then continued:

> "Wood worked for Rivkin from 1993-96, starting as a 'driver-gofer' and becoming his 'executive assistant'. He travelled extensively in Australia and overseas with Rivkin, regarded him as 'a father as well as a boss', and was learning about 'stock-markets and trading' from him.

> Rivkin bought the apartment Wood and Caroline lived in at Potts Point, and paid for a car, clothes and furniture.
>
> Wood, who now describes himself as a stockmarket trader, said that he had left Rivkin in 1996 'because I had this dream of getting myself financially set up to take care of Caroline and the family we were planning to have, and when she died that sort of died with her'.
>
> He said in the interview that Caroline, with whom he was living in what he described as a 'loving, happy relationship', was 'suspicious' of Rivkin. Asked why, Wood said: '... [Rivkin] used to hang out with a whole stack of people at the cafe which, I am sure, you probably discovered has a reputation for being a hangout for ex-drug dealers ... Joe's Cafe ...
>
> 'Some of Rene's closest cronies are ... have certain criminal backgrounds or are rumoured to have it. And the fact that Rene is ... has a high degree of interest in good-looking young men ... so she [Byrne] certainly expressed concern about his intentions towards me.'
>
> But Wood denied he had ever had a homosexual relationship.
>
> He said in his opinion Caroline had committed suicide by jumping off the cliff.
>
> Neither Rivkin nor Wood would return telephone calls from the *Herald*. Wood was not questioned about this allegation during the inquest, nor was Wyver asked the source of his information.
>
> Rivkin, who is married with five children, was not called as a witness and did not make a statement to police apart (says Wyver) from a brief 'door-stop' outside one of his haunts, Joe's Cafe in Darlinghurst, several months later when he said he could not recall whether Wood had been driving him the day Caroline died."

46 Finally, the article briefly discussed the Murder 2 theory. It said that it was the most sinister theory about Ms Byrne's death. The theory was based on her father's belief that a contract killer had been hired to do away with her. The article said that her father

> "makes an extraordinary series of allegations about people he claims were behind the murder. The motive? She had found out about 'a very serious crime' from which they stood to benefit, and they feared she was about to blow the whistle."

The last two paragraphs of the article stated:

> "The police investigation did not take into account Byrne's theory, no statements were taken or witnesses called, and [the Coroner] does not mention the allegations in his official finding.
>
> As far as the police are concerned, Wyver says, the file remains open."

47 Mr Rivkin claimed that the article contained five imputations that were defamatory of him. He also alleged that if one of the imputations was not made out, the article contained an alternative imputation of lesser gravity.

48 The Court of Appeal held that, although it was reasonably open to the jury to find that three of the imputations were not made out, the jury had unreasonably found that the other three imputations had not been made out. Those imputations were:

> "3(a) that the Plaintiff was a person criminally liable in respect of the murder of the late Caroline Byrne;
>
> ...
>
> 3(c)(ii) that the police had reason to suspect that the Plaintiff had engaged in homosexual intercourse with Gordon Wood;
>
> (3(d) that the Plaintiff is a close associate of criminals."

Imputation 3(a)

49 Contrary to the view of the Court of Appeal, it was reasonably open to the jury to find that the article did not contain an imputation that Mr Rivkin "was a person criminally liable in respect of the murder of the late Caroline Byrne." Indeed, it was open to the jury to hold that there was no imputation that Ms Byrne had been murdered. The jury were entitled to hold that ordinary people would read the article as meaning no more than that there was a grave suspicion that she had been murdered.

50 Significantly, the article stated that, after hearing and reading statements from dozens of witnesses including Ms Byrne's father, "examining a cache of forensic evidence and ordering a fresh, more thorough, investigation by the police, the Coroner, John Abernethy, was unable to determine how Caroline Byrne had died." The article went on to say that the Coroner had "left open three possibilities: suicide, murder or an accident." Given this statement, it was open to a jury to conclude that the article contained no imputation that Ms Byrne had been murdered. A reasonable reader reads the article as a whole. It is true that such a reader is entitled to give some parts of the article more weight than other parts. But the jury may have reasoned that, read as a whole, an ordinary reader

would conclude that the article was asserting only that Ms Byrne's death gave rise to competing theories of suicide and murder.

51 It is true that the discussion of the Murder 2 theory stated that the belief of Mr Byrne's father was that a contract killer had been hired to do away with her and that an earlier part of the article indicated that her friends believed she was murdered. But when the article is read as a whole, a jury could reasonably conclude that an ordinary, reasonable reader would not have formed the view that the article as a whole imputed that Ms Byrne had been murdered. There was a grave suspicion that she had been murdered but the evidence did not establish that she had been murdered.

52 I shall assume, however, contrary to my view, that the jury could not reasonably reject the claim that the article contained an imputation that she had been murdered. Nevertheless, I cannot see any basis for holding that the jury acting reasonably must have concluded that Mr Rivkin was "criminally liable in respect of the murder of the late Caroline Byrne".

53 The article stated that Mr Rivkin was not called as a witness at the coronial inquiry and did not make a statement to the police apart from a brief interview when he said "he could not recall whether Wood had been driving him the day Caroline died." The jury were entitled to take the view that ordinary readers would think that it was highly likely that, if Mr Rivkin was even suspected as being implicated in the murder, the Coroner would have called him as a witness. Because that is so the jury may well have reasoned that an ordinary reasonable reader would not think that Mr Rivkin was "criminally liable in respect of the murder of the late Carolyn Byrne." If, as it surely is, "a grave thing to say that someone is fraudulent"[36], it is an even graver thing to say that someone is "criminally liable in respect of the murder" of another person. In the absence of an express assertion to that effect, it is an inference or insinuation that a reasonable reader would draw only if no other reasonable inference was open. In *Mirror Newspapers Ltd v Harrison*[37], Mason J pointed out that the "ordinary reasonable reader is mindful of the principle that a person charged with a crime is presumed innocent until it is proved that he is guilty." Because that is so, this Court held in that case that an ordinary reader would not draw an imputation of guilt from a bare report that a person has been arrested and charged with a criminal offence. Similarly, the ordinary reasonable reader does not infer that a person is involved in a crime as serious as murder unless the terms of the article point irresistibly to that conclusion.

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36 *Lewis v Daily Telegraph* [1964] AC 234 at 267.

37 (1982) 149 CLR 293 at 300.

54 With great respect to the judges of the Court of Appeal, I have considerable doubts whether imputation 3(a) should have been left to the jury at all. To find the imputation pleaded, the ordinary reader would have to infer (1) that Ms Byrne was murdered and (2) that Mr Rivkin had a motive for murdering her – because she knew of his homosexuality or financial misconduct. To find the imputation, the jury would then have to infer from these two inferences that Mr Rivkin either murdered her or was a party to her murder. However, the course of authority in New South Wales holds that a publisher is not liable for an inference that is derived by drawing an inference from another inference[38]. But assuming that it was open to the jury acting reasonably to find that Mr Rivkin was "criminally liable in respect of the murder" of Caroline Byrne, it seems to me, for the reasons I have given, an impossible proposition to say that the jury were acting unreasonably in refusing to find that the article contained this imputation.

55 Grove J said:

> "A submission on behalf of [Mr Rivkin] that the article strongly promotes the theory of murder as the cause of death is correct. Added to this is the mention of [Mr Rivkin's] name no less than eleven times in those sections of the article which deal with the theory of murder."

56 Upon this flimsy foundation, the Court of Appeal concluded that "[t]here was no reasonable basis upon which the jury could find that this imputation was not conveyed."

57 At the trial, in the Court of Appeal and in this Court, counsel for Mr Rivkin made much of the fact that his name was mentioned in the article on eleven occasions. He asked rhetorically what was the point of mentioning Mr Rivkin unless it was to implicate him in the death of Ms Byrne? The cynical answer may be that, by linking a well-known stockbroker and investor with Ms Byrne, it made the story more newsworthy. Allegations that Mr Rivkin and Wood had engaged in homosexual intercourse and that Mr Rivkin hung out "with a whole stack of people at the cafe which ... has a reputation for being a hangout for ex-drug dealers" was the sort of irrelevant sensationalism that sells newspaper articles. So was the statement that some of his "closest cronies are ... have certain criminal backgrounds or are rumoured to have it." However, whatever the point of introducing Mr Rivkin's name, the articles did not either expressly or by insinuation impute that he was "criminally liable in respect of the murder" of Ms Byrne.

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38 *TCN Channel 9 Pty Ltd v Antoniadis* (1998) 44 NSWLR 682 at 687-688; *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 167.

58 The Court of Appeal erred in finding that the jury could not reasonably reject imputation 3(a).

Imputation 3(c)(ii)

59 Imputation 3(c)(ii) – that the police had reason to suspect that Mr Rivkin had engaged in homosexual intercourse – is obviously built on the statement made by Detective Wyver when interviewing Wood. However, all that the article said was that Wyver had said he had been "informed that on the day of Caroline's death she did not in fact attend work, but she made surveillance of you and in the course of this surveillance she caught you and Rene having homosexual intercourse." The detective is then recorded as asking "What can you tell me about that?" The mere fact that Detective Wyver had been given this information and asked Wood about it does not mean that the jury would be acting unreasonably in holding that it did not mean that "the police had reason to suspect that the Plaintiff had engaged in homosexual intercourse" with Wood. The imputation that the police had reason to suspect that Mr Rivkin had engaged in homosexual intercourse with Wood means that the police had the impression or tentative belief that Rivkin and Wood had engaged in homosexual intercourse. It was open to the jury to conclude that a reasonable reader would not infer or insinuate from the detective asking a question on information given to him that he held the tentative belief or impression that the information was true. Once the information was given to the detective, he was entitled – perhaps bound – to ask the question to see whether it was true and, if so, whether it threw any light on Ms Byrne's death. But asking the question does not necessarily indicate that he had the mental state which the existence of a suspicion requires.

60 The Court of Appeal's discussion of this imputation makes no mention of these matters. It appears to assume – erroneously in my opinion – that, in the absence of a statement that Detective Wyver accepted Wood's denial, the reporting of Detective Wyver's question itself conveyed the imputation. In fairness to the Court of Appeal, its reasoning may reflect the arguments – or lack of them – put forward on behalf of John Fairfax. Grove J said:

> "The article itself does not disavow the reported hearsay statement beyond reportage of the denial by Wood who is, as previously mentioned, published as a person who had lied (to a number of Ms Byrne's friends in respect of her death) and about whose credibility the matter complained of was generally dismissive.
>
> It was submitted on behalf of [John Fairfax] that the publication of the response by Wyver 'OK' to Wood's assertion that these were absolute lies left it open to the jury to conclude that the publication conveyed neither of the imputations. That proposition is logically suspect because following 'OK' is the question concerning the alleged argument which is based upon

> the factual supposition that such homosexual intercourse had occurred. Given that circumstance, it was inevitable that at least the alternative pleaded as imputation 3(c)(ii) had been made out in the sense that it must have been conveyed that the police had reason to suspect that the factual supposition had substance."

61 The Court of Appeal erred in holding that the jury could not reasonably reject this imputation. That Court did not mention that the imputation was made out only if the ordinary reader thought that Detective Wyver had the impression or tentative belief that Rivkin and Wood had engaged in homosexual intercourse. The Court's reasons contain no analysis of the type of mental state that "the police" had to hold to make out the imputation asserted. No doubt it was open to the jury to conclude from the asking of the question that an ordinary reader would think Detective Wyver had the relevant impression or belief. But it was far from a necessary inference.

Imputation 3(d)

62 Of all the imputations asserted by Mr Rivkin, the imputation that he "is a close associate of criminals" had the strongest basis in what was published. The article reported Wood as saying:

> "[Rivkin] used to hang out with a whole stack of people at the cafe which, I am sure, you probably discovered has a reputation for being a hangout for ex-drug dealers ... Joe's Cafe ...
>
> Some of Rene's closest cronies are ... have certain criminal backgrounds or are rumoured to have it."

63 There is little doubt that, if an imputation had been pleaded that closely followed the text of the above quotation, no jury could reasonably reject either it or its defamatory content. But the imputation pleaded did not follow the text. It alleged that he was a close associate of criminals. That obviously meant that his associates *were* criminals. But the article did not say that his closest cronies were criminals. It referred to the cafe as being a hangout for ex-drug dealers and some of Mr Rivkin's closest cronies having "certain criminal backgrounds or are rumoured to have it." The jury was not acting unreasonably if it held that the article meant only that Mr Rivkin associated with people who had or were rumoured to have a criminal background. That is a different matter from concluding that his cronies were currently engaged or would, given the opportunity, engage in criminal activity. Wood's statement was also rather tentative, as the words "are rumoured to have" indicate. Indeed, the jury may have thought that reasonable readers would conclude that Wood's lack of credibility and his tentative answer alone made it unsafe to infer that Mr Rivkin associated with criminals. Although it was certainly open to the jury to take the

view that the imputation was made out, it was also open to the jury to hold that a reasonable reader would not draw the imputation, as pleaded.

64 In his reasons, Grove J said:

> "The imputation does not involve the ordinary reasonable reader drawing a distinction between active and inactive criminals. A miscreant who has undergone whatever was required by the imposition of penalty does not emerge absolved of crime to a point where description as a criminal has become somehow fallacious.
>
> [John Fairfax's] argument to the jury was based upon a flawed assumption that the imputation was alleging that [Mr Rivkin] was the associate of 'active criminals' in which terms it was not expressed. Once the assumption is removed it becomes clear beyond argument that the imputation is conveyed."

65 With great respect, this analysis misses the point. It was not the meaning of the *imputation* that was in issue. It was not a question of whether the *imputation* alleged that Mr Rivkin was an associate of "active criminals" or whether the *imputation* drew "a distinction between active and inactive criminals." The issue was whether ordinary readers would think that the *article* alleged that Mr Rivkin had associates who were now engaged, or given the opportunity would engage, in criminal activity, that is to say, were criminals. The existence of a criminal record does not irresistibly point to the conclusion that the person who has that record is a criminal. There is no rule in the law of defamation or elsewhere that once a criminal, always a criminal. If ordinary readers thought that the article insinuated that Mr Rivkin's cronies were currently engaged or might become engaged in criminal activity, the imputation was made out. If they thought that the article meant only that his cronies had or were rumoured to have criminal records – were, for example, ex-drug dealers – the jury could reasonably find that the imputation was not made out.

66 Accordingly, the Court of Appeal erred in holding that the jury's answer on this imputation was unreasonable.

<u>The Sydney Morning Herald article of 5 March 1998</u>

67 The article of 5 March 1998 was a short report of a television interview with Gordon Wood. The second paragraph of the article stated that Wood had told

> "the Seven Network's *Witness* program that suggestions made in a police interview that he had thrown Ms Byrne off The Gap after surveillance she commissioned allegedly caught him having sex with his boss, the flamboyant stockbroker Mr Rene Rivkin, were 'utter lies'.

> 'Utter garbage. There's absolutely no evidence to support that Caroline had hired anybody or that Rene Rivkin had homosexual sex with me or anybody,' Mr Wood said."

68 The plaintiff sued on four imputations in respect of this article, the most serious of which was:

> "7(a) that the Plaintiff had engaged in homosexual intercourse with Gordon Wood".

69 The jury held that none of the imputations were contained in the article of 5 March, and the Court of Appeal upheld the jury's answers in respect of these imputations.

An address-in-reply

70 My conclusion that the Court of Appeal erred in finding that the jury had acted unreasonably in respect of certain answers to the questions put to them makes it unnecessary to determine whether, in any event, the Court was correct in ordering a new trial of all questions put to the jury. As I have indicated, one reason for the Court's order was its conclusion that counsel for the plaintiff should have been given an address-in-reply, a proposition that does not fit well with the common law tradition and practice in civil jury trials. The rationale for this proposed change in traditional practice is that it is unfair to the plaintiff not to have the opportunity of answering the defendant's arguments concerning the meaning of the article and whether it is defamatory. But this rationale overlooks the fact that, even in conventional defamation trials, counsel for the plaintiff often does not know what the defendant's counsel will say on the issues of meaning and defamation.

71 It is a fundamental rule of the common law jury trial of a civil cause that, if counsel for the defendant does not call evidence, he or she has the last address. Statutes or Rules of Court may, of course, alter that fundamental rule of the common law. In New South Wales, Pt 34 r 6 of the Supreme Court Rules (1970) gives effect to the common law rule but gives the judge a discretion to alter the order of addresses. It is a discretion, however, that must not be used to negate the general rule. It should be exercised only when the justice of the case requires it.

72 Although a s 7A trial is unique, in principle it does not differ from other civil jury trials in general and more conventional defamation trials in particular. In conventional defamation trials, the defendant often does not call evidence. It is not uncommon for the only evidence in such trials to consist of the plaintiff's evidence, the publication and the circulation figures. Even when the defendant has pleaded fair comment or qualified privilege, its counsel may not call evidence but rely on cross-examination of the plaintiff or his or her witnesses to

establish the facts necessary to prove the defence upon which the defendant relies. In all these cases, counsel for the plaintiff must address first and has to rely on his or her wit and intelligence to deal in advance with the arguments that the defendant's counsel may later use. These cases are no different in substance or fairness from the trial under the s 7A procedure.

73 Claims that it is unfair to refuse counsel for the plaintiff an address-in-reply overlook the extraordinary advantage that a skilful counsel, appearing for the plaintiff, gets in the opening address in a defamation trial. Psychologists take it as a given that selective perception influences our interpretation and understanding of data. As Scott Plous has pointed out[39]:

> "[I]t is nearly impossible for people to avoid biases in perception. Instead, people selectively perceive what they expect and hope to see."

74 Skilled counsel, appearing for the plaintiffs in defamation trials, exploit this and other biases by delaying bringing the contents of the publication to the jury's attention until they have injected the plaintiff's preconceptions and assumptions into the collective mind of the jury. They begin by discussing the publication in general terms without going to the details. They plant in the collective mind of the jury an expectation that what they will read will be the imputations for which the plaintiff contends. Jurors then tend to see in the publication what they expect to see.

75 Most judges allow counsel to discuss the contents of the publication in the opening address on an undertaking to tender the publication when the evidence commences. Often enough, the publication is tendered and marked as an exhibit during the opening address. But it is a matter for counsel as to when he or she discusses the contents of the publication with the jury. If counsel for the plaintiff has exploited the advantage of the opening address, by the time that he or she deigns to discuss the words of the article with the jury, the jury will be ready to read the article with all the preconceptions and assumptions that favour the plaintiff's reading of the publication. Eradicating the biases, skilfully planted in the collective mind of the jury by counsel for the plaintiff, is no easy task for counsel for the defendant.

76 The real but unstated premise of the complaint of unfairness in counsel for the plaintiff not having an address-in-reply is that in a s 7A trial the jury does not have evidence from the plaintiff as to the falsity of the imputations and the hurt and distress that the publication caused. Because that is so, the jury may assume, unfairly to the plaintiff, that the imputations are true. Falsity and hurt to feelings are, of course, irrelevant to the issues of meaning and defamation in the trial –

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39 Plous, *The Psychology of Judgment and Decision Making*, (1993) at 15.

whether it be a s 7A trial or the conventional defamation trial. But the plaintiff's evidence on those matters usually tends to create sympathy for the plaintiff and sometimes prejudice against the defendant. The s 7A procedure eliminates these advantages for the plaintiff who must conduct the case in the detached – and some would say unreal – atmosphere of a jury trial on documentary evidence.

77 It is unnecessary for me to decide in this case whether this Court should reject so gross a departure from the common law practice and tradition of addresses in civil jury trials as envisaged by the Court of Appeal. I can only hope that in the meantime that Court will reconsider this departure from a practice and tradition that is now more than 200 years old.

Conclusions

78 The jury were acting reasonably when they refused to find that the articles conveyed the imputations pleaded. The Court of Appeal erred in concluding that no reasonable jury could have given the answers that they did. It follows that the appeal must be allowed and the verdict for the defendant entered by the learned trial judge must be restored.

Order

79 The appeal should be allowed. The orders of the Court of Appeal should be set aside. In their place, this Court should order that the appeal to the Court of Appeal be dismissed with costs.

80 KIRBY J. This appeal from a judgment of the New South Wales Court of Appeal[40] concerns the law and practice of defamation trials in New South Wales. By reason of the *Defamation Act* 1974 (NSW) ("the Act") s 7A, there are special features of such trials, unique to that State[41].

The facts and relevant legislation

81 *Three impugned publications*: The background facts are set out in other reasons[42]. The respondent, Mr Rene Rivkin, sued the appellant, John Fairfax Publications Pty Ltd, in respect of imputations said to have been conveyed to the ordinary reasonable reader concerning Mr Rivkin, and defamatory of him, in three publications of the appellant. Those publications were *The Australian Financial Review* of 21-22 February 1998 ("AFR"); *The Sydney Morning Herald* of 25 February 1998 ("SMH1") and *The Sydney Morning Herald* of 5 March 1998 ("SMH2").

82 Because the matters complained of are quoted extensively in other reasons[43], I will not repeat them. The appellant did not contest publication. Nor did it dispute that at least one person who had read SMH1 had also read the article in AFR. That concession was relevant to the reliance by Mr Rivkin upon a true innuendo pleaded by him to the effect that those who read SMH1, having read AFR, would have done so with a heightened awareness of the matters previously published, such that the content of SMH1 would thereby have given rise to imputations inculpating Mr Rivkin in the murder of Ms Caroline Byrne ("the deceased")[44].

83 *A peculiar legal procedure*: In accordance with the Act[45], a plaintiff in New South Wales does not sue upon the matter complained of as such. He or she sues in respect of particular imputations alleged to arise from a close analysis of the publication. Each established imputation has been held to constitute a separate cause of action[46]. This approach has led to artificiality. Those

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40 *Rivkin v John Fairfax Publications Pty Ltd* [2002] NSWCA 87.

41 Noted in *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 578-581 [139].

42 Reasons of McHugh J at [12]-[16]; reasons of Callinan J at [173].

43 Reasons of Callinan J at [174].

44 Reasons of Callinan J at [209].

45 s 9.

46 See *Petritsis v Hellenic Herald Pty Ltd* [1978] 2 NSWLR 174 at 190.

complaining about defamatory matter in a publication seek to eke out (often in language different from the publication itself) a multitude of imputations for which the complaining party sues. The present appeal is far from the worst case of this *genre*[47].

84 No one submitted before this Court that the foregoing approach was wrong. No one suggested that the Constitution implied any limitation or restriction on this procedure or on the respondent's cause of action. Despite the artificiality that it tends to cause – diverting attention from the publication to the lawyer's pleading of the alleged imputations – I shall assume that this is what the New South Wales legislation requires. The problems that have arisen in the present case (as in others) are substantially the outcome of the replacement of what was formerly a comprehensive and intuitive process of jury assessment, taken to reflect community perception of a publication viewed as a whole, by a procedure whereby perception is substantially directed by lawyers towards formulae re-expressed by lawyers and ultimately, for the most part, evaluated and judged by lawyers.

85 In compliance with the foregoing practice, the representatives of Mr Rivkin applied themselves with gusto to the identification of numerous imputations claimed to arise from the three publications in question. There followed the inevitable pre-trial challenges by the appellant concerning the capability of the publications to give rise to the imputations as pleaded. There were two interlocutory hearings in the Supreme Court of New South Wales before Levine J. In a decision in July 1998, his Honour rejected six pleaded imputations alleged to have arisen respectively from AFR and SMH1. In a further interlocutory decision of September 1998, his Honour struck out four additional pleaded imputations.

86 By s 7A(1) of the Act it falls to the judge, where proceedings for defamation are to be tried in part before a jury, to determine whether the matter complained of is "reasonably capable of carrying the imputation pleaded by the plaintiff" and "reasonably capable of bearing a defamatory meaning". The section thus recognises a judicial filter. That filter prevents the more imaginative and remote imputations of the pleader from coming before the jury at all. It is important in the present appeal to appreciate (as the judges below would all have done) that Mr Rivkin's imputations had already been subjected to this filter. A number of his imputations had fallen by the wayside. In respect of all of those that remained, Levine J had determined that the matters complained of were reasonably capable of carrying the pleaded imputations and of bearing the

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47 eg *Drummoyne Municipal Council v Australian Broadcasting Corporation* (1990) 21 NSWLR 135 at 148-151.

defamatory meanings asserted by Mr Rivkin. However, it then remained, in accordance with s 7A(3), for the jury:

> "to determine whether the matter complained of carries the imputation and, if it does, whether the imputation is defamatory".

87 In the Court of Appeal, Mr Rivkin pressed a ground of appeal (or application for leave to appeal) against the pre-trial interlocutory rulings of Levine J, claiming that they were too narrow[48]. That ground of appeal was rejected by the Court of Appeal[49]. This Court has not been troubled by such matters. Their only significance is that they illustrate the hurdles that a person in the position of Mr Rivkin must overcome before having his pleaded imputations considered by the jury. The contested imputations that the jury considers are not raw and unconsidered.

88 *The attenuated jury trial*: Following the resolution of the interlocutory proceedings (which was no small thing) the limited trial of the matters to be determined by the jury took place between 17 and 23 April 2001 before the primary judge (Simpson J) and a jury of four persons. There was no oral evidence. For Mr Rivkin, the three publications were tendered. The appellant called no evidence. Remarkably enough, the entire time of the trial was then taken up by the addresses of counsel representing the respective parties. There followed the charge to the jury by the primary judge. No complaint is made concerning the accuracy of her Honour's instruction to the jury on the law that they were to apply.

89 At the conclusion of Simpson J's charge, on 23 April 2001, at 11.50 am the jury retired. At 2.25 pm they returned at the conclusion of their deliberations to announce their answers to the questions left to them concerning the imputations relied on by Mr Rivkin. As appears in other reasons, the jury found that none of the pleaded imputations was conveyed by any of the matters complained of. It was therefore unnecessary for the jury to determine whether any of them was defamatory of Mr Rivkin. Judgment was directed in favour of the appellant.

The decision of the Court of Appeal

90 *Issues in the appeal*: In the Court of Appeal, Mr Rivkin argued, relevantly, two points[50]. The first, variously put, was that the answers given by

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48 [2002] NSWCA 87 at [12].

49 [2002] NSWCA 87 at [151] per Grove J.

50 [2002] NSWCA 87 at [36].

the jury were appealably erroneous, in the sense that they demonstrated that the jury had acted "perversely" or unreasonably in reaching answers that no reasonable jury could properly have given in the circumstances. Secondly, Mr Rivkin complained that the primary judge had erred in a procedural ruling at the outset of the trial in refusing his counsel's application for a direction altering the order of addresses so as to permit Mr Rivkin's counsel to address the jury after the address of counsel for the appellant. That request had been made notwithstanding the fact that the appellant, having called no evidence, would ordinarily enjoy the right of last address to the jury.

91 The Court of Appeal unanimously allowed Mr Rivkin's appeal. It set aside the judgment entered for the appellant. It ordered that the matter be remitted to the Common Law Division of the Supreme Court for a new trial generally in relation to all of the pleaded imputations upheld by Levine J[51]. The manner in which the Court of Appeal reached these conclusions is described in other reasons[52].

92 *Approach to jury verdicts*: The principal reasons in the Court of Appeal were written by Grove J. On the substantive challenge to the appealable unreasonableness (or "perversity" as it was put) of the jury's answers, Grove J acknowledged the particular deference owed to the conclusions of a jury as the "constitutional tribunal" for deciding contested issues of fact[53]; the special respect owed to the jury's answers in defamation actions given the unique legislative preservation of attenuated jury trials in New South Wales in that context[54]; the heavy burden imposed on Mr Rivkin to justify appellate intervention in such a matter[55]; and the various formulae propounded by appellate courts to give effect to the approach of severe restraint ("incontrovertibly wrong"[56], a "decision … such as no jury could give as reasonable men"[57], that the verdict was not

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51 [2002] NSWCA 87 at [155] per Grove J; at [1] per Meagher JA; at [3] per Foster AJA.

52 Reasons of McHugh J at [15]; reasons of Callinan J at [178]-[182].

53 [2002] NSWCA 87 at [55] per Grove J citing *Gatley on Libel and Slander*, 9th ed (1998) at 889-890; cf *Grobbelaar v News Group Newspapers Ltd* [2001] 2 All ER 437 at 487.

54 [2002] NSWCA 87 at [59] citing *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 at 88.

55 [2002] NSWCA 87 at [61].

56 [2002] NSWCA 87 at [55] citing *Evans v Davies* [1991] 2 Qd R 498 at 511.

"reasonably open" is "clear and beyond argument"[58] and that the verdict is "perverse"[59]).

93 Although these formulae were criticised by both parties in this Court – the appellant suggesting that they were insufficiently stringent and Mr Rivkin arguing that the reference to "perversity", in particular, went further than the law required – it is clear beyond argument that the Court of Appeal reminded itself that great caution was to be exercised before setting aside the jury's answers after a trial that was otherwise conducted according to law.

94 Grove J then proceeded to address the way in which an "ordinary reasonable reader" would understand the three publications as relating to Mr Rivkin. With respect to a number of the pleaded imputations relied on by Mr Rivkin, Grove J (with whom on these issues the other judges of the Court of Appeal agreed) concluded that the jury's answers were not unreasonable in the relevant sense. They could not therefore be disturbed by an appellate court[60]. As an analysis of those imputations, and the conclusions of the Court of Appeal upon them, appears elsewhere, I will not repeat what his Honour said[61].

95 The appellant naturally laid emphasis upon the large number of instances in which the Court of Appeal had concluded that it could not properly disturb the answers of the jury and the fact that all of the answers given in respect of the imputations said to arise from the publication of SMH2 had been upheld by that Court. Effectively it asked: if so many of the jury's answers were immune from disturbance, how could others be so wrong?

96 *Four unreasonable answers*: The Court of Appeal concluded that some of the answers given by the jury were unreasonable (or "perverse") in the relevant sense. For convenience those answers may be catalogued as falling into four classes:

(1) The Offset Alpine imputations (AFR) (Jury answers 1(a) and 1(b));

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57 [2002] NSWCA 87 at [55] citing *Australian Newspaper Co Ltd v Bennett* [1894] AC 284 at 287 and at [56] citing *Ryan v Ross* (1916) 22 CLR 1 at 22.

58 [2002] NSWCA 87 at [58], [60] citing *Cairns v John Fairfax and Sons Ltd* [1983] 2 NSWLR 708 at 716; *Broome v Agar* (1928) 138 LT 698.

59 [2002] NSWCA 87 at [54].

60 Jury answers pars 1(c)(i), 1(c)(ii), 3(b)(i), 3(b)(ii), 3(c)(i), 5(b)(i), 5(b)(ii), 7(a), 7(b), 7(c)(i), and 7(c)(ii).

61 See esp reasons of Callinan J and the Table set out at [179]-[182].

(2) The imputation that Mr Rivkin was a person criminally liable in respect of the murder of the deceased. (SMH1) (Jury answer 3(a)); true innuendo case (AFR and SMH1) (Jury answer 5(a));

(3) The imputation relating to the suggestion that Mr Rivkin had engaged in homosexual intercourse with Mr Gordon Wood (SMH1) (Jury answer 3(c)(ii)); and

(4) The imputation that the appellant was a "close associate of criminals" (SMH1) (Jury answer 3(d)).

97 Having concluded that, in these four respects, the jury's answers had miscarried, it became necessary for the Court of Appeal to decide whether to provide relief to Mr Rivkin, specifically whether to order a new trial and, if so, to what extent. It was in that connection that the Court of Appeal considered two subordinate arguments advanced for Mr Rivkin.

98 One of these was derived from the "persistently"[62] negative answers to *all* of the questions asked of the jury on the first issue as well as the relatively short time (less than two and a half hours) of the jury's retirement. Mr Rivkin submitted that, from these considerations, an inference arose that the jury had "misapplied itself to its task".

99 Grove J was not inclined to attach much significance to the comparatively short retirement of the jury. He concluded that it was "not open to speculate" about why the jury had returned the uniformly negative answers[63]. However, Foster AJA was more affected by this consideration. He could not accept that, in such a "significantly short period of time, the jury could have properly focused upon the complex issues of this case, even if one allows, in their favour, that they attended carefully to the addresses of counsel and the judge's summing-up"[64]. He therefore expressed "concern that the verdict was influenced by extraneous considerations"[65]. He cited this concern to reinforce his conclusion in concurring with Grove J's "comprehensive analyses of the evidence and submissions relating to each imputation" and the result that "certain of [the imputations] should be regarded as inevitably established"[66]. The third member of the Court of Appeal

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62 [2002] NSWCA 87 at [112] per Grove J.

63 [2002] NSWCA 87 at [112].

64 [2002] NSWCA 87 at [7].

65 [2002] NSWCA 87 at [8].

66 [2002] NSWCA 87 at [8].

(Meagher JA) did not specifically refer to the "short retirement" submission. However, he expressed agreement with the reasons of both Foster AJA and Grove J.

100 *Order for a general retrial*: Normally, where, as here, an appellate court upholds an appeal in part, but rejects it in other respects, the relief granted to the partly successful party is confined to those aspects of the appeal upon which that party has succeeded. It was in this respect that Mr Rivkin's second related submission, concerned with the procedures of the trial, became relevant. This was supported by a specific ground of appeal argued before the Court of Appeal. It challenged the interlocutory decision of the primary judge refusing the request for a direction that Mr Rivkin's counsel be allowed to make an opening address and an address in reply at the conclusion of the closing address for the appellant[67].

101 Before the trial, a letter to the appellant's solicitors had indicated that Mr Rivkin would be seeking such a direction[68]. The proposal was duly advanced and opposed. The primary judge refused it. It was not renewed. On the appeal, however, it was suggested that the course that the trial had then taken (and the inability, in the telescoped s 7A procedures, of Mr Rivkin's counsel to answer arguments of the appellant before the jury) explained the erroneous and uniformly negative answers given by the jury to the questions relating to whether the matters complained of carried the imputations alleged.

102 This second factor appears to have influenced the decision of the Court of Appeal to grant a general retrial of all of the imputations upon which Mr Rivkin had sued in the first trial, including those in respect of which Grove J, for that Court, had concluded that (taken alone) the answers were not appealably unreasonable. Taken together, and considered with the suggested error of the interlocutory ruling on the order of addresses, they were sufficient to persuade the Court of Appeal that the jury had "misapplied itself to its task"[69]. For such a conclusion, the solution in which all three judges of the Court of Appeal ultimately joined was a general order for a retrial.

103 *Sequence of counsel's addresses*: In coming to that conclusion, there were important differences between the reasons of the judges constituting the Court of Appeal about the challenge to the primary judge's refusal to permit Mr Rivkin's counsel a right of reply. Thus, Meagher JA was of the opinion that the issue was

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67 [2002] NSWCA 87 at [36] per Grove J.

68 [2002] NSWCA 87 at [42] per Grove J.

69 [2002] NSWCA 87 at [112].

governed not by the Supreme Court Rules 1970 (NSW) ("SCR") but by the inherent jurisdiction of the Supreme Court to order its proceedings. He favoured the adoption of a general principle that a plaintiff should have a right of first address *and* a right of reply. He expressed the opinion that "[t]he present case illustrates the confusion which results from the failure to accord the plaintiff such a right"[70]. On the other hand, Foster AJA considered that the matter was governed by the Rules of Court[71]. In his view, "rules of universal application" were not the solution. Least of all, could a rule be propounded permitting a plaintiff *both* an opening address *and* a right of reply[72].

104 The third judge, Grove J, noted earlier interlocutory decisions of trial judges consistent with the approach that had been adopted by the primary judge in the present case[73]. However, he suggested that the inability of a plaintiff's counsel to respond to an argument before the jury, including one that was "tenuous or even silly", was untenable. He therefore decided that the order of addresses in such trials should be the subject of judicial "regulation", apparently by a universal judicial rule[74].

105 Primarily, Grove J favoured a principle that a defendant should address the jury first so that, in that way, the plaintiff was effectively given a right of reply in every case. But because the other judges in the appeal considered that the plaintiff should normally have the opportunity of first address, Grove J concurred with Meagher JA's opinion on this issue. He therefore favoured, as a matter of general principle, a procedure whereby "the plaintiff should … subject to discretion, have a right of reply"[75]. As this facility had been denied to Mr Rivkin, and might possibly explain the negative answers to all the questions concerning the capability of the matters complained of to carry the imputations pleaded by the plaintiff, the only orders that would achieve justice in the case were orders for a complete retrial.

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70 [2002] NSWCA 87 at [2].

71 Pt 34 r 6 SCR.

72 [2002] NSWCA 87 at [24], [25].

73 [2002] NSWCA 87 at [46]. The cases include: *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 121 and *Rakhimov v Australian Broadcasting Corporation* [2001] NSWSC 693.

74 [2002] NSWCA 87 at [51].

75 [2002] NSWCA 87 at [53].

106 It was in that way that the Court of Appeal reached its conclusion on what should happen in the second trial of Mr Rivkin's claims against the appellant. This appeal, by special leave, challenges that outcome.

The issues

107 The primary issue is whether the Court of Appeal erred in concluding that the trial before the primary judge and the jury had miscarried in a way authorising its intervention to set aside the answers given by the jury in the case of the four categories of imputation mentioned[76]. If, as McHugh J has concluded[77], the Court of Appeal erred in its approach in this respect, and in its conclusion in relation to that primary question, the ancillary issues, concerned with the procedures of the trial and scope of any retrial, do not arise. The judgment in favour of the appellant and against Mr Rivkin would be restored.

108 The appeal therefore presents four issues:

(1) Did the Court of Appeal err in the approach that it took to its authority to disturb the jury's answers to the questions relating to the reasonable capability of the matters complained of to carry the imputations pleaded by Mr Rivkin?;

(2) Did the Court of Appeal err in the conclusion that it reached that, in respect of the four categories of imputations upon which Mr Rivkin sued, the jury's answers were erroneous and authorised appellate intervention?;

(3) Having regard to the resolution of the foregoing issues, did the Court of Appeal err in concluding that the primary judge had erred in exercising her discretion by refusing to permit counsel for Mr Rivkin to address the jury in reply to the address given by counsel for the appellant?; and

(4) Having regard to the resolution of issue (3), to the length of the jury's retirement and any other relevant considerations, did the Court of Appeal err in ordering a general retrial rather than a retrial only of the residual defamatory imputations which were inevitably established by the appellant's publication of the matters complained of?

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76 The four categories of imputations are described at [96] above.

77 Reasons of McHugh J at [78].

The Court of Appeal did not err in its approach

109 *Old authorities – extreme restraint*: Upon the first question, there is a division of opinion in this Court. McHugh J is of the view that the Court of Appeal erred in the *approach* that it took to its appellate function when invited to set aside the jury's "verdict", being, relevantly, the answers given by the jury in this trial as to the capability of the matters complained of to carry the imputations pleaded by Mr Rivkin in the four categories identified[78]. The other members of this Court have concluded that there was no such error of approach[79]. On this issue, I agree with the majority.

110 In his reasons, McHugh J has collected extracts from a large number of the formulations used by appellate judges in Australia and England, designed to remind appellate courts of the severe restraint to be exercised in the disturbance of a jury's conclusions upon the matters submitted to them. However, there is no evidence that the Court of Appeal overlooked, or ignored, these injunctions. Quite the contrary. Some of them were expressly cited by Grove J in an extended passage in his Honour's reasons in which he identified the heavy burden undertaken by an appellant in a challenge of the kind mounted by Mr Rivkin[80]. Foster AJA added his explicit recognition of the "extreme caution" to be followed by an appellate court in such a case[81]. He referred to additional authority in this Court[82]. Meagher JA agreed with both of the foregoing reasons[83]. Accordingly, it should not be accepted that the Court of Appeal approached its function in an incorrect way or, by its reasons, disclosed an error in its understanding of the law governing the approach that it should take.

111 *Perversity is not the test*: If anything, by adopting the verbal criterion of "perversity" (as Grove J[84] and Foster AJA[85] and, by concurrence, Meagher JA[86]

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78 Reasons of McHugh J at [17]-[22].

79 Reasons of Gleeson CJ at [1]; reasons of Callinan J at [183]-[185]; reasons of Heydon J at [219].

80 [2002] NSWCA 87 at [54]-[62].

81 [2002] NSWCA 87 at [4].

82 *Brooker v Roszykiewcz* (1963) 37 ALJR 246 at 250. See also at 251, 253.

83 [2002] NSWCA 87 at [1].

84 [2002] NSWCA 87 at [54].

85 [2002] NSWCA 87 at [10].

did), the Court of Appeal applied a test that was "probably higher than required" by law[87]. In its ordinary connotation, "perversity" connotes deliberate or blind contrariness, obduracy and idiosyncrasy. The word is a left-over from an earlier time in the law. In my view, at least in this and like contexts, it should be given a decent burial.

112 A number of considerations reinforce my view that the proper approach to an appeal to the Court of Appeal against jury decisions is one that permits disturbance of such decisions "in an extreme case … [where they are] unreasonable"[88]. Some of the considerations are relevant to appeals more generally. Others are of special relevance to an appeal from answers given in an attenuated jury trial of the kind provided for in s 7A of the Act.

113 The language of the decisions using "perversity" and similar epithets is redolent with an attitude to the absolute finality of jury verdicts that preceded the introduction, by statute, of general facilities for appeal, including against decisions on facts claimed to have been wrongly found[89]. The introduction of that facility has demonstrated repeatedly that serious mistakes, and grave injustices, can occur as a result of erroneous factual decisions – probably more than in mistaken decisions of law. Whilst error in fact-finding can more readily be demonstrated in the decisions of judges, who must normally give reasons, the procedure of appeal has made contemporary judges more willing to scrutinise jury verdicts for the demonstration of serious error than would have been the case in the times before the facility of appeal became so common and so manifestly beneficial.

114 *Statutory appeal and jury "immunity"*: Some of the language of the older authorities, that might be thought to cloak civil jury verdicts (including in defamation trials) with a mystical immunity from appellate review needs to be reconsidered in the light of the basic statutory legal principle that imposes upon appellate courts in Australia a function to perform their review when an appeal is lawfully brought to them. In such a case, the duty imposed by the statute must be obeyed. It cannot be rejected because of pre-existing or overblown judicial dicta.

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86 [2002] NSWCA 87 at [1].

87 cf reasons of Callinan J at [179].

88 *Gatley on Libel and Slander*, 9th ed (1998) at 889 [36.19].

89 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 331-332 [93]; 160 ALR 588 at 620-622; see also *Warren v Coombes* (1979) 142 CLR 531 at 545 quoting from *Edwards v Noble* (1971) 125 CLR 296; *Fox v Percy* (2003) 77 ALJR 989 at 994-995 [24]-[28]; 197 ALR 201 at 207-209; *Whisprun Pty Ltd v Dixon* [2003] HCA 48 at [123].

This is yet another instance in which lawyers, raised in the language of common law judges, must shake off their inclination to adhere to over-broad judicial remarks that, given full rein, would undermine a duty imposed on them by statutory requirements[90].

115 It is true that jury decisions are still accorded a special status in our law because juries are taken to represent a microcosm of the entire community. That is what is meant by calling the jury the "constitutional" tribunal of fact. This feature of the jury was properly acknowledged by the Court of Appeal in the present case[91]. However, this consideration can only be a factor in appellate analysis. It does not relieve the appellate court of the duty imposed by statute to determine an appeal, including in a case following a jury trial, where an application is made for a new trial on the basis that the jury verdict is unreasonable in the appellate sense[92].

116 *Rationality in civil process*: An appeal, including against jury verdicts and answers, must be proper and effective, not a procedure that is perfunctory and merely symbolic[93]. It is erroneous to elevate a jury verdict in favour of a defendant in a defamation case to a status comparable to that of a verdict of acquittal of a defendant in a criminal case[94]. As Lord Scott of Foscote observed in *Grobbelaar v News Group Newspapers Ltd*[95]:

> "In a civil case, the parties litigate on an even playing field. It is as much an affront to justice if a 'guilty' claimant succeeds in obtaining damages as it is if an 'innocent' claimant fails in his claim for damages. A verdict in favour of the defendant … cannot be set aside simply because the court thinks that the verdict was not 'safe'. Something more would be required.

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90 eg *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 88 [43]; *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 111-112 [249]; *Allan v Transurban City Link Ltd* (2001) 208 CLR 167 at 184-185 [54]; *Conway v The Queen* (2002) 209 CLR 203 at 227 [65].

91 [2002] NSWCA 87 at [59].

92 *Supreme Court Act* 1970 (NSW), s 102. See reasons of McHugh J at [21].

93 cf *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262 at 274-279, 289-290 referring to Art 14.5 of the *International Covenant on Civil and Political Rights*.

94 *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024 at 3052 [73]; [2002] 4 All ER 732 at 758.

95 [2002] 1 WLR 3024 at 3052 [73], 3053 [75]; [2002] 4 All ER 732 at 758, 759.

> The appellate court would need to be satisfied that, in the light of the evidence, a jury could not reasonably have concluded that the claimant had committed the crime.
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> …
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> Each side is equally entitled to justice. The appellate court must, of course, pay proper respect to the jury verdict. The jury are the fact finders. In a civil case, the jury, as fact finders, are entitled to the same respect, no more and no less, than that which is due to a trial judge sitting without a jury. The difference is that the trial judge's reasoning will be, or should be, on the face of the judgment whereas the jury's reasons, being undisclosed, will need to be re-constructed by the appellate court. Subject to that important difference, however, the factual conclusions of juries in civil cases should, in my opinion, be treated by an appellate court no differently, with no greater and no less respect, than the factual conclusions of judges."

117 This reasoning is consistent with the contemporary view that jury verdicts in civil cases must be viewed in the context of a process of decision-making for a society of a particular kind that upholds, so far as it can, fair, reasonable and rational decision-making in its courts[96]. Lord Bingham of Cornhill in *Grobbelaar* said[97]:

> "The oracular utterance of the jury contains no reasoning, no elaboration. But it is not immune from review. The jury is a judicial decision-maker of a very special kind, but it is a judicial decision-maker none the less. While speculation about the jury's reasoning and train of thought is impermissible, the drawing of inevitable or proper inferences from the jury's decision is not, and is indeed inherent in the process of review."

118 These remarks reflect the proper approach to contemporary appellate review of jury verdicts, including in the answers that they give in performance of their functions of deciding the limited issues reserved to them under s 7A of the Act[98]. Rationality is, and should be, a hallmark of contemporary civil

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96 cf Steyn, "The Intractable Problem of The Interpretation of Legal Texts", (2003) 25 *Sydney Law Review* 5 at 18.

97 [2002] 1 WLR 3024 at 3029-3030 [7]; [2002] 4 All ER 732 at 737.

98 In *Grobbelaar* reference was made to the *Human Rights Act* 1998 (UK), s 12(1) and (4). See *Grobbelaar* [2002] 1 WLR 3024 at 3041 [40] and at 3049-3050 [63]; [2002] 4 All ER 732 at 748, 756. However, the reasoning of their Lordships appears to have proceeded independently of the operation of that Act.

proceedings[99]. Where it has been found wanting at trial, it may be provided on appeal. The contrary view is a left over of medieval tournaments and trial attitudes.

119 *Relevance of jury's function*: Each decision-maker in the process established by Parliament, whether judge or jury, is performing a statutory function. Each is therefore a receptacle of statutory power. None may act irrationally or in a way alien to the purposes of the power. Each must fulfil those purposes. If either does not, it is the duty of an appellate court to intervene. The difficulty of establishing the requisite error in the case of a jury, which gives no reasons, is a practical consideration that limits intervention to an "extreme" or "manifest" or "inevitable" case that is "clear and beyond argument". But the criterion for intervention is the failure of the jury to perform their function as the statute contemplated. Such default may be shown by a manifestly unreasonable verdict or decision. Demonstration that one of several verdicts is manifestly unreasonable may sometimes cast doubt on others[100]. Although it is possible for oral evidence to be given before the jury in proceedings conducted in accordance with s 7A of the Act, normally this is not done. Typically, the proceedings follow the course adopted in the trial of Mr Rivkin's case. In such a hearing, there is nothing before the jury that is not equally before the appellate court.

120 What jury members make of this procedure is impossible to say. Perhaps they expect plaintiffs to give evidence, at least of the hurt they have suffered and even to deny the truth of the defamatory imputations pleaded. Perhaps they expect the publisher to call evidence justifying the matter complained of. How they react to the artificial and telescoped task assigned to them is a matter for speculation. The fact that most trials, like Mr Rivkin's, involve little more than the tender of the matter complained of means that one of the normal reasons for particular restraint against appellate disturbance of jury verdicts is absent in such cases. There is no reason for the appellate court to make allowance for the advantages that the jury had in having seen or heard witnesses over the course of a lengthy trial[101]. Whilst the jury continues to enjoy a symbolic function, because its members come from the general community, there remains a real risk, heightened in the s 7A procedure, that they may misunderstand their task. Further, the extent to which a civil jury of four persons represents the entire community should not be overstated, lest fiction and historical symbols overwhelm reality and commonsense.

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99 *Whisprun Pty Ltd v Dixon* [2003] HCA 48 at [123].

100 Reasons of Gleeson CJ at [5].

101 cf *Dearman v Dearman* (1908) 7 CLR 549 at 564.

121 For an imputation even to be considered by the jury, it must have passed the first hurdle provided by s 7A. A judge must already have determined, also on the papers, both that "the matter is reasonably capable of carrying the imputation pleaded by the plaintiff" and that "the imputation is reasonably capable of bearing a defamatory meaning"[102]. In Mr Rivkin's case, in respect of those questions, Levine J so determined with regard to all of the imputations left to the jury. Whilst it is true that judges are enjoined, properly in my view, that they should not deprive the jury of their function by approaching too narrowly the preliminary determinations in that regard[103], the fact that a judge has decided such preliminary questions by the standard of the reasonable capability of the matter complained of to fulfil the essential preconditions, means that an appellate court can approach its function in the knowledge that this step has been taken.

122 It is not the same determination as that reserved by s 7A(3) of the Act to a jury where one is summoned to play its part under s 7A(3). It remains important for the Court, at first instance and on appeal, to respect the role reserved to the jury, limited although it is. Nevertheless, the circumstance that the imputations surviving into the trial have already passed the test of reasonable capability required by s 7A(3) is a reason why it is misleading to talk of the appellate function in terms limited to the correction of "perverse" verdicts or verdicts described with similar pejorative epithets.

123 *Special risks in particular proceedings*: There is a special risk that arises from the procedures established by s 7A of the Act against which appellate review may prove an important safeguard. Because the section concentrates attention upon the "imputation pleaded", there is a danger that a jury may address themselves to the imputations pleaded by the lawyers to the exclusion of the full context of those imputations in the matter complained of[104].

124 The need to view the imputations in the entire context is made clear by the language of s 7A(3) of the Act. The imputations, as pleaded by the plaintiff, constitute the causes of action for which the plaintiff sues. But they can only be understood when read together with the matter actually published, considered as a whole[105]. It would be contrary to the statute and out of step with all modern

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102 The Act, s 7A(3)(a) and (b).

103 cf *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 298 [83].

104 cf *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 578-581 [139].

105 cf *S & K Holdings Ltd v Throgmorton Publications Ltd* [1972] 1 WLR 1036 at 1039; [1972] 3 All ER 497 at 500; *National Mutual Life Association of Australasia Ltd v GTV Corporation Pty Ltd* [1989] VR 747 at 768.

approaches to the ascertainment of the meaning of words and other conduct to ignore the context when considering what was meant. Context may be helpful to a plaintiff in understanding the sting of the defamation complained of. Or it may be helpful to a publisher in putting the pleaded imputations into the entire setting that has the effect of removing that sting. Appeal permits a second look at the outcome of a statutory procedure that carries distinct risks of over-concentration upon the pleaded imputation, isolated from the entirety of the matters complained of.

125 *Conclusion: no error of approach*: Because the Court of Appeal evidenced no error in the approach that it took to the standard of review applicable to the jury's answers (and indeed expressed an approach that, if anything, was more stringent than the law requires) the first complaint of the appellant should be rejected.

126 The fact that the Court of Appeal adopted a correct approach in considering Mr Rivkin's appeal does not mean that it reached the correct conclusion that the imputations that it found in the four categories that it decided in Mr Rivkin's favour were "inevitably established", such that the conclusion of the jury to the contrary was appealably unreasonable. I therefore turn to the second issue.

The four categories of imputation

127 *The Offset Alpine imputations*: Before this Court, the question is not whether the jury erred in a way permitting appellate intervention but whether the Court of Appeal erred in such a way, authorising this Court's intervention. Given the room for differences of view as to the appealable unreasonableness of a jury's answers concerning particular imputations, this Court must be convinced of error before it gives effect to a different evaluation of the same facts[106]. Absent error, this Court does not simply step into the shoes of the Court of Appeal and make the decisions again as it would in an intermediate appeal. To adopt that approach would be to mistake the function of this Court.

128 In his reasons, McHugh J has analysed closely the possibilities upon the basis of which the jury in the present case might have reached the answers they did to imputations 1(a) and (b) to justify the jury's answers that the matter complained of did not in these respects carry the pleaded imputations. With respect, I regard that analysis as excessively defensive of the jury's answers and insufficiently attentive to the appellate court's performance of its independent

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106 *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 879-880 [65]; 179 ALR 321 at 336-338.

function to protect a party against a manifestly unreasonable verdict, although the reasons for such error cannot be identified with exact precision.

129 All that is involved here is a decision on whether the matter complained of carries the imputation[107]. It has already been judicially determined that it is capable of doing so. It remains to be decided by a jury whether, if it does, the imputation is in fact defamatory. It then remains to be decided by a judge whether any defence raised to justify, or excuse, or protect the publication can be made out and, in the light of the foregoing, whether, and if so in what sum, damages should be awarded. The point at which Mr Rivkin failed before the jury was, in this sense, the most preliminary point of all. There is a risk in an overly nice analysis of theoretical possibilities of the jury's reasoning concerning particular imputations of overlooking the language of the matter complained of taken as a whole, viewed in the context in which the imputations appeared.

130 Although I concede that the decision on the Offset Alpine imputations is close to the borderline (and had that issue stood alone, it might not have succeeded) it was open to the Court of Appeal to conclude that the jury's answers were appealably unreasonable upon imputations 1(a) and (b) [108]. No error on the part of the Court of Appeal has been shown. There is therefore no basis for this Court to substitute a different conclusion.

131 *The involvement in murder imputation:* The second category of imputation which the Court of Appeal found that the jury had unreasonably rejected was to the effect that Mr Rivkin "was a person criminally liable in respect of the murder of [the deceased]". These were alleged to arise out of SMH1.

132 As pleaded, the imputation contends that Mr Rivkin was "a" person criminally liable. It does not plead that he was "the" person so liable. There is no doubt that the article postulated the hypothesis of Mr Rivkin's involvement in the murder of the deceased. This was suggested as one of the possibilities being advanced for the reader's consideration. Various factual indications in SMH1 lent credence to the hypothesis. The suggestions disposing of the possibility of suicide; the position of the deceased's body at the foot of The Gap at a distance from its base difficult (on one view) to reconcile with a voluntary leap from a restricted space on the approach to the cliff; the deceased's father's asserted belief that she had been murdered; the suggested discovery by the deceased of Mr Wood and Mr Rivkin in sexual activity the day before the deceased's death; the explicit hypothesis of a contract killing which Mr Wood could not (but

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107 Reasons of Callinan J at [186].

108 cf reasons of Gleeson CJ at [1]; reasons of Callinan J at [192], [196].

Mr Rivkin by inference could) afford to pay for; and the possible implication of murder for sexual jealousy of the deceased or because the deceased was on the point of "blowing the whistle" about some of Mr Rivkin's business dealings.

133 Whilst it is true that other hypotheses were postulated in the article, the inescapable inference and burden of the article was that one clear and unmistakable hypothesis was that Mr Rivkin was "a person criminally liable". Indeed, the power of that implication was strongly reinforced by the context of SMH1. It included the insinuative photograph of Mr Rivkin, the introductory image on the front page of SMH1 with superimposed photographs only of the deceased and Mr Rivkin and the words "Caroline's world and the Rivkin link – death of a model, page 11". This "header" together with the introductory words at the top of the article in SMH1 (" … many who knew her refused to believe it was suicide … ") placed emphasis upon the persuasiveness of the murder hypotheses. Of the two murder possibilities postulated, murder by contract killing is the last stated and apparently the most logical conclusion postulated by SMH1. The presentation of the competing hypotheses leaves this one as the final postulate that an ordinary, reasonable reader would carry away from a reading of SMH1 in sequence.

134 It would be necessary to assume rose coloured glasses and a large pair of blinkers to conclude that the published statements, appearing in an apparently serious broadsheet such as *The Sydney Morning Herald*, did not carry the imputation pleaded *as one of* the postulated hypotheses. If the imputation was not intended, why the introductory caption, even intruding into the newspaper's masthead on page 1 of SMH1? Why the prominent photograph of Mr Rivkin at the head of the article? Why the repeated references to Mr Rivkin in the article? Why the prominent espousal of the belief that the deceased's death was not suicide? Why otherwise link Mr Rivkin to a café frequented by people who had criminal backgrounds? Why the postulation, in this context, of a contract killing, otherwise unexplained except by reference to the deceased's suicide (thought unlikely) and the deceased's discovery of matters personally or professionally discreditable to Mr Rivkin?

135 Given that the pleader used the indefinite article ("a") I am unable to conclude that the Court of Appeal erred in reaching the decision that the jury could not reasonably reject pleaded imputation 3(a).

136 For similar reasons, I find no error in the Court of Appeal's conclusion on the true innuendo case. A person who, in addition to reading SMH1, had also read the AFR article would have more readily inferred that Mr Rivkin was "a" person criminally liable in respect of the murder of the deceased. Such a conclusion was reinforced by the elaboration of the "BAD BUSINESS" and "the mysterious death of [the deceased]" featured in AFR. In the face of the clear suggestion that Mr Rivkin's "bad business" was somehow inextricably mixed up with the "mysterious death", reading the publications together would tend to

reinforce in the mind of the reader of SMH1, the conclusion that Mr Rivkin was one of those "criminally liable" for the deceased's mysterious death. Why else link the two? Why else postulate Mr Rivkin's involvement as one of the possibilities? It is true that the matters complained of did not finally conclude that the second murder hypothesis was the truth. But that was not required by the imputation pleaded. Merely to postulate such a grave accusation as one of three possibilities, was in my view inevitably to carry the message of the pleaded imputation[109]. Certainly, that conclusion was open to the Court of Appeal performing its statutory function.

137 Both *The Sydney Morning Herald* and *The Australian Financial Review* are generally accepted as serious journals. Each is sometimes described as a journal of record. These facts reinforce the seriousness with which an ordinary reasonable reader would view the linkage portrayed in the two articles between Mr Rivkin and the death of the deceased. To the extent that parts of the articles, especially when read together, present the hypothesis of Mr Rivkin's criminal involvement in the murder of the deceased, that was a most serious imputation to give widespread coverage in these newspapers, with the credence that the publication would entail.

138 In our society, a public accusation of murder is amongst the most serious known to the criminal law. Where made by prosecuting authorities, it must be grounded in evidence carefully sifted and weighed by expert police and prosecutors convinced that they can sustain the charge beyond reasonable doubt. The fact that it is made by a serious newspaper to a very large readership, even as one of three competing hypotheses, made it much more likely that many ordinary reasonable readers would accept it as the hypothesis most persuasive to *them*. Such acceptance necessarily does harm to the reputation of the person so accused. In such a case those who publish the accusations must normally be prepared to justify or defend it.

139 I am therefore unconvinced that the Court of Appeal erred in concluding that the jury's answers to the questions relating to the pleaded imputation 3(a) and the true innuendo were appealably unreasonable.

140 *The homosexual intercourse imputations*: In most circumstances, it ought not to be the case in Australia that to publish a statement that one adult was involved in consenting, private homosexual activity with another adult involves a defamatory imputation. But whether it does or does not harm a person's reputation to publish such an imputation is related to time, personality and circumstance. Once, it was highly defamatory in many countries to allege, or

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109 cf *Bellino v Australian Broadcasting Corporation* (1996) 185 CLR 183 at 228.

suggest, that a person was a communist[110]. Now, in most circumstances, it would be a matter of complete indifference. The day may come when, to accuse an adult of consenting homosexual activity is likewise generally a matter of indifference. However, it would ignore the reality of contemporary Australian society to say that that day has arrived for all purposes and all people[111]. At least for people who treat their sexuality as private or secret, or people who have presented themselves as having a different sexual orientation, such an imputation could, depending on the circumstances, still sometimes be defamatory.

141 The introduction of Mr Rivkin's postulated sexual activity with Mr Wood was not entirely innocent, given the context. Mr Rivkin was described as a married man with five children who, by implication, was leading a secret life. This hypothesis was confirmed by the reference to his "high degree of interest in good looking young men" and by his provision to Mr Wood (who arguably filled the description) of a car, clothes, furniture and apartment, by clear implication in exchange for sexual favours. In the context of an article describing two murder hypotheses for the death of the deceased, one of which postulated the engagement of a "contract killer", the suggestion of homosexual activity between Mr Rivkin and Mr Wood in SMH1 went beyond an imputation of marital dishonesty or adulterous promiscuity on Mr Rivkin's part. In the context, such a sexual liaison, inevitably introduced into the matter complained of, as it would be read by the ordinary reasonable reader, the imputation as pleaded.

142 Once again, it is important to note the precise terms of the pleading. What the Court of Appeal upheld was not that the suggested act of homosexual intercourse between Mr Rivkin and Mr Wood had taken place but rather that the police had "reason to suspect" that it had. There was no error on the part of the Court of Appeal in concluding that the jury's answer, to the effect that the matter complained of did not carry such an imputation was appealably unreasonable. With respect, it would take a highly artificial view of the facts to arrive at the contrary conclusion. Here, after all, was the inclusion in an article of a specific imputation that arguably provided a motive that solved the riddle that the article was setting out to lay before the reader. Given the limited way in which the imputation was pleaded, no error appears that would authorise this Court to disturb the Court of Appeal's conclusion on imputation 3(c)(ii).

143 In his reasons, Callinan J concludes, contrary to the Court of Appeal, that the jury's negative answer to the imputation pleaded to the effect that the

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110 cf *Cross v Denley* (1952) 52 SR (NSW) 112 at 114-115; *Braddock v Bevins* [1948] 1 KB 580; *Brannigan v Seafarers' International Union of Canada* (1963) 42 DLR (2d) 249.

111 cf *R v Bishop* [1975] QB 274 at 281.

appellant had in fact engaged in homosexual intercourse with Mr Wood, was appealably unreasonable[112]. In my opinion, no error has been shown in the Court of Appeal's conclusion in this regard. Moreover, no notice of contention was filed for Mr Rivkin on this point. As this Court's record stands, I would not be prepared to treat the imputation in question 3(c)(i) as a matter before the Court[113]. I do not agree that 3(c)(i) contained a more serious imputation than that in 3(c)(ii)[114]. In terms at least, it was a reference to private conduct. The sting of the imputation lay in the suggestion that the police had suspicions about the matter. This implied that the police thought that it might be relevant to the death of the deceased. Otherwise, it was of no legal relevance to them.

144 *The associate of criminals imputation*: This leaves only the appellant's challenge to the imputation put to the jury as question 3(d) arising out of SMH1. This was that "the appellant was a close associate of criminals".

145 It is necessary to view this alleged imputation, like all the others, in the context of the matter complained of in SMH1. The words ascribed to Mr Wood describe Mr Rivkin's "closest cronies" as having "certain criminal backgrounds". This necessarily implies that they have criminal convictions, associations or connections. The context is also relevant to the suggestion that Mr Rivkin frequented a café that "has a reputation for being a hangout for ex-drug dealers …". The significance of the imputation is made immediately apparent both by the postulated second hypothesis of murder by a contract killer and by the large photograph showing Mr Rivkin seated at an unidentified venue with a large Bentley motorcar in the background, inferentially displaying his wealth elsewhere described or implied in the text.

146 In the setting, any innocent reading of the accusations stated or hinted in the case of Mr Rivkin would border on the starry-eyed. Read in isolation, as words only, clever verbal hypotheses might be raised to excuse or explain the jury's answer on this imputation. That all the "rumours" about Mr Rivkin's "cronies" were untrue. That the reputation of the café as a "hangout" was false. That the "ex-drug dealers" had all reformed. That the "criminal backgrounds" were for jaywalking or existed in the distant past.

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112 Reasons of Callinan J at [203].

113 cf *Leotta v Public Transport Commission of New South Wales* (1976) 50 ALJR 666 at 668; 9 ALR 437 at 440; *Water Board v Moustakas* (1988) 180 CLR 491 at 497-498.

114 cf reasons of Heydon J at [220].

147 Nothing in the function of the Court of Appeal, performing its statutory duty, required that Court to take such an unrealistic approach. Performing a proper appellate reconsideration of the jury's answer in this respect did not require the Court of Appeal to clutch at the straws of unrealistic hypotheses that put a uniformly innocent gloss on an imputation that, in the context, partook of what the matter complained of itself described as a "most sinister" matter. The Court of Appeal did not err in concluding that, in this respect, the jury's verdict was appealably unreasonable.

148 The foregoing conclusions leave many other hurdles for Mr Rivkin to overcome in a trial of his claim. The appellant said that it was a matter of fact for the jury in every case to decide what each pleaded imputation meant. So it was. But, by our law, it also remains for the Court of Appeal to perform its function. That function represents, in this context, one of the many instances in which our legal system rejects absolute and inflexible rules and permits an appellate court to intervene so as to prevent the risk of serious injustice where this is clearly demonstrated[115]. The jury's answer that the matter complained of did not carry the imputation that Mr Rivkin "was a close associate of criminals" is such a case. The Court of Appeal was correct to so conclude. No error is shown in its conclusion.

149 *An essential difference of approach*: The essential difference between the approach that McHugh J takes to this issue[116] (and which the appellant and some others have urged[117]) and the one that I regard as required by authority and by proper performance by the Court of Appeal of its appellate role, can now be identified.

150 I am very mindful of what this Court and the Privy Council said in *Hocking v Bell*[118], concerning appellate review of jury verdicts. In this Court, the case is often referred to, and given effect[119]. But neither *Hocking v Bell*, nor any

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115 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 331-332 [93]; 160 ALR 588 at 620-622.

116 See reasons of McHugh J at [17]-[22].

117 eg Rolph, "Perverse jury verdicts in New South Wales defamation trials", (2003) 11 *Torts Law Journal* 28. The author at 47-49 points out that "flaws" in the s 7A procedure may help explain the incidence of appellate intervention which would not have occurred, or been appropriate, to a verdict following a comprehensive trial before jury of all issues, including defences.

118 (1945) 71 CLR 430; (1947) 75 CLR 125 (PC).

119 *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 289 [58], 290 [59], 291-293 [64]-[65]; *Puntoriero v Water Administration Ministerial Corporation*

(Footnote continues on next page)

decision since of which I am aware, obliges an appellate court, performing its function of deciding an appeal from a verdict of a civil jury, to defer to the jury decision if there is the merest scintilla of evidence to support that decision. This is a common misreading of *Hocking v Bell*. It must be removed from legal thinking.

151 In every case it remains for the appellate court to subject the jury verdict to analysis, allowing for difficulties inherent in the absence of reasons and in circumstances where only limited means are available to decide how the jury may have reached their conclusion. Nevertheless, the touchstone is – and should be – one of reasonableness. Nothing else would coincide with judicial authority. Nothing else would fit with the appellate court's duty as a receptacle of statutory power. Reasonableness, rationality and fair process lie at the very heart of our legal system[120]. There is no need to apologise for them, or to dispose of them, in deference to fictious or absolute notions or a blind faith in finality of legal process that has clearly miscarried.

152 The position was explained by McHugh J in *Fox v Percy*[121] in language that I would adopt, word for word, for application in this case[122]:

> "Juries give no reasons. Because that is so, appellate courts must act on the basis that the jury took that view of the evidence *that was reasonably open to them* and is consistent with their verdict. Nevertheless, in some cases *no reasonable view of the evidence* can support the verdict. In those cases the appellate court may intervene to set aside the verdict.

153 That is what happened here. Whilst acknowledging the ingenuity of the demonstration by verbal analysis of the way the jury *might* have construed different parts of the matter complained of, then extended to an explanation of their answers taken as a whole, it is my view that sight has thereby been lost of what was "reasonably open" to the jury to conclude. Alike with the Court of Appeal, I would conclude that "no reasonable view of the evidence" in this case (being the publications) could sustain the jury's answers on the pleaded

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(1999) 199 CLR 575 at 586 [27]; *Rosenberg v Percival* (2001) 205 CLR 434 at 463 [90]; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 877-879 [64]; 179 ALR 321 at 334-336; *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 499 [55]. I leave aside references in criminal appeals where the issues are different.

120 *Whisprun Pty Ltd v Dixon* [2003] HCA 48 at [122]-[123].

121 (2003) 77 ALJR 989; 197 ALR 201.

122 (2003) 77 ALJR 989 at 1002 [71]; 197 ALR 201 at 219 (emphasis added).

imputations in the four identified categories. It follows that the Court of Appeal did not err in its decision in those respects. Professor Fleming puts it well[123]:

> "In the past there was, it is true, a tendency to give perhaps undue weight to a possible innocent meaning[124]. Today, however … the courts will only reject those 'meanings which can only emerge as a product of some strained or forced or utterly unreasonable interpretation'[125]."

154 The latter, with respect, is the characterisation I would give to the appellant's effort to explain the jury's answers in the four categories that are before this Court.

The discretionary ordering of addresses

155 *Finding the applicable rule*: It is therefore necessary to consider the third issue. Not only is there a specific ground of appeal directed to it. Conventionally, it is open to an appellate court, in disposing of an appeal from final orders, to consider appeals from interlocutory decisions that may have influenced the challenged disposition[126]. The suggested error of the primary judge in rejecting the application of Mr Rivkin's counsel to be allowed an address in reply was postulated as a possible explanation of the misapprehension by the jury of its proper function in respect of the answers held to have miscarried.

156 It is first necessary to clarify the rule governing the order of addresses. With respect, I do not agree with the opinion of Meagher JA, in so far as his Honour concluded that Pt 34 r 6 SCR had no application to the "strange semi-interlocutory determinations called for by s 7A [of the Act]"[127]. It is true that the relevant rule was adopted before the enactment of s 7A. The form of "trial" there provided is certainly unusual and restricted. However, the rule was intended, as its terms indicate, to be one of general and continuing application. It therefore has effect on any mode of trial. The trial by jury called for by s 7A invokes the rule. There is no need to resort to the Supreme Court's inherent jurisdiction. The rule is expressed in perfectly ample and clear terms.

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123 Fleming, *The Law of Torts*, 9th ed (1998) at 590.

124 eg *Capital & Counties Bank v Henty* (1882) 7 App Cas 741 of which it was said in *Slim v Daily Telegraph* [1968] 2 QB 157 at 187 the principles were never better formulated nor perhaps ever worse applied.

125 *Jones v Skelton* [1963] 1 WLR 1362 at 1370; [1963] 3 All ER 952 at 958.

126 *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 483 [6]; 494-497 [43]-[51].

127 [2002] NSWCA 87 at [2] per Meagher JA.

157 *A rule founded on statute*: I agree with McHugh J that, because the rule, made pursuant to statute, gives the trial judge the discretion to alter the order of addresses, it is a discretion that may not be used to negative the general rule[128]. The adoption of principles of universal application (as postulated in the Court of Appeal by Meagher JA[129] and, ultimately, by Grove J[130]) runs the risk of challenging the essential postulate underlying the terms of the primary rule. A judicial gloss of such a kind upon a law, founded ultimately in statute, is impermissible. In *Gerlach v Clifton Bricks Pty Ltd*[131], Callinan J and I dissented on this point. We did so in the context of the impermissibility of converting a discretionary power to dispense with a jury into a rule having that effect because of features universal to jury trials[132]. The majority of this Court in that case[133] laid emphasis upon the scope of the discretion provided to the trial judge in a court to which is committed a multitude of such decisions[134]. The principle that McHugh J has expounded in this case is clearly right.

158 It follows that Mr Rivkin was entitled in his appeal to challenge the primary judge's interlocutory decision on the order of addresses. However, he had his work cut out to succeed in such a challenge. Because (despite invitation) no application was made to the primary judge to give reasons for rejecting a variation from the normal order of addresses envisaged by the rule, Mr Rivkin was left with nothing but inferences and deductions to sustain his attack on the judge's conclusion. Upon one view, by proceeding with the trial according to the primary assumption of the rule (which merely follows the historical approach of common law trials rather than those in equity) Mr Rivkin might be taken to have waived any serious objection to the primary judge's ruling on his counsel's request, made at the outset of the trial. The provisions of Pt 34 r 6 SCR are ambulatory. There was nothing to stop Mr Rivkin's counsel at the trial, at the conclusion of the address for the appellant, to renew the application to be allowed a general or limited right of reply. This, counsel omitted to do. That fact suggests that those in Mr Rivkin's camp thought that it was enough to proceed

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128 Reasons of McHugh J at [71].

129 [2002] NSWCA 87 at [2] pars (iii) and (iv).

130 [2002] NSWCA 87 at [53] per Grove J.

131 (2002) 209 CLR 478.

132 (2002) 209 CLR 478 at 505-507 [74]-[79].

133 Gaudron, McHugh and Hayne JJ.

134 (2002) 209 CLR 478 at 484 [8].

according to the standard established by the ordinary provision of the rule, affirmed by the primary judge's initial ruling.

159 The standard stated in Pt 34 r 6 SCR is not inflexible; nor is it unreasonable. In answer to the concern that led Grove J to his "alternative view", namely that a plaintiff should have a right to an address in reply[135] in order to answer an argument that was tenuous or silly, it is unnecessary to postulate a radical or global departure from the procedure primarily envisaged by the Rule to meet such an extreme case. To the end of the trial, it is open to the primary judge, within his or her discretion under Pt 34 r 6 SCR, to vary the ordinary practice and to permit a reply, for example to deal with such arguments. Alternatively (as in part in the present case), the judge may give instruction to the jury that calls attention to the responses available to particular arguments.

160 *Conclusion: no error at trial*: It follows that I consider that Foster AJA was correct in rejecting any supposed special rules of universal application as to the order of addresses in proceedings under s 7A of the Act[136]. His Honour was right in emphasising the individual discretion of the trial judge, including where necessary to permit a right of reply to the plaintiff as an exception. This approach was informed by the applicable legal principles, rooted here in statute. With respect, the majority of the Court of Appeal erred in concluding otherwise.

161 The error of the majority in the Court of Appeal on this point is important because it appears to have affected the conclusion reached that a general new trial should be ordered at which, in a case such as the present, the right of reply sought for Mr Rivkin could be exercised as a matter of principle. There is no such principle. The governing rule remains that stated in Pt 34 r 6 SCR. It applies to a jury trial conducted under s 7A of the Act.

The Court of Appeal erred in ordering a general retrial

162 *Brevity of the jury's deliberations*: This conclusion necessitates consideration of the fourth issue. Once the error in the primary judge's interlocutory ruling as to the order of addresses is rejected, the only suggested foundations to support the Court of Appeal's order for a general retrial were (a) that the length of the jury's retirement was so short, combined with the universal rejection of Mr Rivkin's imputations, as to suggest a misapprehension or miscarriage of the jury's function; and (b) that, otherwise, in the circumstances of established error on the part of the jury in the four identified categories of imputation, the requirements of justice obliged a general retrial on the footing

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135 [2002] NSWCA 87 at [53].

136 [2002] NSWCA 87 at [25].

that "some substantial wrong or miscarriage" had occurred in the trial[137] indicating that the entire process had failed and obliging that it be recommenced.

163 So far as the relatively short retirement of the jury is concerned, it is certainly true that, in the way that lawyers labour over the meaning of pleaded imputations, more time is often needed (and more has been consumed in these appeals) than the jury could have undertaken in their retirement of less than two and a half hours. However, the whole point of summoning a jury, and preserving the facility of jury trial in defamation cases (even if for limited purposes), is to secure the benefits of a different tribunal, comprised of lay members, participating over several days while counsel argue their respective cases.

164 In this country, the jury may (indeed are expected to), discuss the case amongst themselves before their final retirement[138]. An appellate court has no way of knowing the way that the jury approached their task or reached their answers, evidence on such matters being forbidden[139]. So was the conclusion of Foster AJA[140], in which Meagher JA agreed[141], that the brevity of the jury's retirement and the universality of their negative answers sufficient to occasion "grave concern that the verdict was influenced by extraneous considerations"?[142]. To the extent that this conclusion entered into the consideration of the Court of Appeal in ordering a general retrial was it an erroneous factor that vitiates that part of the disposition?

165 In the United States of America, a number of decisions have addressed the suggested brevity of a jury's formal deliberations and the argument that it evidences misconduct or bias in the jury or their failure to understand and perform their duty. Whilst courts in the United States have insisted that "neither the brevity of the time of the jury's deliberation nor the [verdict] if within the limits fixed by [law], indicates either passion, prejudice or caprice on the part of the jury or misconduct"[143] (length of deliberation bearing no necessary

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137 Pt 51AA r 16(1) SCR: see *Gerlach* (2002) 209 CLR 478 at 483-484 [7].

138 *Ng v The Queen* (2003) 77 ALJR 967 at 978 [71]; 197 ALR 10 at 26.

139 *Ellis v Deheer* [1922] 2 KB 113 at 117-118, 121; *Prothonotary v Jackson* [1976] 2 NSWLR 457 at 461; *Laws (No 2)* (2000) 116 A Crim R 70 at 75 [25]-[26].

140 [2002] NSWCA 87 at [7]-[8].

141 [2002] NSWCA 87 at [1].

142 [2002] NSWCA 87 at [8] per Foster AJA.

143 cf *Wheeler v State of Tennessee* 415 SW 2d 121 (1967).

relationship to the "strength or correctness of their conclusions or the validity of their verdict"[144]) nevertheless, where deliberations are extremely short, courts have sometimes infered injustice consequent upon a failure of the process[145].

166 Many of the cases in the United States are reasoned in terms of constitutional rights to due process that have no exact equivalent in Australia[146]. A number of the cases involve jury retirements of only a few minutes after extremely long and complex trials involving much evidence[147], which the instant trial did not[148]. Repeatedly, United States judges have remarked on the double aspect of prompt verdicts as possibly indicating a firm view on the part of the jury as to the absence of any belief in the merits of the complaining party's case[149]. The United States' judges have also stressed that "[w]e cannot hold an hour-glass over a jury"[150]. Only if, in the circumstances, the brevity is so extreme and disproportionate to the trial as to suggest bias on the part of the jury or a failure to apprehend their proper function, will courts intervene on such a complaint if otherwise the verdict is sustained by the evidence.

167 This Court should approach the matter in a similar way. So approached, there is no foundation in the argument based on the short retirement of the jury in the present case to warrant a conclusion, on that ground, that the entire trial miscarried.

168 *Speculation on extraneous prejudice*: That leaves only the residual concern expressed in the Court of Appeal that some blanket consideration of an extraneous kind might have influenced the uniformly negative responses of the jury (shown in the four categories to have been appealably unreasonable) so as to demonstrate such a miscarriage of the first trial that only a complete retrial of all issues could cure.

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144 *Williams v Bridgeford* 383 SW 2d 770 (1964); *Anglin v State of Tennessee* 553 SW 2d 616 (1977).

145 *Derewecki v Pennsylvania Railroad Co* 353 F 2d 436 at 444 (1965); *Nelson v Keefer* 451 F 2d 289 at 295 (1971).

146 eg *United States v Anderson* 561 F 2d 1301 at 1303 (1977).

147 *Paoletto v Beech Aircraft Corp* 464 F 2d 976 at 983 (1972).

148 *Wheeler v State of Tennessee* 415 SW 2d 121 at 127 [13] (1967).

149 eg *United States v Anderson* 561 F 2d 1301 at 1303 (1977).

150 *Marx v Hartford Accident and Indemnity Co* 321 F 2d 70 at 71 (1963).

169 I am unconvinced that that is the correct inference to draw. It amounts, as Grove J ultimately expressed it, to "speculation"[151]. The conduct of a complete retrial would deprive the appellant of the success it has secured from the first trial, to the extent that the jury's answers to questions in that trial have not been shown as appealably unreasonable but have been upheld by the Court of Appeal applying the correct principles. No proper basis has been established to produce a different result. The several bases mentioned in the reasons of the Court of Appeal are insufficient. Justice as between the appellant and Mr Rivkin requires that any future trial be confined to the imputations in the four categories alone in which Mr Rivkin demonstrated appealable error on the jury's part.

170 *Conclusion: a limited retrial*: Appealable error, of itself, is insufficient to warrant an order for a retrial where the first trial was had by jury. Under the applicable Rules of Court governing orders of the Court of Appeal in such cases (as at common law)[152] it is necessary to show, in addition, that "some substantial wrong or miscarriage has been thereby occasioned". In the present case, that element is shown by the return of the jury with answers that were appealably unreasonable in the four categories of imputation found by the Court of Appeal. In respect of such imputations, but in respect of them alone, Mr Rivkin was entitled to a retrial. The Court of Appeal erred in granting a general retrial. Its order in that respect must be set aside.

Orders

171 The appeal should be allowed. Order 4 of the orders of the Court of Appeal of the Supreme Court of New South Wales of 26 March 2002 should be set aside. In place of that order, it should be ordered that the matter be remitted to the Common Law Division of the Supreme Court for a new trial limited to imputations 1(a), 1(b), 3(c)(ii) and 3(d). I agree that there should be no order for costs.

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151 [2002] NSWCA 87 at [112].

152 Pt 51AA r 16(1) SCR; cf *Balenzuela v De Gail* (1959) 101 CLR 226 at 242-244.

172 CALLINAN J. The primary question which this appeal raises, is whether the intervention of an appellate court to correct the holdings of a jury that defamatory imputations as alleged by a plaintiff had not been conveyed, was justified.

The facts

173 The late Caroline Byrne was an attractive young woman who lived with Mr Gordon Wood, an employee of the respondent whom the appellant described as a celebrity stockbroker. Ms Byrne's body was found at the base of a tall cliff at Watson's Bay in Sydney on the morning of 8 June 1995. The appellant is the publisher of the Sydney broadsheet, *The Sydney Morning Herald* and another morning newspaper, *The Australian Financial Review* which, as its name suggests and the subject matter of the articles demonstrates, is primarily concerned with matters of business and finance. The appellant published a deal of at least impliedly critical matter in those two newspapers about Mr Wood and the respondent, and some of the details of an inquest that was conducted into the circumstances of Ms Byrne's death.

174 It is necessary to set out in full (with the addition of numbering for subsequent ease of reference) the three articles which the respondent alleged were defamatory of him.

The Australian Financial Review, 21-22 February 1998 at 1, 23-25.

1. IT'S A BAD BUSINESS

2. What was going through the mind of well-connected Sydney model Caroline Byrne in the hours before her mysterious death? Neil Chenoweth reveals new information about the events surrounding the death, disclosing details of a secret investigation into some controversial business dealings.

3. Sydney has developed an obsession with the death of a 24-year-old model. Intense media coverage in the last fortnight has centred on the mysterious events surrounding the discovery of the body of Caroline Byrne at the foot of a 30 metre cliff at the Gap, a well-known Sydney suicide spot, almost three years ago.

4. Last week the Senior Deputy State Coroner, John Abernethy, returned an open verdict on Byrne's death, finding that she either jumped, slipped or was pushed from the top of the cliff on the night of June 7, 1995.

5. Byrne had been referred to a psychiatrist by her general practitioner two days before, complaining of depression, though the doctor stressed at the inquest that she did not feel Byrne was suicidal.

6. But inquiries by *The Australian Financial Review* have raised a possibility that an Australian Securities Commission interrogation of her boyfriend the day before her death may have contributed to her depression.

7. Caroline Byrne's partner, Gordon Wood, 32, was served a Section 19 order by the ASC on May 31, 1995, together with Wood's employer, high-profile investor Rene Rivkin. The Section 19 order required Wood and Rivkin to submit to a formal examination by an ASC legal team.

8. Caroline's father, Tony Byrne, testified in a statement at the inquest that Wood declined an offer to come to dinner on May 31. Caroline told him, "No, he's in a shitty mood."

9. The ASC questioned Wood and Rivkin on Tuesday, June 6, Rivkin's birthday, over the recent trip the two had taken to Zurich, and in connection with its investigation of secret holdings in Rivkin's Offset Alpine Press Group by mystery Swiss investors. If this did contribute to the pressures upon Wood and indirectly upon Byrne, this could make her a victim of the long-running Offset Alpine saga, where the ASC tried in vain to trace what appeared to function as a $40 million slush fund.

10. Key details about the movements of Byrne and Wood in the month before her death can be ascertained from papers filed before the Federal Court of Appeal relating to Offset Alpine. They outline the pressures a major ASC investigation can produce.

11. Byrne had moved in with Wood in late 1992. Wood lived a life of expensive cars and cosmopolitan style from October 1993, when he became a driver and "gofer" for Rivkin. Rivkin had 18 cars ranging from a red utility and a blue Rolls-Royce Corniche convertible to a green Bentley.

12. "I suppose by the time I left [in February 1996] I would call myself – sometimes I was like – like a manager, but I called myself a personal assistant," Wood told police in an interview tendered to the inquest.

13. During Wood's employment Rivkin's fortunes were on the rise. He had controlled the public company Offset Alpine, in its various incarnations, since the 1980s. By 1992 the company was stripped and virtually moribund. But the share price was galvanised when it bought a printing business from Kerry Packer's recently floated Australian Consolidated Press group at a price three times pre-tax earnings.

[Sub-heading] Bad business: the mysterious death of Caroline Byrne

14. Another share price jump came after a fire on Christmas Eve, 1993, which resulted in a $53 million insurance payout, including $42 million to replace plant that was valued in the books at $3 million.

15. But Rivkin's reputation as a canny and astute broker took a battering in May 1995 when the ASC took legal action to freeze a major part of Offset Alpine's share register.

16. In the Federal Court on May 3 the ASC revealed that the major beneficiaries of Offset Alpine's change in fortune were two Swiss companies which, by ignoring Australian reporting requirements, secretly owned 38 per cent of the company, hidden in five Australian nominee companies (which, like Rivkin, were unaware of the size of the total holding).

17. The ASC said the two companies, Bank Leumi le-Israel, and a finance company EBC Zurich, operated as a "black box" that hid the identity of their clients – the real owners of the shares.

18. The Swiss shareholdings had cost about $15 million to build up over a number of years. The mystery owners had received capital repayments of about $10 million, and raised about $4 million in share sales in the past year. Eventually the Federal Court ordered that the shares frozen by the ASC be sold, with the $26.1 million proceeds released to the Swiss companies.

19. Neither the ASC nor the Australian Taxation Office ever traced the end of the money trail. The beneficiaries forfeited millions of dollars in tax and legal costs to hide their identity. No charges were ever laid, and no negative aspersions were ever drawn about any of those investigated by the ASC.

20. It was not suggested at Byrne's inquest that the ASC matters were in any way linked with her death. Indeed, it appeared that the Coroner and police were not even aware of the ASC's interest.

21. But who were the mysterious clients behind Zurich who received the $40 million?

22. Two months before the ASC court action, on March 6, Phillip Croll, managing director of Rivkin's broking house, Rivkin Croll Smith, had written to Australian Stock Exchange's surveillance chief, Jim Berry, stating that Rivkin had discretionary authority over the EBC Zurich and Bank Leumi share trading accounts.

23. After the ASC froze the shares on May 3, Croll told the ASC that he had misunderstood the relationship, and that Rivkin did not control the accounts. "I think you'll find that a little bit of knowledge can be a dangerous thing," Croll told the *AFR* on May 9 about his mistake.

24. This would have been a tense time for all concerned. It was difficult for the Swiss companies, which were forbidden by Swiss law from disclosing the real identity of their clients. It was tense for the real owners of the shares, who were risking the loss of their entire investment to the ASC by instructing the Swiss companies not to name them.

25. It also must have been a tense time for Rivkin and his personal assistant Gordon Wood, not merely because it now seemed that, unbeknownst to Rivkin, his company had had a covert takeover, but also because thanks to Croll's misunderstanding Rivkin himself had become a major focus of the ASC inquiry.

[Breakout] It appeared that the Coroner and police were not even aware of the ASC's interest.

26. This was the atmosphere in which Wood was working as Rivkin decided to fly to Zurich.

27. In a transcript of an interview with the ASC tabled in the Federal Court of Appeal, Rivkin said EBC Zurich and Bank Leumi had been clients for more than 15 years. They did not understand Australian reporting requirements and were indignant at the ASC's move. He had put them in touch with his lawyer, John Landerer, who had recommended they engage Freehill Hollingdale & Page and Atanaskovic Hartnell.

28. Rivkin made the decision to go to Zurich the day after the ASC froze the shares. He flew out on Sunday, May 7, accompanied by Wood.

29. "I felt it was the least that I owed them [EBC Zurich and Bank Leumi], to go over and talk to the various people involved," Rivkin told the ASC in a transcript of interview tabled in the Federal Court of Appeal. "I mean, I met some of their lawyers, for example, a lawyer, trying to explain what it was all about."

30. Rivkin arrived in Zurich with Wood on Monday, May 8, and spent five days in meetings with EBC Zurich and Bank Leumi staff.

31. "Of course I tried to convince them to release, to issue the names of their customers or their clients as the best way to solve the whole problem," Rivkin told the ASC.

32. Rivkin and Wood flew to England on May 12, returned briefly to Zurich, then flew back to England. They arrived back in Sydney on Saturday, May 27. The ASC had kept their flight arrangements under surveillance, and on May 31 they were summonsed for a Section 19 examination.

33. On Tuesday, June 6, Rivkin told the ASC in the court transcript that EBC Zurich and Bank Leumi were fund managers which decided where to invest their clients' funds, often on his recommendation, and sometimes during a conversation with him. He had no idea who their clients were.

34. (EBC Zurich and Bank Leumi later stated that they only ever acted as bare trustees, with investment decisions made by their clients. Justice Sackville found in the Federal Court that this was not inconsistent with Rivkin's statement.)

35. On Monday, June 5, Wood's girlfriend Caroline Byrne was referred to a psychiatrist, but she did not keep her appointment on Wednesday afternoon. Her general practitioner told the Coroner that Byrne did not appear in any way suicidal, and friends described her as a "normal, vibrant woman".

36. Wood told police that Byrne was depressed on Tuesday night, June 6. He is the last person known to have seen Byrne, at 1pm on Wednesday, June 7. He told police Byrne was out when he returned home that night. He went looking for Byrne after waking at 12.40am to find her still not home.

37. The Coroner described aspects of the matter as puzzling.

38. Byrne died of massive head injuries some time between 1pm on June 7 and 4.30am on June 8. A senior rescue squad officer testified to surprise at the position of Byrne's body, 9 to 10 metres out from the base of the 30m cliff. A fence restricted any run-up to about 1.5m, on a particularly dark night when an onshore breeze was blowing. The Coroner said he was satisfied nevertheless that she could have jumped this far.

39. The Coroner described Wood's testimony as "bizarre", with a number of "glaring inconsistencies". At the same time, he noted that Wood kept to his version of events in a lengthy record of interview with police. "Much of what Wood said has been independently corroborated by others," he said.

40. After first checking Byrne's father's home, Wood was able to find her car at the Gap because of "spiritual communication", he told police in an interview tendered to the inquest. With a barely operating torch he was able to see Byrne's legs and a sandshoe at the foot of the cliff. Later, policemen using much stronger lighting had difficulty locating the body.

41. Wood gave a string of false stories about Caroline's death to her friends, and even to Rene Rivkin's wife, that Byrne had been run down by a car. He said Caroline's father, Tony Byrne, had asked him to do this. Tony Byrne denied this.

42. But the Coroner said the "most telling inconsistency" was the testimony of two restaurateurs who gave "convincing evidence" that they saw Byrne with Wood at the Gap at various times during Wednesday afternoon, as well as a green Bentley.

43. "It would be totally against the weight of evidence not to accept that evidence of identification," the Coroner said.

44. Wood testified that on that last afternoon he did not see Byrne after lunchtime, and that he spent the afternoon lunching with friends and driving Rivkin and his friend, former Labor politician Graham Richardson, in East Sydney. Neither Richardson nor Rivkin gave evidence. Nevertheless, the Coroner said, there is "not evidence that any known person was involved in the death of Caroline Byrne. It simply arouses suspicion and suspicion is not evidence".

45. Another source of potential upset for Byrne was Wood's close relationship with Rivkin.

46. In a transcript of a police record of interview tendered at the inquest, Wood said: "He was sort of like a father to me, if you like, as well as a boss." Wood said Rivkin advised him how to treat Byrne though Caroline had "a lot of suspicions about him". This related partly to the colourful crowd at Rivkin's favourite coffee shop, Joe's Cafe in Kings Cross.

47. Byrne's death initially had been treated as a suicide. Wood was questioned by homicide detectives in an inquiry which was launched eight months later, after a request by the Coroner's office.

48. In the transcript of interview tendered, Sergeant Brian Wyver levelled a number of allegations against Wood, which Wood denied and for which no substantiation was provided. It appears police were exploring the different pressures that may have been upon Byrne and Wood at the time. Byrne's mother committed suicide in 1991, and in 1992 Caroline Byrne had taken an overdose of sleeping tablets in the bath.

49. Independently of this tragedy, the Offset Alpine litigation ploughed along, with Justice Sackville eventually ordering that the shares be sold into a current takeover bid, and the money released to the Swiss companies.

50. An appeal was dismissed by the ASC, and the funds were about to be released in October 1996 when the Tax Office entered the fray, charging tax at the top marginal rate.

51. EBC Zurich had told the Australian Securities Commission that its clients were from "all over the world". Counsel for the Tax Office described plans to send the funds to Zurich as "a little bit cute". "Transmitting it to Zurich to invest in Australian dollars is a curious thing to do," he said.

52. Within a week the mystery shareholders had done a deal with the ATO, which it is believed resulted in them paying millions of dollars as tax – considerably more than the 15 per cent withholding tax that non-Australians would pay. This suggests the mystery shareholders are Australian.

53. Gordon Wood continued as personal assistant to Rivkin until February 1996. He now describes himself as a share trader.

54. According to the ASC records Wood had already branched out with his own interests in February 1995 with Shammas Ltd, a management consultancy/investment company he owned with accountant Anthony Tighe. In June 1995 Shammas reported an operating profit of $677, assets of $4,963 and liabilities of $5,636.

55. Sergeant Wyver, of the homicide squad, was assigned to the investigation of Byrne's death on February 27, 1996. He has since been transferred to the Child Protection Unit and moved to Wollongong. The investigation continues.

The Sydney Morning Herald, 25 February 1998 at 1, 11.

CAROLINE'S WORLD AND THE RIVKIN LINK

When the body of Sydney model Caroline Byrne was found at the bottom of The Gap, many who knew her refused to believe it was suicide. **BEN HILLS** looks at evidence presented to the Coroner.

DEATH OF A MODEL

1. Even at six o'clock on a winter morning, Caroline Byrne would turn heads. Tall, blonde and well-built, she had just come from a casting

session at her modelling agency and was looking "marvellous", her father recalls, when they met at the apartment block near Sydney's Chinatown where he worked as the building manager.

2. They had some family business to transact, papers to sign relating to a $2 million family trust set up by Tony Byrne for his four children. Caroline's share would be $500,000. Rich, attractive, successful, the only hint of gloom in Caroline's life that morning was a call on the mobile phone from her live-in lover "Gordy" Wood, whom, she said, was "in a shitty mood".

3. It was May 31, 1995, an otherwise uneventful day. There was certainly no clue that this was the last time Tony Byrne would see his daughter alive. Eight days later a police helicopter would airlift her shattered body from rocks at the foot of a 30-metre cliff near the entrance to Sydney Harbour, "a terrible waste of such a beautiful young life", as Tony Byrne later wrote to police investigating the death, in a letter on file at the Coroner's Court.

4. Two and a half years later Byrne is still full of grief and anger: grief at his daughter's death, and anger because no-one has been brought to account for what he believes was not a suicide but a cold-blooded killing. Caroline, he wrote, was murdered by a contract killer because she knew too much, the most extraordinary of all the theories yet to come to light about her death. The inquest which was held earlier this month only threw more fuel on the bonfire of speculation.

5. After hearing and reading statements from dozens of witnesses (including Byrne), examining a cache of forensic evidence and ordering a fresh, more thorough, investigation by the police, the Coroner, John Abernethy, was unable to determine how Caroline Byrne had died.

6. He left open three possibilities: suicide, murder or an accident. In other words, she jumped, she was pushed, or she simply slipped and fell to her death some time between 3.47 pm on June 7, when the records show she (or someone who knew her PIN number) withdrew $50 from a Westpac auto-teller machine in Vaucluse, and 3.30 the following morning when her body was found at the Watson's Bay Gap, a popular suicide spot.

7. SUICIDE. Superficially, Caroline Byrne was a woman with everything to live for. "I found her to be a very calm person, a very well-balanced individual. She was a role model for all our students ... [and] at no time showed any signs of depression," stated her former boss, Carol Clifford, manager of the famous June Dally-Watkins modelling school where Caroline had taught "deportment and parade" part-time for three years.

8. Aged 24, she had been brought up on a farm the family once owned near Camden, and had an arts degree with a major in psychology from Sydney University. At the age of 17 she was crowned "Miss Spirit" at the Campbelltown Ghost Festival, and she began modelling professionally when she was at university.

9. Her relationship with Gordon Wood also appeared to be serious and stable. They met at a gym where Wood, now aged 34, was working as a trainer, and had been living together on and off for 2 1/2 years. In one of his statements to police, Wood said they planned to marry and have children, and added: "We were very much in love with each other ... I considered living with Caroline as a dream come true."

10. During a three-month separation from Wood in 1993 she went out with an older man; her medical records show that she had two (negative) HIV blood tests.

11. She was fit and active and didn't drink alcohol or do drugs. When pressed, Wood admitted to police that just once they had shared an "eccy" (ecstasy) tablet and that Caroline had had "three or four puffs" of marijuana.

12. So why would she kill herself?

13. There was one dark chapter in her past of which Wood was aware. At Easter in 1991, Caroline's mother had checked herself into a Kings Cross hotel and killed herself with an overdose of drugs and alcohol, apparently as a result of depression which began with a silicone breast implant which went wrong.

14. Nine months later, Caroline herself, mourning her mother, tried to commit suicide by talking sleeping pills and lying in a bath full of water. That attempt failed, as (according to Wood) did a later attempt to jump off a building. Caroline had consulted a psychiatrist and been prescribed medication.

15. Nor, according to her family and friends who disapproved of him, was her relationship with Wood entirely blissful. Caroline's father said: "Gordon would not let Caroline out of his sight. It was not uncommon for him to call her 10 times a day. He always knew exactly where she was."

16. Detective Senior Constable Brian Wyver of the Homicide Unit South, who was in charge of the re-investigation, reported: "All her friends ... express doubts about Gordon Wood. They describe him as unusual. It would appear that he was obsessed by Caroline Byrne, and the view seems to be that even though he was living in a de facto relationship with her, he in fact stalked her."

17. Adding strength to the suicide theory, Caroline went to her GP, Dr Cindy Pan, two days before her death complaining that she had been feeling depressed for a month, and particularly in the previous week. Pan referred her to a psychiatrist (the appointment was for the afternoon she went missing), saying that the cause of the depression was unknown, but insisting that Caroline had "no thought of self-harm".

18. The cause of her depression remained a mystery until police interviewed Wood. According to him, Caroline was unhappy with a new, full-time job in sales and promotion for June Dally-Watkins; so unhappy that the two of them concocted a story for her boss that Caroline was seriously ill, and were planning to take a week-long "sickie" for a trip to the Blue Mountains.

19. In a 14-page posthumous case analysis, psychiatrist Dr Neil Schultz weighed the odds of suicide thus: "On face value [the evidence of Caroline's father and friends] the risk of Ms Byrne committing suicide is low. It rises to moderate on Dr Pan's evidence, and to high [accepting] Gordon Wood's version [of events]."

20. Caroline skipped an appointment the afternoon before her death ("totally out of character", said a modelling friend) and was, again unusually, still in bed a bit before 1 pm the following day when Wood returned to their apartment in Pott's Point to take her for lunch. Wood said she told him she had taken one of his Rohypnol (a sedative) tablets – he thought there were five or six missing from the packet – and did not want to get up.

[Breakout] 'I found [Caroline Byrne] to be a very calm person, a very well-balanced individual' Carol Clifford

21. That, says Wood, was the last time he saw his lover alive. He went back to work – he had been chauffeur and "executive assistant" to the celebrity stockbroker Rene Rivkin for nearly two years – returned that night to an empty apartment, and did not raise the alarm until after midnight when he awoke after falling asleep in front of the TV to find her still missing.

22. On this version of events, Caroline drove her white soft-topped Suzuki Vitara 4WD through Sydney's eastern suburbs that afternoon. At 3.32 pm (according to a credit-card receipt found in her handbag) she stopped at a Caltex service station in Oxford Street, Paddington, where she spent $7.75 on petrol and what might have been her last meal, two chocolate Freddo frogs.

23. She then drove to The Gap, parked her car in a narrow lane, and took a running jump off the cliff. How do we know it was a running jump? Her body was found nearly 10 metres out from the base of the cliff, which would have taken a "fairly good run-up", according to Sergeant Mark Powderly, the police rescue expert who recovered the body.

24. Either that, he testified, or it was "not inconceivable" that someone threw her off.

25. MURDER 1. Initially, the case was written off as just another suicide at The Gap. In his report, Constable Craig Woods of Rose Bay police, who conducted the original investigation concluded: "I believe the deceased was suffering from depression and that she could no longer cope with this and has attended The Gap some time after 3.45 pm on June 7 and has taken her own life."

26. However, after pressure from Tony Byrne, who wrote complaining that the initial investigation was inadequate, the Coroner ordered police to reopen inquiries, and the case was put in the hands of Sen Const Wyver, who focused on a number of inconsistencies in the evidence of various witnesses.

27. Wood, for example, had denied ever being near The Gap that afternoon, but the police found two witnesses who, while on the balcony of the Bad Dog cafe at Watson's Bay, had spotted a woman with a "very striking appearance, like a model" walking and chatting with two men. In the foyer of the Coroner's Court, they identified Wood and a Melbourne model-booking agent named Adam Leigh, who also knew Caroline, as the men.

28. When Wyver tackled Wood about this, and about a sighting of Rivkin's green two-door Bentley in the area that day, he said: "It's entirely possible, but I'm pretty sure I didn't [go there]."

29. He said that Rivkin had 14 cars, including a Rolls-Royce Corniche, a Bentley and a Ferrari. Because they were not used much, one of his duties was to drive them around to charge up the batteries, and this might have been what he was doing with the Bentley.

30. Wood and Leigh "trenchantly denied being with Ms Byrne" that afternoon, said the Coroner, but he found it "truly coincidental that both men strongly identified as being with Caroline knew her very well indeed, so well as to be material witnesses to this inquest". Abernethy described this as a "telling inconsistency" in the evidence.

31. Police, and Caroline's relatives, were also puzzled by Wood's behaviour after he awoke in front of the TV to find her missing. He picked up Tony and Peter Byrne (her brother) and drove to The Gap where, after searching for some time, he said he spotted her leg and sandshoe by the weak light of a torch he borrowed from two rock fishermen.

32. When Wyver questioned him about this, he said he had been led to the body by "some kind of spiritual communication". The Coroner described Wood's account as a "glaring inconsistency" and found "another anomaly" in the way Wood later lied to a number of Caroline's friends, telling them that she had been killed by a car.

33. An interview tendered as an exhibit during the inquest showed one possibility the police were exploring. The transcript reads:

34. Wyver: Now, I have been informed that on the day of Caroline's death she did not in fact attend work, but she made surveillance of you and in the course of this surveillance she caught you and Rene [Rivkin] having homosexual intercourse. What can you tell me about that?

35. Wood: Absolute lies.

36. Wyver: OK, and then I have been informed that as a result of that an argument between her and you ensued. Is there anything ...

37. Wood: No.

38. Wyver: ... and that you went to The Gap and you threw her over The Gap.

39. Wood: No, that's not correct, not correct.

40. Wood worked for Rivkin from 1993-96, starting as a "driver-gofer" and becoming his "executive assistant". He travelled extensively in Australia and overseas with Rivkin, regarded him as a "father as well as a boss", and was learning about "stockmarkets and trading" from him. Rivkin bought the apartment Wood and Caroline lived in at Potts Point, and paid for a car, clothes and furniture.

41. Wood, who now describes himself as a stockmarket trader, said that he had left Rivkin in 1996 "because I had this dream of getting myself financially set up to take care of Caroline and the family we were planning to have, and when she died that sort of died with her".

42. He said in the interview that Caroline, with whom he was living in what he described as a "loving, happy relationship", was "suspicious" of Rivkin. Asked why, Wood said "... [Rivkin] used to hang out with a whole stack of people at the cafe which, I am sure, you probably

discovered has a reputation for being a hangout for ex-drug dealers ... Joe's Cafe ..."

43. "Some of Rene's closest cronies are ... have certain criminal backgrounds or are rumoured to have it. And the fact that Rene is ... has a high degree of interest in good-looking young men ... so she [Byrne] certainly expressed concern about his intentions towards me."

44. But Wood denied he had ever had a homosexual relationship. He said in his opinion Caroline had committed suicide by jumping off the cliff.

45. Neither Rivkin nor Wood would return telephone calls from the *Herald.* Wood was not questioned about this allegation during the inquest, nor was Wyver asked the source of his information.

46. Rivkin, who is married with five children, was not called as a witness and did not make a statement to police apart (says Wyver) from a brief "door-stop" outside one of his haunts, Joe's Cafe in Darlinghurst, several months later when he said he could not recall whether Wood had been driving him the day Caroline died.

47. MURDER 2. The most sinister theory about Caroline's death is her father's belief that a "contract killer" was hired to do away with her. In his letter to police and the Coroner, Tony Byrne says his daughter was "knocked unconscious a short distance from where she was found, and thrown over the cliff".

48. Byrne makes an extraordinary series of allegations about people he claims were behind the murder. The motive? She had found out about "a very serious crime" from which they stood to benefit, and they feared she was about to blow the whistle.

49. He has offered to put up a $100,000 reward for information leading to the conviction of her killers. He says her death shows "how easy it is to make a murder look like a suicide".

50. The police investigation did not take into account Byrne's theory, no statements were taken or witnesses called, and Abernethy does not mention the allegation in his official finding.

51. As far as the police are concerned, Wyver says, the file remains open.

The Sydney Morning Herald, 5 March 1998 at 7.

1. BOYFRIEND DENIES KILLING MODEL

2. By HONEY WEBB

3. The fiance of a model who was found dead at the bottom of The Gap two years ago broke his silence on national television last night, saying suggestions he was responsible for her death were "utter lies" and "garbage".

4. Mr Gordon Wood, who was engaged to marry Ms Caroline Byrne before her death in May 1996, told the Seven Network's *Witness* program that suggestions made in a police interview that he had thrown Ms Byrne off The Gap after surveillance she commissioned allegedly caught him having sex with his boss, the flamboyant stockbroker Mr Rene Rivkin, were "utter lies".

5. "Utter garbage. There's absolutely no evidence to support that Caroline had hired anybody or that Rene Rivkin had homosexual sex with me or anybody," Mr Wood said.

6. An inquest into the death of Ms Byrne recorded an open verdict last month, although the Coroner called on police to reopen the investigation into how she died.

7. The program said that despite the Coroner's suspicions that Mr Wood might not have been telling the truth, there was "not a shred of evidence that Gordon Wood killed Caroline".

8. When asked if he had killed Ms Byrne, Mr Wood replied: "Of course not. Why would I kill her?"

9. Detective Brian Wyver, who investigated the death, said on the same program he did not think Ms Byrne had committed suicide and that the evidence indicated Mr Wood had told lies.

10. "If I thought that she'd committed suicide then it would make it a lot easier to give a version to the Coroner ... I don't think she really did," Detective Wyver said.

11. "There are a lot of inconsistencies in his story," he said of Mr Wood.

12. Mr Wood claimed he had not lied once.

> 13. "Tell me this, why would I lie about anything to do with the death of the woman I was expecting to live the rest of my life with – happily ever after," he said. "There is no explanation on the face of the planet that makes sense, that has one iota of evidence to suggest that any other scenario is anything but a fantasy."
>
> 14. Ms Byrne's father, Mr Tony Byrne, told the program he believed his daughter was murdered. "She did not commit suicide," he said.

175 The respondent sued the appellant for defamation in the Supreme Court of New South Wales. He alleged that the three articles conveyed a number of imputations which I collect in a convenient table later in these reasons.

176 The form of pleading used in this case is apparently unique to New South Wales. A practice seems to have developed there of pleading in a formal way an imputation in different language from the defamatory matter itself, even when the clarity and defamatory thrust of the actual matter itself need no elaboration. Part 31 r 2 of the Supreme Court Rules 1970 (NSW)[153], which makes provision for staged trials of actions, applied here. Section 7A of the *Defamation Act* 1974 (NSW) ("the Act"), which was introduced by the *Defamation (Amendment) Act* 1994 (NSW) and which was also applicable to these proceedings, provides as follows:

> "**7A Functions of judge and jury**
>
> (1) If proceedings for defamation are tried before a jury, the court and not the jury is to determine whether the matter complained of is reasonably capable of carrying the imputation pleaded by the plaintiff and, if it is, whether the imputation is reasonably capable of bearing a defamatory meaning.

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153 Part 31 r 2 provides:

> "**[31.2] Order for decision**
>
> 2 The Court may make orders for:
>
> (a) the decision of any question separately from any other question, whether before, at or after any trial or further trial in the proceedings; and
>
> (b) the statement of a case and the question for decision."

(2) If the court determines that:

(a) the matter is not reasonably capable of carrying the imputation pleaded by the plaintiff, or

(b) the imputation is not reasonably capable of bearing a defamatory meaning,

the court is to enter a verdict for the defendant in relation to the imputation pleaded.

(3) If the court determines that:

(a) the matter is reasonably capable of carrying the imputation pleaded by the plaintiff, and

(b) the imputation is reasonably capable of bearing a defamatory meaning,

the jury is to determine whether the matter complained of carries the imputation and, if it does, whether the imputation is defamatory.

(4) If the jury determines that the matter complained of was published by the defendant and carries an imputation that is defamatory of the plaintiff, the court and not the jury is:

(a) to determine whether any defence raised by the defendant (including all issues of fact and law relating to that defence) has been established, and

(b) to determine the amount of damages (if any) that should be awarded to the plaintiff and all unresolved issues of fact and law relating to the determination of that amount.

(5) Section 86 of the *Supreme Court Act 1970* and section 76B of the *District Court Act 1973* apply subject to the provisions of this section."

177 The first stage of the trial came on for hearing before Simpson J with a jury. The only evidence before the court consisted of the three articles. The respondent's counsel addressed first. Following his and the appellant's counsel's addresses the trial judge rejected an application by the former to address the jury in reply. The questions for the jury were whether each of the imputations was conveyed, and if it was, whether it was defamatory of the respondent. Section 7A of the Act dictated that these be answered by the jury exclusively. Because the jury answered the first set of questions entirely in the negative, the appellant became entitled to judgment in the action.

178 The respondent in this Court appealed to the Court of Appeal of New South Wales (Meagher JA, Foster AJA and Grove J). That Court unanimously held that six of the imputations pleaded were, but nine were not, necessarily conveyed, and that even though the jury were not perverse in rejecting some of the imputations, there should be a new trial in relation to all of them. The respondent also relied on a ground that he should have been permitted an address in reply. As to that, it was held that the order of address is a matter in the discretion of the trial judge. Subject to that discretion, particularly in a case in which the evidence consists of no more than the tender of the matter complained of, the plaintiff should ordinarily address first (per Meagher JA and Foster AJA, Grove J contra), but should have a right of reply (per Meagher JA and Grove J). Foster AJA was of the opinion that any right of address in reply should be in the discretion of the trial judge in accordance with the circumstances of the case.

179 With respect to the substantive matters, the conveyance or otherwise of the imputations, Grove J wrote the leading judgment. His Honour accepted that the burden upon the respondent in attacking the answers of the jury was a very heavy one. Indeed, the test that his Honour adopted, of perversity, was probably higher than required unless it was intended as a synonym for the phrase, a conclusion that no reasonable jury could reach.

180 It is convenient to repeat, with two additional columns, the table in which the appellant collected the imputations and the holdings in respect of them by the jury and the Court of Appeal. The columns that I have added are the first and second ones. They contain the matter principally, but not exhaustively, relied on by the respondent, as supporting the imputation pleaded and the publication in which it appeared.

Matter of particular reliance	Publication and date	Imputation	Imputation reference (as pleaded and as put to the jury)	Jury answer	Court of Appeal holding
Pars 1, 7, 9, 10, 13, 14, 15, 19, 22, 23, 25, 31 and 49	AFR 21-22 February 1998	That the [respondent's] participation in the affairs of Offset Alpine Press Group had diminished his reputation as a sagacious and astute stockbroker	Pleading: 4(a) Jury: 1(a)	No	Unreasonable or perverse

Pars 1, 7, 9, 10, 13, 14, 15, 19, 22, 23, 25, 31 and 49	AFR 21-22 February 1998	That in May 1995 the Australian Securities Commission had reason to suspect that the [respondent] had engaged in unlawful conduct in connection with the affairs of Offset Alpine Press Group	Pleading: 4(b) Jury: 1(b)	No	Unreasonable or perverse
Pars 6, 8, 9, 10, 13, 15, 16, 19, 22 and 46	AFR 21-22 February 1998	That the late Caroline Byrne had reason to suspect that the [respondent] had involved Gordon Wood in unsavoury business dealings connected with the affairs of Offset Alpine Press Group; or	Pleading: 4(c) Jury: 1(c)(i)	No	Not unreasonable
Pars 6, 8, 9, 10, 13, 15, 16, 19, 22 and 46	AFR 21-22 February 1998	That the late Caroline Byrne suspected that the [respondent] had involved Gordon Wood in unsavoury business dealings connected with the affairs of Offset Alpine Press Group	Pleading: 4(d) Jury: 1(c)(ii)	No	Not unreasonable
The headline; Pars 2, 4, 6, 7, 16, 24, 25, 26, 28, 32, 34, 38, 42, 43	SMH 25 February 1998	That the [respondent] was a person criminally liable in respect of the murder of the late Caroline Byrne	Pleading: 6(a) Jury: 3(a)	No	Unreasonable or perverse

The headline; Pars 2, 4, 6, 7, 16, 24, 25, 26, 28, 32, 34, 38, 42, 43	SMH 25 February 1998	That the father of the late Caroline Byrne had reason to suspect that the [respondent] was a person criminally liable in respect of her murder; or	Pleading: 6(b) Jury: 3(b)(i)	No	Not unreasonable
The headline; Pars 2, 4, 6, 7, 16, 24, 25, 26, 28, 32, 34, 38, 42, 43	SMH 25 February 1998	That the father of the late Caroline Byrne suspected that the [respondent] was a person criminally liable in respect of her murder	Pleading: 6(c) Jury: 3(b)(ii)	No	Not unreasonable
Pars 34, 35, 36, 37, 38, 39, 42 and 43	SMH 25 February 1998	That the [respondent] had engaged in homosexual intercourse with Gordon Wood; or	Pleading: 6(d) Jury: 3(c)(i)	No	Not unreasonable
Pars 34, 35, 36, 37, 38, 39, 42 and 43	SMH 25 February 1998	That the police had reason to suspect that the [respondent] had engaged in homosexual intercourse with Gordon Wood	Pleading: 6(e) Jury: 3(c)(ii)	No	Unreasonable or perverse
Pars 42, 43, 46 and 47	SMH 25 February 1998	That the [respondent] was a close associate of criminals	Pleading: 6(f) Jury: 3(d)	No	Unreasonable or perverse
The matter relied upon consists of a combina-tion of the pars referred to above in respect of the like imputa-tions there referred to	AFR 21-22 February 1998 and SMH 25 February 1998	That the [respondent] was a person criminally liable in respect of the murder of the late Caroline Byrne	Pleading: 7(a) Jury: 5(a)	No	Unreasonable or perverse

See above	AFR 21-22 February 1998 and SMH 25 February 1998	That the father of the late Caroline Byrne had reason to suspect that the [respondent] was a person criminally liable in respect of her murder; or	Pleading: 7(b) Jury: 5(b)(i)	No	Not unreasonable
See above	AFR 21-22 February 1998 and SMH 25 February 1998	That the father of the late Caroline Byrne suspected that the [respondent] was a person criminally liable in respect of her murder	Pleading: 7(c) Jury: 5(b)(ii)	No	Not unreasonable
Par 4	SMH 5 March 1998	That the [respondent] had engaged in homosexual intercourse with Gordon Wood	Pleading: 9(a) Jury: 7(a)	No	Not unreasonable
Par 4	SMH 5 March 1998	That the police had reason to suspect that the [respondent] had engaged in homosexual intercourse with Gordon Wood	Pleading: 9(b) Jury: 7(b)	No	Not unreasonable
Pars 4 and 9.	SMH 5 March 1998	That the late Caroline Byrne had reason to suspect that the [respondent] had engaged in homosexual intercourse with Gordon Wood; or	Pleading: 9(c) Jury: 7(c)(i)	No	Not unreasonable
Pars 4, 9 and 13	SMH 5 March 1998	That the late Caroline Byrne suspected that the [respondent] had engaged in homosexual intercourse with Gordon Wood	Pleading: 9(d) Jury: 7(c)(ii)	No	Not unreasonable

181 Notwithstanding that Grove J did not think that all of the jury's answers were perverse, the multiplicity of those that were, and the apparently undiscriminating rejection of all of the imputations, required that there be a fresh trial in respect of the totality of them. He said[154]:

> "The persistently negative answers by the jury to all questions whether an imputation had been conveyed were therefore in my opinion perverse in respect of those above identified emerging from the AFR

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154 *Rivkin v John Fairfax Publications Pty Limited* [2002] NSWCA 87 at [109]-[113].

article and the first Herald article and on the true innuendo case but not perverse in respect of others above identified and alleged to emerge from the same publications. None of the negative answers in respect of the second Herald article was in my opinion so perverse.

The question then arises as to whether a new trial should be ordered in respect of only those imputations in respect of which perversity of answer has been found. Even where the negative answer has not been found perverse in relation to a pleaded imputation, there were nevertheless arguments capable of supporting the [respondent's] contentions (including contentions supporting the pleaded imputations alleged to arise out of the second Herald article) and the refusal of the application for an address in reply (or the alternative of change in the order of address) must contribute to a determination whether there has been miscarriage attracting an order for new trial on some or all of the answers.

The [respondent] (expressly in ground 2) sought to attach significance to the aggregation of negative answers. In the case of a number of these I have concluded that they were unacceptable in any of the terms of the tests as they have been expressed from time to time.

It is not open to speculate upon why the jury may have persistently returned these negative answers. The issue of whether a meaning is conveyed by a matter complained of and whether it is defamatory does not involve assessment by the tribunal of fact of any matter touching upon the persona or reputation of a plaintiff, the truth of the imputation, privilege or other matters previously dealt with in a 'complete' libel trial but in the circumstances, that is to say constant rejection of the cause of a litigant in many cases in defiance of reasonableness, it is apt to conclude that the jury has misapplied itself to its task.

In those circumstances I consider that there should be a new trial of all the imputations which were before the jury."

182 Passages from the judgment of Foster AJA in which his Honour recorded his concern at the brevity of the jury's deliberations should also be quoted because of the respondent's reliance on them in this Court[155]:

"Whilst it is true that the members of the jury might have had some time during the conduct of the case to discuss these complex questions in a preliminary way, I am satisfied, as a matter of common sense, that their main deliberations would necessarily have been confined to the period in which they were considering their verdict in the jury room, after having

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155 *Rivkin v John Fairfax Publications Pty Limited* [2002] NSWCA 87 at [7]-[9].

had the benefit of counsels' addresses and the trial judge's summing-up. The Court was advised that the period of deliberation prior to verdict, was of the order of two hours, which included the ordinary lunch hour. For my part, I cannot accept that, in this significantly short period of time, the jury could have properly focused upon the complex issues of this case, even if one allows, in their favour, that they attended carefully to the addresses of counsel and the judge's summing-up.

When I consider that the jury returned the answer 'no' to each one of the alleged imputations at the end of this significantly short period of deliberation, I experience grave concern that the verdict was influenced by extraneous considerations. Grove J's comprehensive analyses of the evidence and submissions relating to each imputation, including his Honour's conclusions that certain of them should be regarded as inevitably established (with which conclusions I respectfully agree) serve further to indicate that this jury failed properly to address its task.

In particular, I am satisfied that it could not have given proper consideration to the powerful arguments on behalf of the [respondent] which posed the question why the [respondent] should have been referred to in the articles at all, let alone being accorded such extraordinary prominence in them."

The appeal to this Court

The applicable principles

183 It is right, as the respondent submitted, that in finding that some of the answers of the jury were perverse, the Court of Appeal may have adopted a more demanding test than the law requires. As the cases to which Grove J referred and others show, the courts in the United Kingdom and this country, have from time to time used different language to state an appropriate test. The differences on occasions have been more than ones of subtle nuance: incontrovertible error[156]; an extreme case of unreasonableness[157]; a decision no reasonable jury could hold[158]; inherently wrong[159]; unreasonableness[160]; clear and beyond argument[161];

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156 *Evans v Davies* [1991] 2 Qd R 498 at 511 per Macrossan CJ.

157 *Grobbelaar v News Group Newspapers* [2001] 2 All ER 437 at 487 per Jonathan Parker J.

158 *Australian Newspaper Co Ltd v Bennett* [1894] AC 284 at 287 per Lord Herschell LC.

159 *Thompson v Truth and Sportsman Limited (No 1)* (1929) 31 SR (NSW) 129 at 135 per James J.

[un]reasonable[162]; unreasonable and almost perverse, overwhelming preponderance[163]; an enormously strong case[164]; and, wrong and completely unreasonable and unjust[165]. Grove J probably referred to perversity because he took the view that the rejection of all of the imputations amounted to no less than that.

184 The fact that an appeal lies to the Court of Appeal does not mean that the Court may substitute the answer that it would give to a question for that of a jury. Nor does it mean that a finding of a jury should be invested with no more than the authority of a trial judge to whom all questions, including of fact, have been assigned for answer. The jury has an especially significant constitutional role to play in those cases in which it participates. Both as a practical and legal matter, a jury's decision on a factual question, although by no means impregnable, does have an authority over and above that of a decision of a judge sitting alone to determine a factual question. The jury is representative of the community. Its members are better placed than judges to give meaning to, and evaluate, the spoken and written word and its impact upon the community. Nor should it be assumed that juries approach their task with heightened or lowered suspicion and prejudice. History shows that not all lawyers and judges are strangers to suspicion. It may accordingly be accepted that the occasions for judicial correction of jury verdicts will be extremely rare. But such occasions do arise. That they may, and then will require appellate intervention, follows from the right of appeal which the legislature confers in respect of them[166]. And if recent example in this Court be required, *Carson v John Fairfax & Sons Ltd*[167], a case in which a large verdict in respect of a gross defamation was struck down as excessive and a retrial ordered, provides it. A judge's view of what is an

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160 *Cairns v John Fairfax & Sons Limited* [1983] 2 NSWLR 708 at 716 per Samuels JA.

161 *Broome v Agar* (1928) 138 LT 698 at 702 per Sankey LJ.

162 *Mechanical and General Inventions Co and Lehwess v Austin and the Austin Motor Co* [1935] AC 346 at 373-375 per Lord Wright.

163 *Cox v English, Scottish, and Australian Bank* [1905] AC 168 at 170 per Lord Davey.

164 *Place v Searle* [1932] 2 KB 497 at 515 per Scrutton LJ.

165 *Hocking v Bell* (1945) 71 CLR 430 at 501 per Dixon J.

166 See s 102 of the *Supreme Court Act* 1970 (NSW).

167 (1993) 178 CLR 44.

appropriate award of damages is neither more nor less sacrosanct than a jury's view whether imputations have or have not been conveyed. Another relatively recent example of the overturning of a jury verdict in this country is *Conrad v The Chermside Hospital Board*[168] in which the Full Court of the Supreme Court of Queensland (Lucas SPJ, Kelly and Connolly JJ) upheld an appeal against a finding of no negligence by a jury and ordered a retrial.

185 The law as I understand it to be, and which I will apply, is that a finding of a jury may only be overturned if it is one that no reasonable jury could reach. And in deciding whether that was so, the respondent who was the appellant in the Court of Appeal, was not entitled to any particular advantages stemming from the enactment of s 102 of the *Supreme Court Act* 1970 (NSW), whether or not the rights of an appellant under that section were greater or less than those of an appellant in an ordinary appeal at common law. The principles with respect to jury trials are too well established for any different view to be taken.

186 It is important to keep in mind what the jury here were not asked to decide in answering the first of the questions. They were not asked whether any of the imputations were actually defamatory of the respondent, and the amount of the damages that should be awarded if they, or any of them were. The relevant question in each instance was simply whether the imputation was conveyed.

187 Some other preliminary observations should be made. It is true that an article has to be read as a whole. But that does not mean that matters that have been emphasized should be treated as if they have only the same impact or significance as matters which are treated differently. A headline, for example, expressed pithily and necessarily incompletely, but designed to catch the eye and give the reader a predisposition about what follows may well assume more importance than the latter. There are two such headlines here: "It's a Bad Business" and "Caroline's World and the Rivkin Link". Layout may create its own impression. Some black and white shading which was used for one of the stories does have some sinister overtones. The order in which matters are dealt with can be significant. The capacity of the first paragraph of an article, the "intro," to excite the reader's attention is a matter upon which editors place store. The language employed is also of relevance. Here for example, the articles speak of "new information," "details of a secret investigation," "Sydney has developed an obsession," "high profile," "long running ... saga," "black box," "money trail," "no negative aspersions were ever drawn," "bonfire of speculation," "celebrity stock broker," "executive assistant" (in quotation marks), "hangout for ex-drug dealers," "closest cronies," "a very serious crime," and "how easy it is to make a murder look like a suicide." The intrusion of irrelevant information may raise questions as to the meaning intended to be, and actually conveyed: for example:

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168 [1982] Qd R 242.

"Rivkin had 18 cars ranging from ...," and " ... share price jump ... after a fire on Christmas Eve ...". True it may be that readers may take an article or articles on impression, but the fact that they may do so is likely to have the consequence that ideas and meanings conveyed by graphic language will create the strongest impressions. Of course publishers are entitled to use colourful and seductive language, but in using it they may run the risk of seducing readers into believing only what is colourful and on occasions scandalous, rather than the facts conveyed by straight reportage.

188 An even moderately attentive and reasonable, but not unduly suspicious reader of one or more of the articles here, would be bound to ask himself what each or all of them is or are really about: why is a financial newspaper dwelling and speculating on the "mysterious" death of a young model; what is the "bad" as opposed perhaps to the "sad" business of which the publisher is speaking; why was there so much secrecy; what did Mr Wood and the respondent wish or need to conceal; did the respondent have a motive to procure the death of Ms Byrne; and why are Mr Byrne's allegations given so much prominence? The repetition of one person's allegations by a newspaper, particularly if accompanied by other, balanced material may not always necessarily carry as an imputation the substance of the allegations, but the fact that an apparently responsible financial and broadsheet publisher has chosen to repeat them may well give them a meaning, credibility and impact that they might not otherwise possess.

189 The matters that I have just discussed cannot be divorced from a consideration of the question that this Court has to decide, whether the Court of Appeal should have held that the conclusions of the jury on the six imputations which the Court of Appeal found conveyed were ones that no reasonable jury could reject.

190 Counsel for the respondent sought to maintain in this Court the order of the Court of Appeal that there be a retrial on all the imputations although only six of them were held to have in fact been conveyed. He properly conceded, that although he would urge that such a total retrial was appropriate, he could not, in light of the course that the proceedings had taken, argue that the jury so unreasonably dealt with the nine other imputations not found, that one or more of these should in any event be the subject of a retrial.

191 The result for which the respondent contended therefore was whether there should, as ordered by the Court of Appeal be a retrial on all of the imputations, or on the six found by the Court of Appeal and one other which requires separate treatment. That does not mean however that the jury's response to all of the alleged imputations is irrelevant. Indeed that response may well provide an indication of both the diligence and reasonableness, or otherwise, of the way in which the jury undertook their task. It is for this reason that I propose to give consideration to all of the imputations. Whether the relatively short duration of the jury's deliberations which Foster AJA in the Court of Appeal

thought relevant provides a similar indication, is a matter which I will put aside for the present.

Imputation 1(a) (Pleading 4(a))

192 The Court of Appeal was correct to hold that the jury's answer in respect of imputation 1(a) was one that no reasonable jury could give. Paragraph 15 of the relevant article has no other meaning than that the respondent's reputation as a stockbroker, whether as a canny and astute stockbroker, or a sagacious and astute one (and whether rightly so or not) was diminished. Indeed, the word used, "battering", probably conveys a much stronger imputation than of diminution. The fact that other parts of the article may go some way towards ameliorating the damage that the paragraph inflicts does not remove the sting contained in it.

193 Paragraph 15 does not stand alone. Other parts of the article, for example: the reference to "slush fund" and the "long-running Offset Alpine saga" in paragraph 9; and the incurring of the large liability for tax, all combine to convey a clear impression of financial ineptitude or worse, in which the respondent as a stockbroker was involved. The imputation as pleaded did not allege that the diminution in reputation was a permanent one. Its duration and impact would be matters for the court when it came to assess damages. So too it was of no consequence that the article may also have said that Mr Croll was mistaken, or the respondent was "cleared of any wrong doing". It was upon the respondent's canniness and astuteness that paragraph 15 reflected, and not necessarily his probity although that too, taken with the rest of the article, was thrown into question.

Imputation 1(b) (Pleading 4(b))

194 There is no doubt that the article described and treated the respondent as the controller of the Offset Alpine Press Group ("Offset"). Paragraph 13 speaks of the stripping of Offset in its various incarnations during the period of the respondent's association with it. There then follows (in paragraph 25) the statement that the respondent became a major focus of an inquiry by the ASC. These have to be read in the context of other statements in the article: in paragraph 9, the reference to "secret holdings in Rivkin's Offset Alpine Press Group", "the long-running Offset Alpine saga", and "where the ASC tried in vain to trace what appeared to function as a $40 million *slush fund*". (emphasis added)

195 It is important to note the precise words of the imputation. It refers to June 1995. The ASC was undoubtedly making inquiries into Offset's affairs. An important function of the ASC was to unearth, investigate and set in train the punishment of unlawful conduct. And it was, as the article said, undertaking at least the first and second of those activities with the respondent as its focus. The ASC then was, as the ASIC now is, an important regulatory authority. Readers

could not reasonably doubt that it would have as its focus in an inquiry persons in respect of whom it believed it had grounds to suspect of unlawful conduct. The imputation pleaded was not that the respondent had engaged in unlawful conduct. It was the ASC's reported suspicion of it at the relevant time that was the matter complained of.

196 It was unreasonable for the jury to find that imputation 1(b) was not conveyed. The Court of Appeal was bound to hold accordingly.

Imputations 1(c)(i) and 1(c)(ii) (Pleadings 4(c) and 4(d))

197 These imputations can be dealt with together. Earlier (in the table) I indicated the paragraphs upon which these imputations might be founded. The Court of Appeal held that the jury's rejection of them could not be said to be unreasonable. Their only relevance now is what their rejection says of the jury's deliberations, in view of the fact that they were plainly capable of being conveyed, and, in my opinion which cannot be substituted for that of the jury, were conveyed. The jury's answers certainly suggest that they undertook their task without a full appreciation of its importance and the need for a reasonable degree of diligence in performing it.

The *SMH* of 25 February 1998

198 The next imputations are those arising out of the first of the articles in the SMH which bore the headline "Caroline's World and the Rivkin Link". The headline and the photographs of the persons whom the article discusses are shown, suggestively, in black and white shading. The language is colourful: "Even at six o'clock on a winter morning, Caroline Byrne would turn heads" (paragraph 1); "Caroline, [Byrne] wrote, was murdered by a contract killer because she knew too much ..." (paragraph 4); "The inquest ... threw more fuel on the bonfire of speculation" (paragraph 4).

199 The name of the respondent is first introduced into the article in paragraph 21. Later, in paragraphs 34 and 38 it is directly stated (in quoting from a record of interview) that Mr Wood was alleged to have thrown Ms Byrne over the cliff where her body was found following surveillance which resulted in observation of the respondent and Mr Wood engaging in homosexual intercourse. The article then dwells upon the respondent, his employment of Mr Wood, their travel together, his relationship with Mr Wood as "a father as well as a boss", Ms Byrne's suspicion of the respondent, the respondent's "hang[ing] out with a whole stack of people ... [at] a hangout for ex-drug dealers ... Joe's Cafe" (paragraph 42) and that "Some of [the respondent's] closest cronies ... have ... criminal backgrounds or are rumoured to have it". (paragraph 43)

Imputation 3(a) (Pleading 6(a))

200 Even taken with the headline, the passages I have referred to, together with the other matter contained in the article, do not go quite so far as to convey necessarily that the respondent was a person criminally liable in respect of the murder of the late Caroline Byrne. I would uphold the appeal in relation to this imputation. The jury was not unreasonable to reject it. The article is redolent of grave suspicions of murder but does not compel the reader to believe that murder had been committed by the respondent or by the respondent's agency.

Imputations 3(b)(i) and 3(b)(ii) (Pleadings 6(b) and 6(c))

201 The Court of Appeal held that the jury was not perverse in relation to imputations 3(b)(i) and 3(b)(ii). I would myself have strongly disagreed with this conclusion, particularly with respect to the second of the imputations. The headline and the matters in particular to which I have referred in discussing imputation 3(a), and the article overall, in tone and implication, unmistakably I think convey both of these implications. The words of Lord Devlin in *Lewis v Daily Telegraph Ltd*[169] are apposite in respect of them:

> "It is not, therefore, correct to say as a matter of law that a statement of suspicion imputes guilt. It can be said as a matter of practice that it very often does so, because although suspicion of guilt is something different from proof of guilt, it is the broad impression conveyed by the libel that has to be considered and not the meaning of each word under analysis. A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also a fire; but it can be done. One always gets back to the fundamental question: what is the meaning that the words convey to the ordinary man: you cannot make a rule about that. They can convey a meaning of suspicion short of guilt; but loose talk about suspicion can very easily convey the impression that it is a suspicion that is well founded."

202 However, because of the course of the proceedings, my opinion as to these imputations is of no significance, except again, to cast a very grave doubt upon the performance of the jury overall.

Imputation 3(c)(i) (Pleading 6(d))

203 The Court of Appeal did not decide whether or not the jury erred in relation to this imputation. In my opinion the jury did err. The article states in terms that Ms Byrne had "caught [Mr Wood] and [the respondent] having

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169 [1964] AC 234 at 285.

homosexual intercourse". It is impossible to say that those words did not convey that the respondent had engaged in homosexual intercourse with Gordon Wood. There is nothing anywhere in the article to correct that assertion. The fact that it is a repetition of the words of someone else may perhaps lessen its impact but does not change its meaning. Although this imputation was rejected by the jury, and although the Court of Appeal did not decide whether the jury was correct, it was accepted by the parties that the issue of its conveyance or otherwise remained open in this Court. Accordingly, I intend to treat it as if it were the subject of a notice of contention.

Imputation 3(c)(ii) (Pleading 6(e))

204 Equally, the asserted adoption by the police officer of the claim in paragraph 34 apparently earlier made by someone else, coupled with the blunt accusation, albeit again imputed to some other (anonymous) person, necessarily means that the police officer at least entertained the suspicion in question, to the point that he was prepared to put those assertions to Mr Wood. This imputation was inescapably conveyed.

Imputation 3(d) (Pleading 6(f))

205 If a person says, as the appellant did in this article, that the respondent frequented a hangout for ex-drug dealers, and that some of his closest cronies have criminal backgrounds, that person is clearly saying that the person in question is a close associate of criminals. The word "crony" plainly implies both closeness and at least a suggestion of dishonourableness. The imputation was conveyed and any view to the contrary I would hold to be unreasonable.

The *SMH* of 5 March 1998

Imputation 7(a) (Pleading 9(b))

206 Although the third article records Mr Wood's denial of his having been caught having sex with his boss (the respondent), the flamboyant stockbroker Mr Rene Rivkin, and his description of the allegations as "utter lies" (paragraph 4), the repetition of Detective Wyver's opinion that the evidence given at the inquest indicated that Mr Woods told lies, is certainly well capable of conveying an imputation that Mr Woods had engaged in sexual intercourse with the respondent. I would have held that it was in fact conveyed, but again my view can have only the limited relevance that a similar view that I hold in relation to some of the other rejected imputations has.

Imputation 7(b) (Pleading 9(b))

207 For the same reasons as I have stated for my opinion about imputation 7(a), I would reach the same conclusion with respect to this imputation.

Imputations 7(c)(i) and 7(c)(ii) (Pleadings 9(c) and 9(d))

208 Paragraph 4 of the third article says, almost in terms, despite Mr Wood's denial of it, that surveillance commissioned by the late Ms Byrne had lead to the revelation to her, of a matter which she then had reason to believe, of the engagement by the respondent with Mr Wood in homosexual relations. This I would have thought necessarily conveyed the pleaded imputations. The jury and the Court of Appeal were however of a different mind.

The *AFR* of 21-22 February 1998 and the *SMH* of 25 February 1998

True innuendo

209 I turn now to the true innuendo case. The substance of this case is that those who read both of the first two articles would have had a heightened suspicion and a greater awareness of the facts and circumstances as they were being stated and implied by the appellant. In reading and reflecting on, no matter how briefly, the two articles as a composite, a reader would be left with the impression that suicide by Ms Byrne was unlikely because her body was found some distance from the base of the cliff; that the references to the respondent, particularly to his association at Joe's Cafe with his cronies who had criminal backgrounds, and that Ms Byrne possessed embarrassing information about the respondent, that is, information relating to serious crime as referred to in the article in the AFR. All of this, it is submitted by the respondent, is necessarily to implicate him in the crime of murder.

Imputation 5(a) (Pleading 7(a))

210 Having regard to my understanding of the two articles I might well have inferred the imputation alleged. I cannot say however that it would be beyond reason for an ordinary reader to take a different view falling short of the imputation alleged, that there was a possibility of the respondent's involvement, that there was reason to entertain a strong suspicion of the respondent's involvement but these are not the imputations pleaded here. I would disagree therefore with the holding of the Court of Appeal that the jury's negative answer on this imputation cannot be sustained.

Imputations 5(b)(i) and 5(b)(ii) (Pleadings 7(b) and 7(c))

211 Again I think I would have reached a different conclusion on these two imputations, particularly the latter, from both the jury and the Court of Appeal. My view can only however have the limited relevance to which I have referred.

The disposition of the appeal

212 For the reasons that I have given it is plain that the jury both misunderstood the nature of their task and acted unreasonably. This was so, in my opinion, in respect of all of the imputations except those alleging criminal liability on the part of the respondent for the murder of Ms Byrne. The consistent and undiscriminating rejection of all of the imputations is astonishing. Perhaps the jury believed, or thought they knew something of the respondent. If the appellant was correct to describe him as it did, as a *celebrity*, perhaps his presence in the public eye may have told against him. Who knows? It is pointless to speculate. True it is that a jury's verdict is inscrutable, but inscrutability cannot be used as a mask for unreasonableness.

213 The argument of the appellant in the Court of Appeal for the complete retrial ultimately ordered by the Court of Appeal, and the maintenance of that entitlement by the respondent in this Court, is based on the fact of the jury's unreasonableness throughout. The argument does have force. In the end however, I do not think that an appellate court should make such a far reaching order in respect of a jury's answers. The counsels against substitution of a judge's opinion for those of a jury, especially in the performance of the latter's duty under s 7A of the Act should be heeded. I am not prepared to accede to the respondent's submission that there should be a complete retrial.

214 I remain of this view notwithstanding that the jury deliberated for only two hours before reaching their verdict. Whilst such a short retirement to answer so many questions inspires little confidence, it cannot, particularly in light of the fact that counsel had beforehand addressed them at some length, and that they were directed by the trial judge as to their duty, provide a basis for the complete rejection of the jury's answers.

215 The only other matter (apart from costs) is the order of addresses. The traditional rules relating to ordinary common law trials are these[170]. If the defendant has called or tendered evidence, the defendant should address first. If the defendant has not called or tendered evidence, the plaintiff should address first. Replies, if any, should be strictly limited to the correction of misstatements of facts. Except for the last matter and a general discretion which has been left to

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170 *Phipson on Evidence*, 10th ed (1963) at 65-66 [125]-[127].

the trial judge, these rules have substantially been adopted in New South Wales. Part 34 r 6 of the Supreme Court Rules provides as follows:

"**[34.6] Conduct of the trial**

6 (1) The Court may give directions as to the order of evidence and addresses and generally as to the conduct of the trial.

(2) Subject to subrule (1):

(a) where the only parties are one plaintiff and one defendant, and there is no cross-claim, the order of evidence and addresses shall be as provided by the following subrules of this rule; and

(b) in any other case, the order of evidence and addresses shall be as provided by the following subrules of this rule, subject to such modifications as the nature of the case may require.

(3) The beginning party may make an address opening his case and may then adduce his evidence.

(4) Where, at the conclusion of the evidence for the beginning party, no document or thing has been admitted in evidence on tender by the opposite party, the opposite party may elect to adduce evidence or not to adduce evidence.

(5) If, pursuant to subrule (4), the opposite party elects not to adduce evidence, the beginning party may make an address closing his case and then the opposite party may make an address stating his case.

(6) If, pursuant to subrule (4), the opposite party elects to adduce evidence, the opposite party may make an opening address before adducing his evidence and after adducing his evidence he may make an address closing his case and thereupon the beginning party may make an address closing his case."

216 The discretion exercised by the trial judge has not been shown to have been erroneously exercised. The trial judge made no error, particularly as there was nothing in the respondent's address to correct, in refusing the appellant a right of reply.

217 The appellant succeeded in relation to imputations 3(a) (6(a) as pleaded) and 5(a) (7(a) as pleaded). The appeal should be upheld as to that extent. A

retrial should however be ordered in respect of imputations 1(a) (4(a) as pleaded), 1(b) (4(b) as pleaded), 3(c)(i) (6(d) as pleaded), 3(c)(ii) (6(e) as pleaded) and 3(d) (6(f) as pleaded) for the reasons I have given. I would make orders accordingly.

218 Because both parties have had their successes and their failures in this Court I would make no orders as to costs.

219 HEYDON J. I agree with the conclusions of Callinan J in relation to imputations 1(a), 1(b), 3(a), 3(c)(ii) and 3(d) for the reasons he gives.

220 I also agree with his conclusions on imputation 3(c)(i) for the following reasons. Imputations 3(c)(i) and (ii) were left to the jury as alternatives. The Court of Appeal held that "at least the alternative pleaded as imputation 3(c)(ii) had been made out". However, the Court of Appeal did not decide one way or the other whether the jury had been unreasonable in not concluding that imputation 3(c)(i) was conveyed. Since imputation 3(c)(i) is more serious than imputation 3(c)(ii), there could be some practical importance in deciding the question which the Court of Appeal left undecided. I agree with Callinan J's reasons for concluding that the words of the article conveyed the imputation and that the jury behaved unreasonably in not so finding.

221 The written submissions of the respondent did not seek a ruling from this Court on the reasonableness of the jury's finding on imputation 3(c)(i). Since the Court of Appeal's orders gave the respondent a new trial on that imputation, together with all the other imputations, it would have been inappropriate for the respondent to have filed a Notice of Cross Appeal: there was no order which the respondent was seeking to disturb. However, had the respondent intended to raise the point from the outset, a Notice of Contention was necessary. Despite the absence of any relevant Notice of Contention, it became common ground in argument in this Court that this Court was at liberty to reach a conclusion about imputation 3(c)(i). The parties reached that common ground in the following way. Counsel for the respondent argued in this Court that since the Court of Appeal had not upheld the jury conclusion on imputation 3(c)(i), but merely left its reasonableness undecided, it was open for the respondent to seek a new trial on that imputation even if the wider argument that he should have a new trial on all the imputations on which the Court of Appeal had agreed with the jury failed. In the address in reply of counsel for the appellant, it was contended that imputations 3(c)(i) and (ii) were "[m]utually exclusive alternatives". That is correct in one sense but not another. The document containing "Questions for the Jury" contained the following note after question 3(c)(ii): "Answer (c)(ii) only if you have answered (c)(i) 'No'. Do not answer (c)(ii) if you have answered (c)(i) 'Yes'." Hence an affirmative answer to question 3(c)(i) was exclusive of any answer to question 3(c)(ii). But the fact that the Court of Appeal thought question 3(c)(ii) could only have been answered "Yes" left open the issue whether question 3(c)(i) could only have been answered "Yes". A little later counsel for the appellant indicated opposition to a suggestion that this Court could examine the merits of the Court of Appeal's reasoning in relation to all of those imputations which they held the jury had rightly rejected. Counsel for the respondent then said he did not support the suggestion. Counsel for the appellant in turn responded by observing that that spared him saying anything about imputations 3(c)(i) and (ii) beyond a submission he made about imputation 3(c)(ii). Shortly thereafter counsel for the respondent indicated that his disclaimer of any invitation to examine the correctness of the Court of Appeal's

agreement with the jury on the imputations it rejected did not apply to imputation 3(c)(i). Counsel for the appellant then said that the relevant paragraph of the Court of Appeal's reasons was "expressed in such a way that we would accept that my learned friend may raise that point". That consensus between the parties obviated the need for any notice of contention about imputation 3(c)(i).

222 The complaint of the respondent about the trial judge's failure to grant leave to the respondent to have an address in reply should be rejected on the ground that, assuming there was power to permit an address in reply, nothing calling for the exercise of that power in a manner favourable to the respondent was pointed to. While it was reasonable for the parties and the trial judge to debate, at the start of the trial, whether the respondent could have an address in reply, the best time to judge when an address in reply is needed is immediately after the close of the address to which it will be a reply. Most "replies" are abuses of process, being only rehashes of what was said in the address-in-chief: a true reply is one which is needed to deal with fresh matter raised in the address to which the reply is directed, and thereby to reduce the risk of injustice. In particular, a reply is needed, if there is power to permit it, where the party seeking to reply would be materially prejudiced without it. A judgment by counsel who might deliver a reply or by the court on questions of injustice and prejudice depends on what the address being responded to contained. The respondent did not submit to the trial judge or to this Court that there was anything prejudicial in the appellant's address to the jury. The respondent did not point to anything which could or should have been said in any address in reply. Accordingly, the present occasion is not a suitable one on which to deal definitively with the existence of any right to an address in reply in cases under s 7A of the *Defamation Act* 1974 (NSW).

223 I agree with Callinan J's conclusion that the retrial should be limited to imputations 1(a), 1(b), 3(c)(i) and (ii) and 3(d). I do so for one narrow reason. While there were features of the jury's performance about which the Court of Appeal was rightly troubled, in a case where the articles taken separately or together were not without complication, where the imputations were numerous and subtle and where there has been considerable diversity of judicial opinion as to what findings should have been made about whether particular imputations could or should have been conveyed, it cannot be inferred either from the universality of the jury's rejection of the imputations or the period of time for which the jury retired or any other circumstance of the case that the jury mistook or failed to perform its function to so great an extent that a retrial should be ordered on all the imputations. It does not follow from the fact that error has been specifically demonstrated in relation to some imputations that it should be inferred from others.

224 The question whether the authorities which make it difficult for appellate courts to interfere with jury verdicts can stand with s 102 of the *Supreme Court Act* 1970 (NSW) should be left for another occasion. A full examination of the

question would call for analysis of past authorities in the light of the language of the statutory enactments regulating appeals in force at other times in both New South Wales and other places. It is unnecessary to undertake that extensive inquiry in this case, because the outcome could not be different whatever the answer to the question.

225 I favour the following orders:

1. The appeal is allowed.

2. There is to be a new trial on imputations 1(a), 1(b), 3(c)(i) and (ii), and 3(d).