Neutral Citation Number: [2019] EWHC 3393 (QB)

Case No: QB-2018-000390

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 /12/2019

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

Emil Kirkegaard	**Claimant**
- and -	
Oliver Smith	**Defendant**

- -
- -

Richard Owen-Thomas (instructed by **Samuels Solicitors LLP**) for the **Claimant**
Aled Maclean-Jones (instructed by **Debenhams Ottaway Solicitors**) for the **Defendant**

Hearing dates: 26 November 2019

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Approved Judgment

If this draft Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

The Honourable Mr Justice Julian Knowles:

Introduction

1. This is a trial of meaning and fact/opinion as preliminary issues in a defamation claim brought by the Claimant, Emil Kirkegaard, against Oliver Smith, the Defendant.

2. The Defendant applies under CPR r 3.1(2)(i) for a ruling on the following preliminary issues:

   a. whether the words pleaded in [3] of the Particulars of Claim (PoC) bear the meanings pleaded in [4], [9], and [14]; and

   b. if so, whether those meanings are defamatory of the Claimant.

3. I can state the factual background fairly briefly.

4. The Claimant describes himself in his PoC as a data scientist. He is also a blogger who regularly writes and speaks on a wide range of topics including psychology, sociology and genetics. He has written on several controversial topics including the IQ of different migrant groups, and the morality of child pornography.

5. The Claimant and the Defendant are not known personally to one another, but they have often disagreed online.

6. On 3 February 2018 someone called Anatoly Karlin published a blog/article on the website unz.com (the Karlin blog). In the blog Mr Karlin (inter alia) criticised things which the Defendant had written about him. This blog attracted a significant number of comments from numerous internet users, including the Defendant. Three of the publications that the Claimant complains of (Posts 1, 2 and 3 as they are called in the PoC) were published by the Defendant in this comment thread.

7. Earlier, on 11 January 2018, a tweet was published from the Defendant's Twitter account (accessible at: www.twitter.com/oliveratlantis) which referred to the Claimant. This is the fourth publication complained of by the Claimant in his PoC. This is Post 4.

8. On 7 December 2018 the Claimant's Claim Form and PoC were deemed served. The Defendant filed an acknowledgement of service and, after the Defendant's solicitors drew to the Claimant's attention *dicta* of Nicklin J in *Morgan v Associated Newspapers Limited* [2018] EWHC 1725, the parties consented to having the issues of meaning and whether the words complained of were fact or opinion being dealt with at trial as a preliminary issue.

9. A hearing took place on 22 May 2019 in which, due to procedural issues, the trial was relisted for 26 November 2019 before me.

10. The Defendant is represented by Mr Maclean-Jones. The Claimant is represented by Mr Owen-Thomas. I am grateful to both of them for their clear and helpful written and oral submissions.

The words complained of

11. The pleaded words complained of and their allegedly defamatory meanings are as follows. This is the chronological order: for some reason, the PoC pleads them non-chronologically.

12. *Post 4: 11 January 2018*

> "If you merely point out @KirkegaardEmil supports child rape and is a paedophile (by quoting his OWN words) you will get stalked by him. He's a malicious individual and sick creep."

13. The Claimant says that in their natural and ordinary meaning these words meant that the Claimant was a sexual abuser of children, a stalker, and that he acts in a predatory sexual manner that is socially unacceptable.

14. *Post 2: 3 February 2018, 4.58pm*

> "It's not a right or left issue, but right or wrong: anyone with a moral conscience can see Kirkegaard is a vile human and paedophile."

15. The Claimant says that in their natural and ordinary meaning these words meant that the Claimant was a sexual abuser of children and therefore a contemptible person.

16. *Post 3: 3 February 2018, 10.33pm*

> "Why are you defending a blatant paedophile ?"

17. The Claimant says that in their natural and ordinary meaning these words meant that the Claimant was a sexual abuser of children.

18. *Post 1: 4 February 2018, 3.31am*

> "Like I said, it's obvious to anyone, Kirkegaard is a paedophile. This is why all mainstream newspapers described him as either a paedophile-apologist or paedophile".

19. The Claimant says that in their natural and ordinary meaning these words meant that the Claimant was a sexual abuser of children.

Legal principles

20. Before turning to the parties' contentions, I will set out the material legal principles. These were not in dispute. They are familiar and well-established.

Determining meaning

21. The principles in relation to meaning were summarised by Nicklin J in *Koutsogiannis v The Random House Group Ltd* [2019] EWHC 48 (QB), [11] - [15] (internal citations omitted):

> "11. The Court's task is to determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words bear. It is well recognised that there is an artificiality in this process because individual readers may understand words in different ways …
>
> 12. The following key principles can be distilled from the authorities …
>
> (i) The governing principle is reasonableness.
>
> (ii) The intention of the publisher is irrelevant.
>
> (iii) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. A reader who always adopts a bad meaning where a less serious or non-defamatory meaning is available is not reasonable: s/he is avid for scandal. But always to adopt the less derogatory meaning would also be unreasonable: it would be naïve.
>
> (iv) Over-elaborate analysis should be avoided and the court should certainly not take a too literal approach to the task.
>
> (v) Consequently, a judge providing written reasons for conclusions on meaning should not fall into the trap of conducting too detailed an analysis of the various passages relied on by the respective parties.
>
> (vi) Any meaning that emerges as the produce of some strained, or forced, or utterly unreasonable interpretation should be rejected.
>
> (vii) It follows that it is not enough to say that by some person or another the words might be understood in a defamatory sense.

(viii) The publication must be read as a whole, and any 'bane and antidote' taken together. Sometimes, the context will clothe the words in a more serious defamatory meaning (for example the classic "rogues' gallery" case). In other cases, the context will weaken (even extinguish altogether) the defamatory meaning that the words would bear if they were read in isolation (eg, bane and antidote cases).

(ix) In order to determine the natural and ordinary meaning of the statement of which the claimant complains, it is necessary to take into account the context in which it appeared and the mode of publication.

(x) No evidence, beyond publication complained of, is admissible in determining the natural and ordinary meaning.

(xi) The hypothetical reader is taken to be representative of those who would read the publication in question. The court can take judicial notice of facts which are common knowledge, but should beware of reliance on impressionistic assessments of the characteristics of a publication's readership.

(xii) Judges should have regard to the impression the article has made upon them themselves in considering what impact it would have made on the hypothetical reasonable reader.

(xiii) In determining the single meaning, the court is free to choose the correct meaning; it is not bound by the meanings advanced by the parties (save that it cannot find a meaning that is more injurious than the claimant's pleaded meaning).”

13. As to the *Chase* levels of meaning, see *Brown v Bower*, [17]:

> ‘They come from the decision of Brooke LJ in *Chase v News Group Newspapers Ltd* [2003] EMLR 11 [45] in which he identified three types of defamatory allegation: broadly, (1) the claimant is guilty of the act; (2) reasonable grounds to suspect that the claimant is guilty of the act; and (3) grounds to investigate whether the claimant has committed the act. In the lexicon of defamation, these have come to be known as the Chase levels. Reflecting the

> almost infinite capacity for subtle differences in meaning, they are not a straitjacket forcing the court to select one of these prescribed levels of meaning, but they are a helpful shorthand. In *Charman v Orion Publishing Group Ltd*, for example, Gray J found a meaning of "cogent grounds to suspect' [58].
>
> …
>
> 15. Finally, in relation to this case, it is necessary to have regard to the 'repetition rule' (see *Brown v Bower* [19]-[32]): namely that where an allegation by a third party is repeated by the defendant, the words must be interpreted by reference to the underlying allegations of fact. Context nevertheless remains critical: *Brown v Bower* [29]."

22. The courts have emphasised the importance of avoiding an overly technical analysis of the words complained of where a judge is required to determine meaning. The authors of *Gatley on Libel and Slander* (12th Edn) explain at [3.14] that:

> "Where a judge has to determine meaning it has been said that the correct approach is to ask himself what overall impression the material made on him and then to check that against the detailed textual arguments put forward by the parties. Hence in *Armstrong v Times Newspapers* Gray J 'deliberately read the article complained of before reading the parties' respective statements of case or the rival skeleton arguments'."

23. The meaning of the words must be ascertained in the context of the publications complained of. As Nicklin J said in *Greenstein v Campaign Against Antisemitism* [2019] EWHC 281 (QB) at [15]:

> "Although the Claimant has selected only parts of the Articles for complaint, the Court must ascertain the meaning of these sections in the context of each Article as a whole."

24. The fundamental importance of context was also emphasised by the Supreme Court in *Stocker v Stocker* [2019] 2 WLR 1033, [38]:

> "38. All of this, of course, emphasises that the primary role of the court is to focus on how the ordinary reasonable reader would construe the words. And this highlights the court's duty to step aside from a lawyerly analysis and to inhabit the world of the typical reader of a Facebook post. To fulfil that obligation, the court should be particularly conscious of the context in which the statement was made, and it is to that subject that I now turn.

> […]
>
> 40. It may be that the significance of context could have been made more explicitly clear in *Jeynes*, but it is beyond question that this is a factor of considerable importance. And that the way in which the words are presented is relevant to the interpretation of their meaning - *Waterson v Lloyd* [2013] EWCA Civ 136; [2013] EMLR 17, para 39.
>
> 41. The fact that this was a Facebook post is critical. The advent of the 21st century has brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read."

25. As I shall explain, Posts 1, 2 and 3 were accompanied by hyperlinks to other internet content. This content may, if appropriate, be taken into account as part of the context of the words complained of. The legal position was set out by Nicklin J in *Greenstein*, supra**,** [16] - [18]:

> "16. In this case, there is an issue about hyperlinks. As made clear in Warby J's judgment in *Yeo v Times Newspapers Ltd* [2015] 1 WLR 971 [87], contextual material relied upon by way of hyperlinks is a matter which, as an exception to the rule that no evidence is admissible when determining the natural and ordinary meaning, can and should be proved by evidence. The Defendant has filed a witness statement from Alex Wilson dated 29 January 2019. In it, Mr Wilson helpfully sets out each Article, with hyperlinks underlined. In respect of each hyperlink, he has exhibited what a reader would have been taken to if s/he had followed the hyperlink.
>
> 17. The extent to which hyperlinked material in an article would be read by the ordinary reasonable reader does not admit of a hard and fast rule; it is a matter to be judged on the facts of each case: *Falter v Atzmon* [2018] EWHC 1728 (QB) [12]-[13]. As with most issues relating to meaning in defamation claims, context is everything."

Statement of fact v expression of opinion

26. I turn to the issue of fact versus opinion. The relevant principles were summarized in *Koutsogiannis*, supra, [16] - [17]:

> "16 […] when determining whether the words complained of contain allegations of fact or opinion, the Court will be guided by the following points:

(i) The statement must be recognisable as comment, as distinct from an imputation of fact.

(ii) Opinion is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc

(iii) The ultimate question is how the word would strike the ordinary reasonable reader. The subject matter and context of the words may be an important indicator of whether they are fact or opinion.

(iv) Some statements which are, by their nature and appearance opinion, are nevertheless treated as statements of fact where, for instance, the opinion implies that a claimant has done something but does not indicate what that something is, i.e. the statement is a bare comment.

(v) Whether an allegation that someone has acted 'dishonestly' or 'criminally' is an allegation of fact or expression of opinion will very much depend upon context. There is no fixed rule that a statement that someone has been dishonest must be treated as an allegation of fact.

17. I would also note here what I said recently in *Tinkler v v Ferguson* [2018] EWHC 3563 (QB) [37] about implied or inferred expression of opinion:

> '… a number of adjectives and adverbs have been inserted into the Claimant's meaning which are not part of the natural and ordinary meaning of the words. They are strained constructions of what is being said in the [publication]. For example, if an individual reader thought that the Claimant's alleged behaviour was 'selfish', that would be a personal judgment made by the individual reader. It is neither stated nor implied in the text. Such inferential meanings (that depend upon - and vary between - each individual reader's moral judgment) are not part of the natural and ordinary meaning of words: *Brown v Bower* [54]. In context, a suggestion that the conduct of the Claimant was 'selfish' would be an expression of an opinion. If such an opinion is expressly stated by the author, then it can readily be identified as such by readers. I find

> the notion of an 'inferred opinion' conceptually difficult. I suppose it is conceivable that an article may not make express an author's view, but it nevertheless emerges clearly as a result of discernible indications in the text as to what his or her opinion actually is on the given facts. But this is very subjective; and it may be difficult to separate out those cases from cases where what is really happening is simply that the reader is supplying his or her own judgment on the stated facts rather than detecting the author's opinion by implication."

27. In *Burgon v News Group Newspapers* [2019] EWHC 195 (QB), [61], Dingemans J (as he then was) said:

> "When a meaning is determined, the Court will have to consider whether the meaning is a statement of fact or opinion. Opinion must be recognisable as an opinion, as distinct from an imputation of fact. The opinion must explicitly or implicitly indicate, at least in general terms, what are the facts on which the opinion is formed, otherwise the opinion will be treated as a statement of fact. It has been said that the sense of opinion 'is something which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark, observation, etc', see *Branson v Bower* [2001] EWCA Civ 791; [2001] EMLR 32 at paragraph 12 and the authorities there considered. A statement may be fact or opinion, depending on context."

28. Also relevant to this topic is the following passage from the judgment of Nicklin J in *Zarb-Cousin v Association of British Bookmakers* [2018] EWHC 2240 (QB), [26] - [27]:

> "26. I think that some caution must be applied before overly prescriptive rules are adopted as to the assessment of fact or opinion. The pitfalls of doing so are perhaps demonstrated by *Singh*. In my judgment, what Eady J is saying in those passages is that context is likely to play a critical role in this assessment. It is the fourth point from *Morgan* about bare comment. There is no fixed rule that a statement that someone has been dishonest must be treated as an allegation of fact. The real question is whether, in context, the allegation of dishonesty would be understood to be the deduction or inference of the speaker. In most cases, it will be the context in which the words appear or are spoken that will provide the answer to whether the words are (or would be understood to be) opinion or whether the statement is 'bare comment' and therefore potentially liable to be treated as an allegation of fact. Asking a question of whether the

statement is 'verifiable' is perhaps a dangerous gloss on this approach.

27 Indeed, I note from Eady J's decision in *Lowe v Associated Newspapers Ltd* [2007] QB 580, he said this in relation to the test:

> '55 …readers need to be able to distinguish facts from comment for the defendant to be permitted to rely upon the defence of fair comment. A bald comment, made in circumstances where it is not possible to understand it as an inference, it is likely to be treated as an assertion of fact which will only be susceptible to a defence of justification or privilege.
>
> 56. Where facts are set out in the words complained of, so that the reader can see that an inference or opinion is based upon them, then the defence of fair comment will be available; but the defendant is not tied to the facts stated in the article. He may invite the jury to take into account extrinsic facts 'known to the writer' as part of the material on which they are to decide whether a person could honestly express the opinion or draw the inference.
>
> 57. Whilst it is necessary for readers to distinguish fact from comment, it is not necessary for them to have before them all the facts upon which the comment was based for the purpose of deciding whether they agree with the comment (or inference). I draw that conclusion with all due diffidence, since Lord Nicholls has twice expressed the opposite view, but it does seem consistent with principle and, in particular, with the undoubted rule that people are free to express perverse and shocking opinions and may nevertheless succeed in a defence of fair comment without having to persuade reasonable readers, or the jurors who represent such persons, to concur with the opinions. It is difficult to see why it should matter whether a reader agrees; what matters is whether he or she can distinguish fact from comment. Sometimes that will be possible, as it was in *Kemsley v Foot* , without any facts being stated expressly, because either they are referred to or they are sufficiently

> widely known for the readers to recognise the comment as comment.'

29. Paragraph [18] of *Greenstein*, supra, is also relevant:

> "18. … Where hyperlinks are provided in an online article, there is no reason to exclude that contextual material. Indeed, depending on the context of the article, it may well lend significant support to the submission that readers would have understood the publication to be an expression of opinion."

30. Finally, it has been said that if the subject matter of the words complained of is a *corpus* of published work emanating from the claimant in a defamation claim, then that is a factor which may tend to weigh in favour of the words being regarded as comment: *Butt v Secretary of State of the Home Department* [2017] EWHC 2619 (QB), [19]; *Keays v Guardian Newspapers Ltd* [2003] EWHC 1565 (QB), [48].

The words complained of set in context

31. Mr Maclean-Jones submitted that the Posts had to be read along with the hyperlinked material with which they were associated. Mr Owen-Thomas disputed whether a reasonable reader would have read that material. I will address this issue later, but I should at least set out the words complained of in the context in which they appeared, including the hyperlinked content. I will deal with them in chronological order. For Posts 1, 2 and 3 I have italicized the words complained of. I have been assisted in this exercise by a table which the Claimant and Defendant agreed pursuant to Warby J's order of 22 May 2019.

32. Post 4 is a tweet which was free-standing and was not accompanied by any hyper-linked material. However, the Defendant's case, as set out the table to which I have referred, is that this formed part of a thread of tweets which has since been deleted.

33. The next publication was Post 2, published on 3 February 2018 at 4:58pm. It is a response by the Defendant to an assertion by Mr Karlin (as reported by the Defendant in an article/blog and quoted in the Karlin blog) that the Claimant had been misquoted or taken out of context by 'SJWs' (social justice warriors) about his view on paedophilia. According to Wikipedia, 'SJW' is a pejorative term for an individual who promotes socially progressive views, including feminism, civil rights, and multiculturalism, as well as identity politics.

34. In Post 2 the Defendant stated:

> "Emil Kirkegaard was never 'smeared' by s0-called SJW's since newspapers and other news sources, covering the entire political-spectrum exposed him as a child-rape/paedophilia apologist and neo-Nazi; the Socialist Worker is far-left wing, The Guardian is left wing , The Independent is centrist, The Telegraph is centre-right, while the Daily Mail, right-wing. As for far-right, there is a thread

> on Stormfront criticising Kirkegaard's obscene child rape comments. *It's not a right or left issue, but right or wrong: anyone with a moral conscience can see Kirkegaard is a vile human and paedophile.*
>
> And no surprise, it turns out the sick freak Kirkegaard is a fan of animated baby porn and wants it made legal:
>
> https://rationalwiki.org/wiki/Emil_O._W._Kirkegaard#Animated_baby_porn"

35. The hyperlink at the end of Post Two led to an article which stated the following (inter alia):

> *"*Animated baby porn
>
> Kirkegaard disturbingly supports possession of animated (cartoon) baby pornography, that is illegal in most countries. In 2010, he wrote a blog post defending animated baby/child porn and criticised Sweden and Norway for having laws against it."

36. The third publication was Post 3, published on 3 February 2018 at 10:33. It is a reply by the Defendant to another user with the name '@DFH' who had earlier (at 6:09pm and 7:11pm) posted messages in the comment thread directed at the Defendant that was critical of him and called him a liar. @DFH had said that the Claimant was not a 'fan' of animated child pornography. In reply, the Defendant published the following:

> "@DFH
>
> He penned an essay defending animated baby-porn and argues for it to be made legal in Norway and Sweden and any other country that has banned it. So he does support legalising it since the vast majority of countries have banned it (Denmark being the only notable exception).
>
> When questioned if he supports possession/legalising of *real* child porn, what did he say?
>
> https://rationalwiki.org/w/index.php?title=Talk:Emil_O._W._Kirkegaard&diff=prev&oldid=1862554
>
> > 'As for possession, I'm unsure. My blogpost is from 2012, 5 years ago, and I haven't thought much of the topic since.'

> What kind of an answer is that? Only something a paedophile would write. A non-paedophile of course is against child porn, but Kirkegaard is ambiguous/undecided and refuses to be against it.
>
> Furthermore, Kirkegaard uses the paedophilia-apologist definition of paedophilia as pre-pubescent:
>
> https://rationalwiki.org/w/index.php?title=Talk:Emil_O._W._Kirkegaard&diff=prev&oldid=1863285
>
> In his essay where he proposes a compromise for paedophiles is to rape children while they sleep, Kirkegaard wrote:
>
> > "One can have sex with some rather young ones (say, any consenting child in puberty) without any moral problems."
>
> Children in puberty are as young as 11-12; in other words Kirkegaard literally supports adults having sex with children, who while not pre-pubescent are still under the age of consent.
>
> https://rationalwiki.org/wiki/Emil_O._W._Kirkegaard#Child_rape
>
> *Why are you defending a blatant paedophile* ?"

37. The hyperlinks in Post Three led to the following:

    a. The first hyperlink led to a comment made by the Claimant on an internet page ('RationalWiki'), in which it appears the Claimant stated the following:

> "I think you need more reading comprehension. The idea with legalizing child porn possession was to avoid the creation of blatant internet censorship, which is now is place following the first ban on child porn possession. This idea does not originate with me, but from [http://falkvinge.net/2012/09/07/three-reasons-child-porn-must-be-re-legalized-in-the-coming-decade/ Rick Falkvinge, of the Swedish Pirate Party]. I never proposed the compromise attributed to me, it was a hypothetical. I have public stated that I think the evidence shows that rape and child rape/sexual abuse (CSA) is harmful. For instance, [http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3482426/ this study] using a MZ twin control method found that even within twin pairs, the association of a history (self-reported)

> of CSA and mental illness is found, making it likely that the association is causal. My remark was simply that if you have sex with someone while they are asleep and somehow don't wake up from it and they never discover it later somehow, it is not likely for there to be any causal effects on mental health. How would there be? As for 'my' definition of pedophilia, it is totally in line with mainstream research, as anyone can easily verify [https://en.wikipedia.org/wiki/Pedophilia by reading Wikipedia]. For the record, I'm not in favor of lowering the age of consent from the current Danish value of 15, nor do I propose legalizing the filming of child porn. As for possession, I'm unsure. My blogpost is from 2012, 5 years ago, and I haven't thought much of the topic since. In fact, I have posted a total of [http://emilkirkegaard.dk/en/?s=pedo&submit=Search 2 times on pedophilia], out of some 940 blogposts (as of writing). --[[User:EmilOWK|EmilOWK]] ([[User talk:EmilOWK|talk]]) 23:47, 24 August 2017 (UTC)"

b. The second hyperlink led to a comment made by the Claimant on a RationalWiki page, in which the Claimant stated the following in response to an edit made on the site:

> "== "Interestingly, Kirkegaard narrowly defines pedophilia as adult-prepubescent sex, which excludes teens who're still under the age of consent." ==
>
> There is nothing particularly interesting about this. As [https://link.springer.com/article/10.1007%2Fs11194-007-9049-0 Blanchard et al 2007] note:
>
> :The term pedophilia may be defined as the erotic orientation of persons whose sexual attraction to prepubescent children exceeds their sexual attraction to pubescent or physically mature persons (Freund 1981). Similarly, the term hebephilia (Glueck 1955) refers to persons who are most attracted to pubescent children, and the term teleiophilia (Blanchard et al. 2000), to persons who are most attracted to physically mature adults. Although most authorities are careful to define pedophilia in terms of erotic interest in prepubescent children (e.g., DSM-IV-TR; American Psychiatric Association 2000), the distinction between pedophilia and hebephilia is somewhat artificial. Many child molesters—sometimes called pedohebephiles (Freund et al. 1972)—approach both prepubescent and pubescent children. Such patterns of offending correspond with the realities of physical maturation. The external body shape changes gradually and continuously from childhood though puberty, adolescence, and maturity. Even the single

> most discrete, watershed event in either sex—menarche in females—produces no abrupt change in the individual's outward appearance.
>
> This article is not particularly unusual in its use of these terms, as can be seen by reading [https://en.wikipedia.org/wiki/Pedophilia Wikipedia] and [https://scholar.google.dk/scholar?q=pedophilia+hebephilia&btnG=&hl=en&as_sdt=0%2C31 searching for the terms on Google Scholar]. The current text makes it seem like I made up/cherry-picked some especially narrow definition for nefarious purposes, while in actual fact I'm using the most common definition. --[[User:EmilOWK|EmilOWK]] ([[User talk:EmilOWK|talk]]) 10:48, 26 August 2017 (UTC)*"*

c. The third hyperlink led to an article about the Claimant which stated the following:

> "Paedophilia controversies
>
> Child rape
>
> 'Emil Kirkegaard, who has written supportively of paedophiles being allowed to have 'sex with a sleeping child'.
>
> —Sophia Siddiqui, Institute of Race Relations
>
> Kirkegaard has been described in mainstream and other news sources as a child-rape apologist, defender of paedophilia, and a paedophilehimself. This comes from a 2012 blog post in which he makes a sickening compromise for paedophiles - to rape children while they sleep:
>
> > 'Perhaps a compromise is having sex with a sleeping child without them knowing it (so, using sleeping medicine). If they dont[sic] notice it is difficult to see how they cud[sic] be harmed, even if it is rape.'
>
> In the same blog post, Kirkegaard defends paedophilia, by writing:
>
> > 'One can have sex with some rather young ones (say, any consenting child in puberty) without any moral problems.'
>
> Children in puberty are as young as 11-12; in other words Kirkegaard literally supports adults having sex with

> children, who while not pre-pubescent are still under the age of consent.
>
> In response to newspapers (e.g. The Guardian) quoting his post and describing him as paedophilia apologist, Kirkegaard updated it in January 2018, claiming his post was only a 'thought experiment'. However, this was never mentioned originally and looks like damage control to his reputation.
>
> In August 2017, when questioned about his compromise for paedophiles to rape sleeping children, Kirkegaard defended his original statement and said he thinks there will be no mental harm:
>
> > 'My remark was simply that if you have sex with someone [children] while they are asleep and somehow don't wake up from it and they never discover it later somehow, it is not likely for there to be any causal effects on mental health. How would there be ?'
>
> —Emil Kirkegaard, child rape apologist"
>
> Animated baby porn
>
> Kirkegaard disturbingly supports possession of animated (cartoon) baby pornography, that is illegal in most countries. In 2010, he wrote a blog post defending animated baby/child porn and criticised Sweden and Norway for having laws against it."

38. The final comment, Post 1, was published on 4 February 2018 at 3:31am and was a reply to a post by @DFH at 10:48pm directed to the Defendant in which he disputed that the Claimant was a 'fan' of animated baby porn. This post by @DFH was in response to the Defendant's Post 3 (which had been posted 15 minutes earlier). The Defendant wrote:

> "Kirkegaard supports possession of animated child porn and wants to legalise it for the countries he said it was banned in, which is virtually all countries – so it's the same thing to describe him as a 'fan of animated baby porn'. The point is: only paedophiles support possession of CP [child pornography] or cartoon baby porn. If Kirkegaard isn't a paedophile, why is he pro-CP? Why would a non-paedophile want to legalise obscene cartoons of babies being raped in diapers? Please do care to explain…. *Like I said, it's obvious to anyone, Kirkegaard is a paedophile. This is why all mainstream newspapers described him as either a paedophile-apologist or paedophile.* And these

> journalists independently read Kirkegaard's comments and came to the same conclusion as myself. The only people denying this are some neo-Nazi nutjobs on this weird website because you share Kirkegaard's cranky/pseudo-scientific views on race.
>
> He never posted paedophiles should be castrated, what he said was this:
>
> > 'the best solution to one who is exclusively aroused by very young children: castration, either medical or fysical. This will help reduce libido.'
>
> He's added 'very' there when this was not mentioned earlier, so is talking here of infants or pre-pubescent. In the same post he says there are no moral issues for adults to have sex with 'rather young ones' in puberty, so he's distinguishing children in puberty to pre-pubescent's; he's fine for adults to have sex with children in puberty under age of consent, but not pre-pubescent. Both though are paedophilia. Kirkegaard though restricts the term paedophilia to only pre-pubescent's. This is what paedophilia-apologists do to try to normalise having sex with children in puberty but below age of consent.
>
> This is all explained on the RW article.
>
> And if you're claiming I 'smeared' Kirkegaard, are you saying every mainstream journalist/newspaper has as well ?"

39. So far as the Claimant is concerned, his position is that for Posts 1, 2 and 3 the reasonable reader would just have read the Karlin blog and notable comments but would not have taken the trouble to read the hyperlinked material before forming a judgment about the meaning of the Post in question. In relation to Post 4, he contends that the reasonable reader would have formed their impression of its meaning by reading the tweet alone.

The parties' contentions

The Defendant's case

40. On behalf of the Defendant, Mr Maclean-Jones submitted that the words complained of in the four Posts are expression of opinion and not statements of fact, and mean the following.

41. *Post Four*:

a. the Claimant has controversial opinions on the acceptability of paedophilia due to his own writings in support of child rape; and

b. the Claimant is a weird and vindictive individual due to his conduct in repeatedly smearing and attacking the Defendant on the Claimant's website.

42. *Post Two*: the Claimant is an apologist for paedophilia given his widely reported writings, comments and publicly taken positions including his comments on child rape, his blog in support of possession of animated child pornography, and his criticism of a number of countries for banning child pornography.

43. *Post Three*: the Claimant is an apologist for paedophilia given his writings, comments and publicly taken positions including his essay defending animated child pornography, his ambiguous position on the legality of possessing child pornography, his view that paedophilia relates solely to pre-pubescent children and so treats sex with teenagers below the age of 16 as not paedophilia, and the essay in which he proposed that a compromise for paedophiles was to rape children while they sleep.

44. *Post One*: the Claimant is an apologist for paedophilia given his widely reported writings, comments and publicly taken positions including his support for possessing animated child pornography, his criticism of a number of countries for banning child pornography and his view that paedophilia relates solely to pre-pubescent children and so treats sex with teenagers below the age of 16 as not paedophilia.

45. He submitted that the Defendant's suggested meanings as set out above are firmly grounded in the context of the words complained of by the Claimant. He made the following points.

46. Posts 1, 2 and 3 were published on the comments thread of a website called unz.com. The Defendant says in his witness statement ([6]) that this is a blogging platform which describes itself as an alternative to the mainstream media. Mr Maclean-Jones said it is evident from the size and scale of the comments thread that the words complained of were published on a website with a hardcore following of regular readers who not only go on the website, but interact regularly via unz.com comments threads.

47. He said it is also a website that is very difficult to stumble upon by accident (unlike say, an extremely popular Twitter thread made in response to a tweet by a celebrity). The ordinary and reasonable reader of this thread would be someone with a direct interest in alternative news who would have taken a conscious decision not only to view the Karlin blog from 3 February 2018, but also the substantial comment thread below it.

48. He further submitted that when viewing the comment thread containing Posts 1, 2 and 3, it is obvious that they were made as part of a general debate with other unz.com users about comments that the Claimant had placed into the public domain. He said the discussion was in-depth, with many contributors including hyperlinked sources and many people making multiple contributions. He also said that comments linked with each other as responses, etc, which were designed to be read in context. In short, he said the thread was intended to be a forum for serious discussion.

49. Overall, the Defendant submitted that the ordinary reasonable reader would have viewed in some detail the publications complained of, including clicking on the hyperlinked material that he had presented as evidence in support of his opinion; and viewed the article and additional comment posts that preceded posts one to three.

50. Mr Maclean-Jones made a number of points in relation to each Post. For example, he said Post 2 made clear it was an expression of opinion that the Claimant is a paedophilia apologist in response to an allegation that the Claimant had been smeared by 'social justice warriors'. He said in relation to Post 3 that this was clearly an 'inferred opinion' that the Claimant is an apologist for paedophilia in which the Defendant had set out his reasoning. He said that Post 1, which was a response to @DFH, was an expression of inferred opinion in which the Defendant clarified his remarks in Post 3 in the face of challenge by @DFH. In relation to Post 4, Mr Maclean-Jones emphasised this was a Twitter message and drew my attention to what he called the 'idiosyncratic' rules about how such messages were to be analysed, eg, Warby J's comments in *Monroe v Hopkins* [2017] EWHC 433 (QB), [35] where he said an 'impressionistic approach' was required to the interpretation of tweets.

51. He therefore invited me to conclude that the meanings of the words complained of are the Defendant's meanings, and that the meaning in each case is one of opinion and not fact.

The Claimant's submissions

52. On behalf of the Claimant, Mr Owen-Thomas responded as follows.

53. In relation to context, he said that it was not accepted that a reasonable reader would have read the hyperlinked articles and all the posts before the comments complained of. He said even if this was so, the Defendant could not rely on other defamatory posts to give context to his publication. He submitted that when the impression given is so stark (that the Claimant is a paedophile) it is unreasonable to conclude that a reader will reign back from that other than by a similarly stark disclaimer or modifier to the meaning. He said the reality is that the reasonable reader is likely to read the Karlin blog, above which the comments are posted, and significant comments which attract their interest, and no more.

54. On the question of opinion versus fact, Mr Owen-Thomas said that the meaning contended for by the Claimant in relation to each post is straightforward: he is accused of being a paedophile. He said that is a stark allegation of fact. He said that the Defendant's suggested opinion meanings were inferential rather express statement and such a concept was 'difficult': *Tinkler,* supra, [37]. He said that the overriding rule when dealing with both meaning and the question whether a statement is factual or an opinion is encapsulated in the principle [16(iii)] of *Koutsogiannis,* supra, namely, how the reasonable reader would respond to the words.

55. Applying the principles to the facts, Mr Owen-Thomas submitted that the meaning of each of the Posts stands alone and is obvious in each case, ie, that the Claimant is a paedophile. He says that the Defendant's suggestion that all he was doing is expressing the opinion that the Claimant is an apologist for paedophilia is an unwarranted gloss. He said that in order for the Defendant to have been able to establish that he was expressing an opinion, the Defendant should have set out, at least in broad terms, the basis for that

opinion. He did not do so, but merely referred to matters that he says prove that the Claimant is a paedophile. He said that the Defendant's statements were not recognisable as comments.

56. Overall, Mr Owen-Thomas said that applying the relevant legal principles, it is clear that the words would strike the reasonable reader as assertions of fact and carry the meanings pleaded.

Discussion

The context and the hyper-linked material

57. I am quite sure that in order to determine meaning and the issue of fact versus opinion then the whole context of the posts has to be considered, and that includes the hyperlinked material. I reject the Claimant's submissions and accept the Defendant's submissions. The authorities that I have set out make clear that on this issue the context is very important. The hyperlinked material properly forms part of that context. I am satisfied that by their very nature, readers of the thread under the Karlin blog would have clicked on the hyperlinks in order to understand the full extent of debate/dispute between the Defendant and Mr Karlin, and the Defendant and @DFH, in order to see whether the material hyperlinked by the Defendant supported his views or whether, as @DFH apparently believed, the Defendant was wrong or lying in his portrayal of the Claimant's view.

58. This was not a website for the casual reader, as Mr Maclean-Jones rightly observed. Nor were the topics covered by the comment thread likely to be ones of interest to such a reader. Rather, this website was one very likely to be of interest only to those with deep set views, many of whom were prepared to commit their views to writing and who would want enthusiastically to take part in debate by scrutinising all that others were posting in order to challenge them on it. As well as what Mr Karlin had (or had not) said about the Claimant, the postings related to a number of Mr Karlin's views as expressed in the blog, which were on varied topics.

Fact v opinion, and the meaning of the Posts

59. *Post Four*: is a tweet published in a conversation with other Twitter users as part of a thread which has been deleted. I accept the point made by Mr Maclean-Jones that an impressionistic approach is the correct approach to such messages, but this approach must take account of the whole tweet and the context in which the ordinary reasonable reader would read it. That context includes (a) matters of ordinary general knowledge; and (b) matters that were put before that reader via Twitter: *Monroe*, supra, [35]; *Monir v Wood* [2018] EWHC (QB) 3525, [90].

60. I am satisfied that a reasonable reader taking an impressionistic approach to this tweet would conclude that it was an expression of opinion by the Defendant about the Claimant. That is because:

    a. It offers a conclusion or inference reached by the Defendant that the Claimant's own writings show that he supports paedophilia and child rape;

b. It predicts for the future, based on how the Defendant has perceived the Claimant to have acted in the past, how he will react were such a thing to happen;

c. 'Sick creep' is obviously a form of (fairly severe) criticism, bordering on vulgar abuse by the Defendant of the Claimant. But Twitter is a medium where people abuse each other regularly and not in a literal way, and a reasonable reader would know that.

61. I find the meaning of this Post to be as follows:

a. That the Claimant's own writings demonstrate that he supports child rape and supports paedophila;

b. That anyone making such an observation can anticipate being the subject of retaliation or unspecified vindictive behaviour but, presumably, online abuse such is the nature of the Claimant's unpleasant character.

62. I find that (a) and (b) are expressions of opinion that are defamatory of the Claimant at common law. For the avoidance of doubt, I am not deciding the question of serious harm under s 1 of the Defamation Act 2013.

63. *Post 2*: As I have explained, in order to determine whether Post 2 contains an expression of opinion or statement of fact it is necessary to consider the words complained in the context in which they appear, namely the whole post by the Defendant, including the hyperlinked material. It is artificial for the Claimant to take a single sentence out of context: cf *Greenstein,* supra, [29].

64. I am satisfied that the ordinary reasonable reader of this post would conclude that it consisted of expressions of opinion by the Defendant about the Claimant, including the words complained of. My reasons are as follows:

a. The clear identification of the Claimant as the subject of the Post;

b. The Defendant was responding by way of counter-argument to an assertion that Mr Karlin had advanced that the Claimant had been the victim of misplaced criticism ('smear') by 'social justice warriors'. Thus, the ordinary reasonable reader would have understood this Post to have been a contribution to an on-going debate;

c. The Defendant set out the basis for his opinion that Mr Karlin was wrong in that view, namely, that the Claimant had been 'exposed' as a paedophile by a range of publications across the political spectrum from the far-left to the far-right;

d. The words complained of were a deduction from what had been previously stated: because publications of all shades of politics had reached the same conclusion about the Claimant, the issue was not one of left-right politics, and all were agreed that the Claimant is a paedophile, a view point supported by the hyper-linked article which further supported that view;

e. The Post in part involves criticising that which the Claimant had written and imputing a point of view to him based on his writings about child pornography and that it ought to be lawful.

65. I find the meaning of Post 2 to be as follows:

a. The Claimant is an apologist for paedophilia;

b. Any right-thinking person would regard him as vile and a paedophile;

c. He is in favour of animated pornography involving babies, supports possession of it which he considers ought to be lawful, and has published material that is critical of Sweden and Norway for having laws against it.

66. Meanings (a) to (c) are all expressions of opinion and are defamatory of the Claimant at common law.

67. *Post 3*: I am satisfied that the ordinary reasonable reader of this post would conclude that it consisted of expressions of opinion by the Defendant about the Claimant, including the words complained of. My reasons are as follows:

a. Post 3 is a direct response to a comment made by another user in the thread, @DFH. The ordinary reasonable reader would therefore have understood this Post to be part of an argument/dispute with another user intended to refute and respond by way of argument to the counter-argument put by @DFH including that the Defendant had lied about the Claimant's view on paedophilia;

b. The Post consisted of a response by the Defendant to a body of writings by the Claimant on the topic of paedophilia;

c. The words complained of came at the end of the post in the course of which the Defendant had cited a number of hyperlinked sources to support his inferred conclusion that the Claimant blatantly supports paedophile;

d. The Defendant had noted the ambiguities in the Claimant's writings about child pornography. Although he had written an essay defending animated child pornography and had argued for it to be made legal in Norway and Sweden, he had also given an ambivalent response to whether the possession of non-animated child pornography should be illegal, as directly linked to in the first hyperlink in Post 3;

e. The Defendant inferred from some of the Claimant's writings a viewpoint he describes as being 'paedophilia apologist;'

f. The third hyperlinked article, which referred to other sources as having noted the Claimant's support for paedophilia;

g. In addition to the above, the reader of the words complained of would have also read the preceding thread and would have been aware of the additional evidence

adduced by the Defendant in Post Two, as well as the general context that underpinned the online debate.

68. I find the meaning of Post 3 to be as follows:

    a. The Claimant supports legalising baby pornography because he has written an essay defending animated baby pornography;

    b. The Claimant is a paedophile apologist because he expressed himself not to have thought about it for some years when asked if he supported possession or legalisation of it, whereas a non-paedophile apologist would have been unquestionably against it;

    c. The Claimant has adopted arguments which those who apologise for paedophilia utilise;

    d. The Claimant supports the right of adults to have sex with children under the age of consent and that he believes that raping children whilst they sleep would not cause harm;

69. Meanings (a)-(d) are expressions of opinion and are defamatory of the Claimant at common law.

70. *Post 1*: I am also satisfied in respect of this Post that the ordinary reasonable reader would conclude that it consisted of expressions of opinion by the Defendant about the Claimant, including the words complained of. My reasons are as follows:

    a. Post 1 is a direct response to a comment made @DFH. This comment by @DFH was made in direct response to Post 3, and Post 1 essentially clarifies the Defendant's remarks in Post 3 in the face of challenge by @DFH. The ordinary reasonable reader would therefore have understood this Post to be part of the on-going argument between @DFH and the Defendant.

    b. In a similar manner to Posts 2 and 3 above, I consider the Defendant to be setting out what is clearly an inferred opinion that the Claimant is an apologist for paedophilia, and provides further evidence in support besides that in Posts 2 and 3 which the hypothetical reader would already have read.

    c. That the words complained of are an expression of opinion is highlighted by the prefatory words, 'Like I said, it's obvious to anyone …' and the fact that the Defendant supports his opinion by reference to what he considers to be the viewpoint of all mainstream media outlets.

71. I find the meaning of Post 1 to be as follows:

    a. The Claimant supports the possession of animated child pornography and wishes to see it legalised and is a paedophile;

    b. His writings concerning pubescent and pre-pubescent children, and the distinction that he draws, supports the viewpoint that he is a paedophilia apologist.

72. Meaning (a) – (b) are expressions of opinion that are defamatory of the Claimant at common law.