Context:

*How has **Stocker v Stocker** changed existing thinking on context, when determining meaning in a libel action? What counts and what will sway a court?*

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Innocent face

What the tweet said:

Why is Lord McAlpine trending? *Innocent face*

What the tweet meant:

The Claimant was a paedophile who was guilty of sexually abusing boys living in care.

“4. People who are not familiar with Twitter may not understand the words “trending” and “innocent face”. But users of Twitter would understand.”

McAlpine v Bercow, 2013

doughty street chambers

Jeynes ++

(1) The governing principle is reasonableness. **(2)** 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. **(3)** Over elaborate analysis is best avoided. **(4)** The intention of the publisher is irrelevant. **(5)** The article must be read as a whole, and any 'bane and antidote' taken together. **(6) The hypothetical reader is taken to be representative of those who would read the publication in question.** **(7)** … the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation …' …. **(8)** It follows that 'it is not enough to say that by some person or another the words might be understood in a defamatory sense. **(9)** 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.

From *Sube* at 20, drawing on *Jeynes* and *Bukovsky*

Stocker **What he did**

Mr Stocker tried – in anger – to forcibly silence Mrs Stocker by placing one hand on her mouth and the other on her upper neck under her chin to hold her head still.

This left red marks on Mrs Stocker's throat that were still visible to the police several hours later.

Stocker **What she said**

… **he tried to strangle me** …

Stocker **Why she lost**

"I do not, however, believe that he threatened to kill her or did anything with his hands with that intention. I do not believe that he was capable even in temper of attempted murder." [§43]

Stocker The judge's reasoning

OED definition of the verb "to strangle":

(a) to kill by external compression of the throat; or

(b) to constrict the neck or throat painfully.

D is still alive … but she has red marks on her neck

D can't have meant (b) because she said, "tried"

D must therefore have meant (a); that he tried to kill her

D had not demonstrated that C had tried to kill her

Stocker Supreme Court

Allegations about threats, gun issues and the breach of a non-molestation, “paint a picture of acute marital conflict and … set the scene for any reader of the Facebook post.” (§4)

“[M]eaning is to be determined according to how it would be understood by the ordinary reasonable reader. It is not fixed by technical, linguistically precise dictionary definitions, divorced from the context in which the statement was made.” (§25)

Stocker **Supreme Court** on Context

"Context

"39. The starting point is the sixth proposition in *Jeynes* - that the hypothetical reader should be considered to be a person who would read the publication - and, I would add, react to it in a way that reflected the circumstances in which it was made. …

"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."

Stocker **Supreme Court** on Social Media

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.

In *Monroe v Hopkins* [2017] EWHC 433 (QB); [2017] 4 WLR 68, Warby J at para 35 said this about tweets posted on Twitter:

> "The most significant lessons to be drawn from the authorities as applied to a case of this kind seem to be the rather obvious ones, that this is a conversational medium; so it would be wrong to engage in elaborate analysis of a 140 character tweet; that an impressionistic approach is much more fitting and appropriate to the medium; but that this impressionistic approach must take account of the whole tweet and the context in which the ordinary reasonable reader would read that tweet. That context includes (a) matters of ordinary general knowledge; and (b) matters that were put before that reader via Twitter."

Stocker **Supreme Court** on Social Media

43. I agree with that, particularly the observation that it is wrong to engage in elaborate analysis of a tweet; it is likewise unwise to parse a Facebook posting for its theoretically or logically deducible meaning. The imperative is to ascertain how a typical (ie an ordinary reasonable) reader would interpret the message. That search should reflect the circumstance that this is a casual medium; it is in the nature of conversation rather than carefully chosen expression; and that it is pre-eminently one in which the reader reads and passes on.

Koutsogiannis (Jeynes +++)

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 (e.g. 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).

Koutsogiannis 8-11

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Textual context

"I read the whole Book in advance of the hearing. Deliberately, as is my practice, I did not look at the parties' rival contentions as to meaning until I had read the publication. The only difference between my reading of the Book and that of an ordinary reader was that I knew the identity of the Claimant and my copy of the Book had the passages complained of by the Claimant underlined. That did not interfere with my understanding of the broad message and themes in the Book and, in some respects, it was convenient to have those passages identified. If that had not been done, I would almost certainly have had to have gone back to consider the specific passages that were complained about, but then I would have been looking at them out of their proper context and not reading them as an ordinary reader would."

(*Koutsogiannis* at §23)

Extraneous context

"Jeynes principle (6) means that the nature of the publication or medium can also affect the characteristics which the court attributes to the ordinary reader. But it is necessary to be a little cautious about this aspect of the matter, because it can involve an invitation to act on preconceptions that are unsupported by evidence. Special characteristics should only be taken into account if they are matters of common knowledge, agreed, or proved: *McAlpine* [58], *Simpson v MGN Ltd* [2015] EWHC 77 (QB) [10]."

(*Monroe v Hopkins* at [33] (cited by Warby J in Doyle v Smith at §60))

Textual context vs. extraneous context

- When can you reach beyond the publication sued on for context?
  - Social media posts never stand by themselves
  - Individual posts are part of a dialectic which incorporates other tweets, memes, current affairs etc.
- What are the limits of judicial notice?
- How general does knowledge need to be before it is no longer necessary to plead and prove an innuendo meaning?

Some tentative conclusions

1. It is always relevant to identify and consider the nature of the publication. Serious publications attract serious readers, and serious articles command the attention of such readers, permitting a degree of analysis that less serious articles may not bear. (See ***Tinkler*** CA) Even in serious publications, a particular article may be presented as less serious (***John***)
2. Context is particularly important in deciding whether statements are matters of fact or opinion (***Greenstein***).
3. In relation to social media publications, if these are conversational a more impressionistic and less analytical approach to meaning is called for. (***Stocker***) However, it is possible to present serious material on Facebook (***Alexander-Theodotou***).
4. Where context is supplied by the whole article complained of, or the whole book, no evidence beyond that material is necessary (or admissible: ***Carruthers***) but consideration of such material in its entirety is essential. (***Koutsogiannis* #8**) This might extend to two or more articles in a single edition. (***Poulter***)
5. In some cases, context may need to be gleaned from material extraneous to the publication itself, for example other publications that are referred to (hyperlinks etc; ***Greenstein***) or matters of general knowledge (***McApline, Hopkins*)**. The court may need evidence in such cases and should be wary of drawing on its own knowledge (***Hopkins, Sheikh***).
6. Extraneous context that goes beyond this may turn a natural and ordinary meaning into an innuendo meaning which requires a different approach (***Tinkler* QB**).

Citations

- *McAlpine v Bercow* [2013] EWHC 1342 (QB)
- *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130
- *Stocker v Stocker* [2019] UKSC 17
- *Koutsogiannis v The Random House Group Ltd* [2019]. EWHC 48 (QB)
- *Monroe v Hopkins* [2017] EWHC 433 (QB)
- *Tinkler v Ferguson*
- *Greenstein v Campaign Against Anit-Semitism* [2019] EWHC 281 (QB)
- *Alexander-Theodotou & Ors v Kounis* [2019] EWHC 956 (QB)
- *Poulter v Times Newspapers* [2018] EWHC 3900 (QB)
- *Lord Sheikh v Associated Newspapers* [2019] EWHC 2947 (QB)

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