Federal Court of Australia

 V’landys v Australian Broadcasting Corporation [2023] FCAFC 80

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| Appeal from: | *V’landys v Australian Broadcasting Corporation (No 3)* [2021] FCA 500 |
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| File number(s): | NSD 524 of 2021 |
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| Judgment of: | **RARES, KATZMANN AND O'CALLAGHAN JJ** |
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| Date of judgment: | 26 May 2023 |
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| Catchwords: | **DEFAMATION** – appeal against primary judge’s findings that no imputations conveyed in trial by judge alone – whether primary judge erred in making findings of characteristics of ordinary reasonable viewer of matter complained of without evidence – whether primary judge entitled to have regard to own first or final impressions of whether imputations conveyed – where new case not put to primary judge raised on appeal – Held: appeal dismissed.  |
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| Cases cited: | *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158*Banditt v The Queen* (2005) 224 CLR 262*Bazzi v Dutton* (2022) 289 FCR 1*Browne v Dunn* (1893) 6 Rep 67*Capital and Counties Bank v Henty* (1882) 7 App Cas 741*Chau v Australian Broadcasting Corporation (No 3)* (2021) 386 ALR 36*Commissioner of Metropolitan Police v Caldwell* [1982] AC 341*Coulton v Holcombe* (1986) 162 CLR 1*Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89*Farquhar v Bottom* [1980] 2 NSWLR 380*Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186*Gatto v Australian Broadcasting Corporation* [2022] VSCA 66*Horlick v Associated Newspapers Ltd* [2010] EWHC 1544 (QB)*Jeynes v News Magazines Ltd* [2008] EWCA Civ 130*John v Times Newspapers Ltd* [2012] EWHC 2751 (QB)*Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293*Morgan v Odhams Press Ltd* [1971] 1 WLR 1239*Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500*Skuse v Granada Television Ltd* [1996] EMLR 278*Slim v Daily Telegraph Ltd* [1968] 2 QB 157*Trkulja v Google LLC* (2018) 263 CLR 149*University of Wollongong v Melwally (No 2)* (1985) 59 ALJR 481*V’landys v Australian Broadcasting Corporation (No 3)* [2021] FCA 500*Warren v Coombes* (1979) 142 CLR 531 |
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|  | Collins, *The Law of Defamation and the Internet* (3rd ed, 2010, Oxford University Press)Parkes et al, *Gatley on Libel and Slander* (13th ed, 2022, Sweet & Maxwell) |
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| National Practice Area: |  |
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| Number of paragraphs: | 141 |
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| Date of hearing: | 11 May 2022  |
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| Counsel for the appellant: | Mr B Walker SC and Mr G Ng |
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| Solicitor for the appellant: | Yeldham Price O’Brien Lusk |
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| Counsel for the respondents: | Mr P Gray SC and Mr A d’Arville  |
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| Solicitor for the respondents: | Australian Broadcasting Corporation Legal Services |

ORDERS

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|  | NSD 524 of 2021 |
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| BETWEEN: | PETER V’LANDYSAppellant |
| AND: | AUSTRALIAN BROADCASTING CORPORATIONFirst RespondentCARO MELDRUM-HANNASecond Respondent |

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| order made by: | RARES, KATZMANN AND O'CALLAGHAN JJ |
| DATE OF ORDER: | 26 MAY 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the respondents’ costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RARES J:

1. Peter **V’landys** AM, the appellant, sued the Australian Broadcasting Corporation (**ABC**) and its **reporter**, Caro **Meldrum**-**Hanna** (together, **the publishers**), for defamation arising out of the broadcast on 17 October 2019 in the *7:30* current affairs program of a 50-minute long “special investigation” **report** entitled “*The Final Race: The dark side of the horse racing industry*” and its subsequent publication on the internet, together with a transcript. For brevity, I have referred to all three matters complained of in these reasons as ‘**the report**’, since the issues are the same for all of them. At the time of the broadcast, Mr V’landys was the Chief Executive Officer (**CEO**) of Racing NSW, which was the regulator of the thoroughbred horse racing industry in New South Wales.
2. Mr V’landys pleaded that the report conveyed four defamatory imputations and sought damages. However, the primary judge found that none of the imputations was conveyed and dismissed the proceeding with costs. Mr V’landys contended that his Honour erred in failing to find that each imputation was conveyed. That was because, he asserted, his Honour adopted an incorrect approach in a variety of respects to assessing how the ordinary reasonable **viewer** of the report would have understood it and that, instead, should have found that each imputation, or an imputation not differing in substance from it, was conveyed. Again, for brevity, I will refer to each imputation as including one not differing in substance.
3. Mr V’landys also contended that, if the imputations were conveyed, his Honour’s obiterremarks about how he would have assessed damages, including Mr V’landys’ claim for aggravated damages, were also erroneous. It is not necessary to deal with the damages issue since, for the reasons that follow, the primary judge correctly found that none of the imputations was conveyed.

# The matter complained of

1. The report opened with the then host of *7:30*, Leigh Sales, introducing it. She tells viewers that the report is the result of a two year investigation into horse racing and that it will challenge both the public assertions of the industry that it cares for the horses in its charge and the sport’s integrity. She says that the ABC “can reveal what really goes on when race horses’ lives end in knackeries and abattoirs”. She warns viewers that some of the footage will be “extremely hard to watch”, adding “[b]ut, if you have ever put a bet on the Melbourne cup or enjoyed a day at the races, **surely there’s an obligation not to turn a blind eye**” (emphasis added). She continues, saying that lovers of the sport and animal welfare advocates will be enraged by “seeing the pitiful way the horses are treated when they are no longer profitable or wanted”. Ms Sales tells the viewers that they will see “the graphic violent deaths of animals” and that the report “is absolutely not suitable for family viewing”.
2. The report begins with film of a highway at Caboolture, Queensland, before panning across to a sign with the name “Meramist Pty Ltd” (which the viewer learns later is the owner of the **Meramist abattoir**). It then shows horses in the darkness in holding pens. Ms Meldrum-Hanna explains that the footage comes from undercover cameras and that “this is not a safe space for these animals”. The camera zooms into some of the horses and the reporter tells viewers about what is shown, namely that “recent injuries are noticeable – an ominous sign this is a place of violence”.
3. She informs viewers that brandings, which they see highlighted on horses, shows that they are thoroughbred racehorses and that night after night more of them appear in the pens but “according to the racing industry’s own policies and rules, they should not be ending up here”.
4. The reporter tells viewers of the prominence of horse racing as “the sport of kings” and that it is “a billion dollar industry and growing”. She says that it produced more than 14,000 foals in the previous 2017-18 financial year. Next, the viewer is introduced to Professor Paul **McGreevy** and told that he is an internationally recognised expert, veterinarian and a professor of animal behaviour and welfare science at the University of Sydney who has studied thoroughbred racehorses for over 25 years. Ms Meldrum-Hanna interviews Professor McGreevy and asks him what the greatest threat for the thoroughbred industry is. He says “**wastage** is the big one. Wastage is the loss of animals from the industry to an uncertain fate” (emphasis added).
5. The reporter tells viewers against a background track that each year about 8500 horses are retired from the track and that “according to the racing industry, less than 1% of them are ending up in an abattoir”. The report switches back to the interview, where Professor McGreevy says:

The figures don't add up. If my concerns are substantiated, then we're talking about a large number of horses that are meeting a very grizzly end.

1. He tells the reporter that this “black hole” is in the order of 4000 horses per year. The viewer is shown daylight images of Meramist abattoir while Ms Meldrum-Hanna tells them that it slaughters mixed livestock, including horses.
2. Next the report switches to an interview Ms Meldrum-Hanna has with Elio **Celotto** of the **Coalition** for the Protection of Racehorses. He says that Meramist abattoir slaughters horses and exports their meat for human consumption in Europe, Russia and Japan. She tells viewers that Mr Celotto and the Coalition had been watching the activities at Meramist abattoir for the past two years using perimeter cameras to record daily activities. She says that, in Australia, it is “legal to send racehorses to abattoirs for slaughter. No law protects them”.
3. As Mr Celotto describes what one can see from the property boundary, footage shows horses being unloaded and sometimes hit with polypipe. He describes the animals’ fear and says that “a fairly high percentage … are in fact racehorses”. Ms Meldrum-Hanna then speaks over footage taken at Meramist abattoir that, she tells viewers, persons other than the Coalition have recorded covertly over hundreds of hours in 22 visits over two years, with cameras inside the abattoir. That covert activity included horses being processed in Meramist abattoir and the scanning of the details of microchips implanted in the horses which Ms Meldrum-Hanna says the ABC checked forensically against the Australian Stud Book, the official record of thoroughbreds. She says that this detected around 300 racehorses that were at Meramist in the 22 days of footage that had earned almost $5 million in prize money. Mr Celotto then tells her that he estimates that “4000, probably closer to 5000” racehorses were killed each year just at Meramist abattoir. The report switches to Professor McGreevy saying that the thoroughbred industry asserts that only 0.4% of its horses leaving the industry, or about 34 each year, end up in a knackery or abattoir. Mr Celotto tells viewers than more than 34 racehorses are killed in one week at Meramist abattoir.
4. The viewer then sees footage of one dead horse being pulled out of a truck and another body already on the roadside at Meramist abattoir, while Mr Celotto comments on this footage. Then viewers are shown what they are told is footage from covert cameras showing brutal, vile and inhumane treatment of horses at Meramist abattoir, including being beaten and given electric shocks. The report returns to the interview with Professor McGreevy who says that such treatment is “disgusting … awful … absolutely unacceptable”. Ms Meldrum-Hanna then speaks over graphic footage depicting thoroughbred horses being slaughtered and images of the then Queensland Racing Integrity Commission’s animal welfare strategy, saying:

**Undercover cameras strategically installed** inside Meramist's killing room record mass animal destruction. Hundreds of racehorses, many watching in terror, trying to escape the sounds of slaughter accompanied by the happy hum of music on the radio.

It's a damning state of affairs, particularly when you consider the Queensland Racing Integrity Commission's animal welfare strategy. Its first objective - to minimise the wastage of racing animals.

**Neither the Queensland Racing Integrity Commission, nor Racing Queensland, answered our questions about racehorses being slaughtered at Meramist**, but in a statement said it investigates reports about the treatment of racehorses and that it includes immediate site visits by authorised officers or stewards, including a QRIC veterinarian and the issuing of directions or other necessary action.

(emphasis added)

1. The reporter speaks over footage of horses taken at Meramist abattoir identifying the well-known studs whose branding is depicted on the horses. She then raises the question of what happened to the horses and how they came to be delivered to the abattoir. Mr Celotto tells her that some horses “are coming straight off the race track” while some may have been sold on or passed through two or three owners. Ms Meldrum-Hanna tells viewers that the ABC has detected horses at Meramist abattoir from throughout Australia (except Western Australia) “despite Racing Australia introducing a traceability rule three years ago to track all thoroughbreds from birth to retirement”.
2. Mr Celotto tells her that the “problem is massive” and that this was “because they’re breeding too many horses”. Next, Ms Meldrum-Hanna is seen assessing Meramist abattoir’s slaughtering practices with Professor McGreevy. This includes them discussing footage where a horse is bolted five times while a worker whoops with enthusiasm and other footage in which horses are stomped on and kicked. Professor McGreevy comments “clearly … there’s no excuse for that sort of treatment. That’s not acceptable; of course it isn’t. It’s disgusting”. The reporter then adds that **standardbreds** from the trotting industry are also depicted in the footage, based on their brandings.
3. The report next shows Ms Meldrum-Hanna on speakerphone calling Meramist abattoir from Sydney. She asks how many thoroughbreds and standardbreds it slaughters each week, month or year. The person replies “that’s not accurate”. She asks for clarification, to which he ripostes that he is not prepared to respond over the phone, and asks her whether she would like to make an appointment to have a discussion, before hanging up. She says that Meramist abattoir did not reply to the ABC’s written questions.
4. The reporter then details instances of a number of thoroughbreds linked to New South Wales appearing to be slaughtered for human consumption at Meramist abattoir, saying that how this occurred “requires answers because, under New South Wales rules, it’s strictly prohibited”.
5. The report moves on to a clip of a press conference on 7 July 2016 where the Hon Mike Baird MP, then Premier of New South Wales, announces a ban on greyhound racing, saying:

An industry that has overseen the slaughter of tens of thousands of healthy dogs - the only humane response is to close that industry down.

1. The reporter tells viewers that the Premier’s response occurred after the ABC had exposed the illegal practices of live baiting and extreme wastage in the greyhound industry by the killing of unwanted dogs. At this point, the report plays YouTube footage taken on 1 April 2016 in which Mr V’landys first appears. The transcript of the report reads:

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| Peter V’landys takes questions at an industry meeting. | (Extract from YouTube, 1 April, 2016)**GREYHOUND BREEDER:**Where will all these dogs go and how will they find homes?**PETER V’LANDYS, CEO, RACING NSW:**Like it or not the greatest challenge racing has at the moment is welfare.(End of extract) |
| V’landys nods and engages with other members of the meeting. | **CARO MELDRUM-HANNA:**The horse racing industry came together to address its biggest problem. |
| V’landys continues to speak at the meeting. | (Extract from YouTube, 1 April, 2016)**PETER V’LANDYS:**Well, we do have wastage as well. We're the next online [scil: in line] for the animal liberationists. If you think we're not, you are kidding yourself.(End of extract) |

(emphasis added)

1. Next, the report shows footage of racing and then a press conference, captioned as having been posted on YouTube on 5 September 2016, in which John Messara AM, in Mr V’landys’ presence, says “we’ve got some pretty good news today”, while Ms Meldrum-Hanna tells viewers:

Industry leaders led by Racing New South Wales CEO, Peter V’landys, **mounted a PR offensive introducing a raft of new animal welfare measures.**

(emphasis added)

1. The report continues with what Mr V’landys said at that press conference as follows:

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| V’landys speaking at a press conference transitions to close up of a horse in a stable. | **PETER V’LANDYS:**Today, in a first of any jurisdiction in Australia, we're going to announce that 1 per cent will be taken out of all prize money in New South Wales to establish a horse welfare fund. |
| The picture stays on the horse in the stable. | **CARO MELDRUM-HANNA:**The new horse welfare fund was complemented by this iron-clad guarantee. |
| V’landys speaks at the same press conference. | **PETER V’LANDYS:****We're going to ensure that every horse in New South Wales that's domiciled in New South Wales will be rehomed**. |

(emphasis added)

1. Ms Meldrum-Hanna tells viewers that Racing NSW purchased three properties which it publicised as “retirement paradises for gallopers leaving the track”. Next, the report presents a clip of Mr V’landys speaking on *Four Corners*in 2018 saying:

We're not going to stop once the horse has been given to somebody else. We're going to expand it to the next level, where **we want to know that the horse is having a good retirement.**

(emphasis added)

1. The reporter tells viewers, over a screen shot of some rules that Racing NSW and Racing ACT had introduced, that there was a new enforceable rule that required any owner unable to find a home for a horse that was being retired to ensure that it was not directly or indirectly sent to an abattoir or a knackery. She said that a horse could not be gifted or sold at a livestock auction that the regulator had not approved. Mr Celotto now makes the point that one would think that the first thing the regulators would do would be to have someone at horse sales to detect if racehorses were being offered for sale for slaughter and, if so, rescue them.
2. The report then shows Ms Meldrum-Hanna interviewing Mr V’landys but intersperses this with other matters not put to him, as reflected in the below transcript:

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| V’landys is interviewed. | **CARO MELDRUM-HANNA:**Is that being policed by your stewards?**PETER V’LANDYS:**Yeah, absolutely, yeah.Without divulging all our secrets, we have intelligence networks that we can trace if those horses are being sent to those and we have cooperation from various people to know if that's occurring. |
| The picture lingers on V’landys before transitioning to an aerial shot of a horse sales auction in Canberra.  | **CARO MELDRUM-HANNA:****The sale of racehorses at unauthorised livestock auctions is occurring**. An hour's drive west of Sydney, on the first Wednesday of each month, are the Camden horse sales - a popular livestock auction. |
| Scenes of the horse auction including the transportation, auctioning and the keeping of horses. | **For the past 10 months, undercover investigators have infiltrated the Camden horse sales, providing the footage to the ABC recording vast numbers of branded, registered racehorses here**.There's nothing preventing the auction house from selling these gallopers - no law against it.And it's not known exactly how so many racehorses have ended up here but **it's a brazen contravention of racing rules, if industry participants had anything to do with the trade**. |
| Video of horses gnawing on fences before still images of damage to their mouths. | Horses are recorded visibly distressed, gnawing at the enclosure, known as wind sucking, others bleeding and wounded. |
| A hidden camera records a conversation in a yard with subtitles of the conversation at the bottom of the screen. The bodies of those speaking are partially visible. | Outside, in the large public yard, **undercover investigators** try to find out more - whether **kill buyers, known in the industry as 'doggers', are buying racehorses here**.**UNDERCOVER INVESTIGATOR:**Where do they go from here?**BUYER:**What do you mean? They go to different people who bought them.Some guys come here and they buy a heap of horses.**CARO MELDRUM-HANNA:**After an awkward pause, the truth comes out.**UNDERCOVER INVESTIGATOR:**As long as it doesn't go to the doggers.**BUYER:****Some of them will go to the doggers.** |
| The picture lingers on the yard before moving through a series of race horses focusing on their branding. | **CARO MELDRUM-HANNA:**The doggers and their transporters are ever-present here and the holding pens are constantly replenished with the racing industry's wastage - including Doncaster brood mare, Lady Bryce.Five-year-old Bells Creek and Glen Appin, almost $40,000 of prize money between them. Incredibly both mares are listed as active and racing on the regulator's online database. |
| Interview between Meldrum- Hanna and V’landys. | I'm wondering, what does 'active' mean?**PETER V’LANDYS:**It means that the horse is still in the racing industry, that it is still competing.**CARO MELDRUM-HANNA:**Can a horse be listed as active and actually have been sent to a knackery?**PETER V’LANDYS:****If the owners haven't notified us, that is a possibility, yes.****I mean, we have to rely on the information that's given to us.****I mean, we don't have the resources to go to every horse in New South Wales to see if it is alive or passed away.** |

(emphasis added)

1. Immediately after this exchange, Ms Meldrum-Hanna voices over scenes that she tells viewers were taken by undercover investigators at the Camden auction sales to which she had referred in the section in the second and third boxes in [#23] above, that the report spliced between the above excerpts from her interview with Mr V’landys, after she had asked if Racing NSW’s stewards policed horse sales. The undercover footage shows a person who appears to be the driver of a large livestock semi-trailer being asked where he was taking horses that had just been bought at the Camden horse sales auction. He tells the inquirer that he is taking them to his place at Cootamundra. Ms Meldrum-Hanna tells viewers that is a 3.5 hour drive, but instead the truck drove 25 minutes north to **Luddenham** Pet Meat’s premises, a knackery that is contemporaneously displayed in the footage and which she says is owned by John and Bec **Pace**.
2. The report then switches to historical footage of Ms Pace addressing a protest in 2016 against the ban on greyhound racing. She tells the crowd that her business produces over 20,000kgs of fresh meat per week, 80% of which is for the greyhound industry. She laments the lack of any government plan for the hundreds of horses in the Sydney basin. Mr Celotto comments “that tells you everything about the connection between the greyhound industry and the racing industry. They rely on each other”. He says that it is “abhorrent” for the Luddenham business to be “accepting” racehorses protected by the New South Wales rules of racing.
3. The reporter then says that that the viewer is now seeing CCTV footage that “we’ve been provided with” of comings and goings at the Luddenham premises’ arrivals yard, showing the truck filmed in the report earlier at the Camden auction arriving there and unloading all its cargo of horses. She describes the CCTV footage as it plays, showing greyhound transport and other vehicles arriving at the Luddenham premises and picking up loads of fresh meat, while horses are delivered for slaughter, adding: “including clearly branded thoroughbred gallopers. The racing industry’s wastage recorded wandering around the busy public drive through”. Mr Celotto comments about what he describes as “this cycle of breeding, using, then disposing of them, it’s grotesque, and how it’s allowed to continue is beyond me and it needs to come to an end”.
4. The report then switches back to the following excerpt from the interview with Mr V’landys:

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| Interview between Meldrum- Hanna and V’landys. | **CARO MELDRUM-HANNA:**The question is, are New South Wales racehorses being fed to greyhounds as fuel?Are racehorses being fed to greyhounds as fuel?**PETER V’LANDYS:****I have no evidence of that. I have had no reports from anyone, other than yourself today, that that is happening.****CARO MELDRUM-HANNA:****Never heard of that rumour?****PETER V’LANDYS:**No, haven't. |

(emphasis added)

1. Ms Meldrum-Hanna next tells viewers that Luddenham Pet Meat also sells mincemeat to boarding kennels and pet shops across Sydney. She asks Mr Celotto about whether everyday Australians could be feeding their pets mince produced from racehorses, which, he replies, is highly likely. She tells viewers that she has seen “proof of multiple racehorses ending up at Luddenham Pet Meat after the knackery ban came into force” and now voices over footage filmed during races of five named successful racehorses. The reporter focuses on the last horse, Perfectly Spun, which she tells viewers “unbelievably, according to the regulator’s own retirement data [which appears onscreen] … was formally registered as retired as an equestrian pleasure companion horse, just eight days prior” to going to a knackery. Professor McGreevy comments that this is “a clear breach of everything they’re assuring us of”. The reporter comments that it was “unclear” how Perfectly Spun wound up at the knackery only eight days after being officially retired and now the report splices in the following extracts from the interviews with Mr V’landys and Mr Celotto:

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| Interview between Meldrum- Hanna and V’landys. | **How many New South Wales horses are ending up at a knackery or abattoir? What is your data telling you here?****PETER V’LANDYS:****Well, in New South Wales, zero.****CARO MELDRUM-HANNA:**Zero?**PETER V’LANDYS:****Because it is against the rules of racing.****CARO MELDRUM-HANNA:****Are you sure zero?****PETER V’LANDYS:****Yes, absolutely.** |
| **Celotto being interviewed.** | **ELIO CELOTTO:****They produce data that they want to release to the general public to give the impression that they're looking after these horses and they're not. They're simply not.** |
| Footage of V’landys from the interview is followed by cuts to aerial shots of Luddenham Pet Meat. | **CARO MELDRUM-HANNA:**But the regulator is confident its integrity is intact, its rules are working.It says it hasn't found any proof of unauthorised slaughter at abattoirs interstate or at New South Wales knackeries. |
| Interview between Meldrum- Hanna and V’landys. | Zero are ending up at a knackery or an abattoir in New South Wales? That is what we've just said.**What if I told you that's not correct?** That there are New South Wales horses ending up at a knackery and an abattoir?**PETER V’LANDYS:****Well, if there is, it means that the people have acted against the rules of racing and if we have evidence of that, they will be dealt with pretty severely.****We'll put the full force of the rules of racing against anyone that does that because it's a severe breach of our rules and our terms and conditions of being in the thoroughbred racing industry.** |
| Aerial shots of the market are followed by footage of a horse being auctioned and still shots of National Flag before showing footage of National Flag racing. | **CARO MELDRUM-HANNA:**Back at the Camden horse sales, inside the auction ring.**Undercover cameras record more racehorses being sold off**, including mare Millster for $350 and this five-year-old stallion, National Flag, bred by Victorian powerhouse, Rosemont Stud sold to a Chinese syndicate in 2016 for $200,000. |
| Same footage of National Flag racing. | **RACE CALLER:**National Flag has won at three-quarters... |
| A horse is being auctioned at market. | **CARO MELDRUM-MANNA:**Just three years later, National Flag is sold off for a measly $380. |
| Celotto being interviewed | **ELIO CELOTTO:**Racing New South Wales has a whole integrity department that is supposed to protect these horses from these very situations |
| Interview between Meldrum- Hanna and V’landys. | **PETER V’LANDYS:****No matter how good you are as an administrator, no matter how solid your systems and processes are, you'll never eradicate the 1 per cent no matter how hard you try and that goes for everything in the community not just horse racing.****There is always going to be an element that do the wrong thing.**Some of these people that are going out and attacking thoroughbred racing, what are they doing about the domestic animals, the pets that are abandoned and what about the 6,000 dogs that are euthanised each year? What about the 14,000 cats that are euthanised each year?**CARO MELDRUM-MANNA:**I think the difference here is, Peter, that thoroughbred racing is a sport and it is regulated.**PETER V’LANDYS:**But why aren't domestic animals regulated.When you can tell me how you trace cats and dogs, I’ll tell you how we can trace our horses.**CARO MELDRUM-MANNA:**Not my responsibility, I'm not a regulator for cats and dogs but you are a regulator for racehorses.**PETER V’LANDYS:**But I think it should be fair to all animals, not just horses. |

(emphasis added)

1. Ms Meldrum-Hanna now tells viewers that undercover investigators had found more horses were falling through the regulator’s systems for traceability, as the report switches to footage of a conversation between two unidentified persons in a horse holding yard, one of whom asks where the horses are going and the other responds that he does not know, before becoming agitated about being filmed. The report shifts to footage that Ms Meldrum-Hanna voices over with a description of the location of another knackery, **Burns Pet Foods**, in Riverstone, a suburb of Western Sydney, about which she says, reciting the statement on a sign displayed outside the premises, “Here, the best is fresh”. She tells viewers that “we’ve seen proof that the following horses have ended up at Burns Pet Foods, condemned to death in the last 10 months alone”. She says that the first horse, Legal Waves, last raced in October 2017, a week after the New South Wales knackery ban came into force” before she goes through the racing history and subsequent fate of nine other horses. She tells viewers that it was “breathtaking” that a horse of the calibre of the last of those horses, **Tahitian Black**, “ended up discarded at Burns Pet Foods”.
2. The reporter speaks on the phone to Tahitian Black’s trainer and owner, David **Pfeiffer**. He expresses shock at being told that, after selling the horse when it was retired in 2016, it had been sold to the knackery. She also asks him about another of the nine horses sent to Burns Pet Foods, Next of Kin, that was still registered as “active”. Mr Pfeiffer checks and says that he had overlooked registering that horse as retired.
3. The report switches back to Professor McGreevy, who says that Racing NSW “will really struggle to justify what’s going on here”.
4. Next, Ms Meldrum-Hanna tells viewers of seeing proof that “standardbreds, pacers from the trots, are being slaughtered at these knackeries too, despite New South Wales Harness Racing’s ‘lifelong tracking and care of standardbreds’ announced in 2016”. The report shows footage of her interview with the CEO of Harness Racing NSW, John **Dumesny**. In the interview she forcefully drives Mr Dumesny to admit that, in the years since it announced its new policies in 2016, his body had done nothing to implement a rehoming program except incorporate a company, and tells her says “we’re continuing to develop” the rehoming program.
5. Ms Meldrum-Hanna reminds viewers that, while it was not illegal for New South Wales knackeries to slaughter racehorses, “one fact is incontrovertible – it is the racing industry that’s fueling their business”. She says that how this number of racehorses have ended up being sent to the knackeries at Luddenham and Burns Pet Foods was unknown. The report then plays footage of her trying to talk on speakerphone from her car with each of Mr Pace and Mr Burns. She says that Mr Burns told her that his business only slaughtered sick racehorses. The report shows footage of her listening to the two men hanging up when she asks them how many racehorses they had slaughtered.
6. Next, the reporter returns to footage of a covert recording at Meramist abattoir where two workers discuss a horse that someone had delivered the previous day for which, one says, the owner had paid $80,000. The covert footage switches to a Meramist abattoir worker whipping a thoroughbred with hose pipe and uttering vile abuse at it, while Ms Meldrum-Hanna tells viewers that “the racing industry’s wastage is endless”. She identifies the whipped horse as War Ends, that had sold for $400,000 in 2008, and says that the horse raced and trialled 87 times over five years and Racing Australia still listed it as “active”, 18 months after its slaughter, while the footage depicts horses being abused in the abattoir’s kill box.
7. The report next displays a promotion for the forthcoming 2019 Melbourne Cup. Ms Meldrum-Hanna speaks of the contrast of the glamour and money lavished on racing with her assertion that “behind closed doors, at Meramist abattoir, there is no wonderland, no cloud nine here”.
8. Now, the report moves back to Mr V’landys’ interview, bookended by comments of Professor McGreevy as recorded in the following transcript:

|  |  |
| --- | --- |
| McGreevy being interviewed. | **PAUL MCGREEVY:**We're talking about destroying horses on an industrial scale. We're seeing animals suffering. **I don't think anybody in the industry could ever defend this.** |
| Interview between Meldrum- Hanna and V’landys. | **CARO MELDRUM-HANNA:****I'm going to give you a worst case scenario and you tell me how bad this scenario would be** - that New South Wales racehorses are being sold at livestock auctions that aren't approved and they are falling into the hands of kill buyers, that New South Wales racehorses are also being sent interstate for slaughter and that New South Wales racehorses are also being knackered in New South Wales. This is post the ban.**We're told this is happening.** **If that is happening, what is your response?****PETER V’LANDYS:****If it is happening, we will put the full force of the law against them, because they are breaching the rules of racing.****As I said I'm the first person that loves horses more than anyone. I will go down very hard on them.** |
| McGreevy being interviewed before screen fades to black. | **PAUL MCGREEVY:**Oh God. There's no denying the footage.There is a massive question mark over the regulator, and the problem of self-regulation comes into play yet again.This is the sort of material that will shake the industry to the core. |

(emphasis added)

1. Finally, he report switches back to the studio where Ms Sales tells viewers:

That report from Caro Meldrum-Hanna, produced by Amy Donaldson and edited by Fred Shaw. For the record the ABC sought interviews with both national racing regulators, Racing Australia and Harness Racing Australia as well as Racing Queensland; all unavailable. We put detailed written questions to all, as well as Racing Victoria, Luddenham and Burns knackeries and Meramist abattoir.

**Following our interview with Racing New South Wales we provided the regulator with further information regarding the knackeries and the abattoir mentioned in this program and also the names of the race horses featured tonight.**

**This afternoon Racing New South Wales told 7:30 it will commit to investigating all of the reported horses but raised questions about jurisdictions.** You can find the full statements from all those who responded on our website soon. And for anyone disturbed by the images in tonight’s story, help is available from Lifeline on … or Beyond Blue on ...

(emphasis added)

# The pleaded imputations

1. Mr V’landys pleaded that, in its natural and ordinary meaning, the report conveyed each of the following imputations, namely that:
2. Mr V’landys, as CEO of Racing NSW, callously permitted the wholesale slaughter of thoroughbred horses;
3. Mr V’landys, because of his indifference to their suffering, ignored the cruelty to which thoroughbred horses were subjected to in a Queensland abattoir;
4. Mr V’landys dishonestly asserted that no racehorses were sent to knackeries for slaughter in New South Wales, when he knew that was untrue; and
5. Mr V’landys dishonestly asserted that Racing NSW cared about the welfare of thoroughbred horses and took adequate steps to protect their welfare when he knew that was untrue.

# The primary judge’s reasons

1. After identifying the issues and describing the report, his Honour set out the well understood principles for determining whether a publication conveys a defamatory imputation. The primary judge summarised Mr V’landys’ submissions and distilled the pith of how Mr V’Landys put his case below as follows (at [57]):

Mr V’landys’ submissions did not separately address each of the pleaded imputations. Rather, he approached the issue by addressing the overall impression conveyed by the report as a whole. **He contended, in effect, that the main message and overall impression conveyed by the report was that he was not only aware, or was callously ignoring or disregarding, that retired racehorses were being slaughtered in abattoirs and knackeries, but was callous and dishonest when he claimed that the slaughter of racehorses was not happening, or that he was not aware that it was happening.** In short, the overall suggestion was, so Mr V’landys submitted, that he was not only personally responsible for the racing industry’s failings in respect of the treatment of retired racehorses, **but that he was a callous liar when he denied the existence of those failings**.

(emphasis added)

1. However, as will appear below, Mr V’landys propounded a substantively different argument on appeal that he did not put, at least not substantively, to his Honour.
2. The primary judge found that the report did not convey any of the four imputations. He began his reasoning by noting that the question of what meaning is conveyed to the ordinary reasonable viewer of a television or video broadcast will be one of impression. He cautioned that the viewer, in whose position the judge was as the tribunal of fact, would not have watched the report as a lawyer nor paused or replayed it or parts of it, or parsed or analysed it to check or confirm the impression that it made on the viewer. Despite the legal correctness and good sense of that approach, his Honour also correctly acknowledged that in order to express reasons for his findings about whether the imputations were carried, it would be necessary to engage in some degree of analysis of the words and images in the report. He found (at [70]):

Fortunately, as events transpired, my initial impressions of the report and the meanings conveyed by it turned out to be lasting impressions. Despite hearing detailed submissions concerning the meanings conveyed by the report, re-viewing the report and re-reading the transcript of it in that context, my initial impressions largely remained. While I of course paid close attention to the parties’ submissions, my initial impressions upon viewing the report for the first time very much informed the conclusions that I finally arrived at concerning the meanings conveyed by the report.

1. The primary judge found that the viewer would have watched the report with the understanding that it was an episode on one of the ABC’s flagship news and current affairs programs and he or she could expect it to be well researched, presented by experienced journalists and deal with serious issues of public interest and concern. He found that the viewer of *7:30* would understand that the program was not prone to sensationalism, or loose or imprecise reporting and the viewer would be likely to view it carefully. The primary judge distinguished such a viewer of *7:30* as less likely to engage in loose thinking and speculation than viewers who watched more sensationalist and less informative programs aimed more at entertainment.
2. His Honour also found that the ordinary reasonable viewer of the report would have watched it in its entirety, without pauses, before forming his or her final view as to the meanings or imputations that it conveyed. Even so, his Honour said, some striking or powerful words and images could stay with the viewer from his or her first perception of them and influence his or her thinking about what followed. This would be likely in respect of footage in the report that depicted, in graphic ways, cruelty and mistreatment of horses that appeared throughout it and undoubtedly would have distressed, disturbed and probably angered the viewer. He found that it was likely that those scenes would have had a powerful and lasting effect on an ordinary reasonable viewer that would contribute to the ultimate impressions that he or she would form at the end of the report.
3. His Honour also recognised the importance of the overall content, subject matter and tenor of the report in any assessment of the way in which a viewer would have understood it. As he found, the report’s overriding focus was not on Mr V’landys but on the integrity of the racing industry generally, in relation to its retired racehorses and “wastage”. It featured the activities at Meramist abattoir and the two New South Wales knackeries. The primary judge found that Mr V’landys’ interview was interspersed with other matter, usually graphic scenes of horses’ mistreatment in or near the abattoir or parts of interviews with Mr Celotto and or Professor McGreevy. He found that their statements tended to undermine or cast doubt about Mr V’landys’ statements with which they were juxtaposed and continued at:

82 The general message that was conveyed by Professor McGreevy and Mr Celotto was: that “wastage” was a major problem in the racing industry; that, contrary to what the racing industry would have the public believe, large numbers of retired racehorses were ending up in abattoirs and knackeries; and that the racing industry was not effectively policing the rules that were apparently designed to prevent that happening. Their message was very much confirmed by the graphic footage taken from within the Meramist abattoir and in the vicinity of the two featured knackeries. The general messages conveyed by Mr V’landys in answer to the questions put to him were: that Racing NSW had put in place rules to stop racehorses ending up in abattoirs and knackeries; that he was unaware that racehorses were ending up in abattoirs and knackeries; and that, if that was in fact happening, it was a result of the actions of a small number of people who were acting contrary to the rules of racing.

83 It would be fair to say that **the overall effect of the juxtaposition of the footage of parts of the interview with Mr V’landys between footage of the interviews with Professor McGreevy and Mr Celotto and the footage of the racehorses at the knackeries was to convey an overall negative impression of Mr V’landys and his assurances concerning the efficacy of the rules that Racing NSW had put in place to combat the problem of wastage in the racing industry. It also tended to present the material and the issues raised by it in a more dramatic and sensational way.** The question whether the report conveyed the specific imputations that Mr V’landys contended were conveyed must be considered in the context of the overall negative impression that was conveyed by that juxtaposition and the way the report was constructed and edited.

(emphasis added)

1. The primary judge then considered whether the report conveyed each imputation, in turn. He concluded that none was conveyed. He held that imputation 1 implicitly contained two essential elements, that *first*, Mr V’landys knew that a large number of racehorses were being slaughtered at Meramist abattoir and the two New South Wales knackeries, and *secondly*, despite that knowledge, he deliberately and insensitively allowed the slaughter to continue (at [86]). However, his Honour found, nothing in the report stated explicitly that Mr V’landys knew about the racehorses being slaughtered in the three establishments or anywhere else. And, his Honour found, nothing in the report, including when viewed as a whole, would have conveyed that Mr V’landys allowed the slaughtering to continue. Rather, his Honour found, the overall message that the report conveyed was that Racing NSW and other regulators had put in place measures to stop the slaughter of racehorses at abattoirs and knackeries, those measures were inadequate, ineffective and being ineffectively policed so that the regulators “were, to put it in colloquial terms, asleep at the wheel” (at [88]).
2. His Honour found that the ordinary reasonable viewer would have understood from the nature and tenor of Ms Meldrum-Hanna’s questions to Mr V’landys that it was obvious that he had not seen any of the covert footage of the inhumane, awful mistreatment of racehorses or their presence at the abattoir, knackeries or saleyard, in contrast to her questions to Mr Celotto and Professor McGreevy while they looked at the footage.
3. His Honour found that the reporter’s questions to Mr V’landys at the end of the interview were couched in hypothetical terms as a “worst case scenario”, to elicit his theoretical response on the basis that the ABC had been “told” that New South Wales racehorses were being sold at auctions, falling into hands of kill buyers and sent to local and interstate premises for slaughter. The primary judge found that the viewer would have appreciated that Mr V’landys had not seen or been confronted by the horrific images in the footage aired in the report and about which Ms Meldrum-Hanna directly questioned Mr Celotto and Professor McGreevy. She never mentioned the footage to Mr V’landys in any of the aired interview. In that context, the viewer would have understood Mr V’landys’ conditional response “if it is happening we will put the full force of the law against them” as confirming that he had not seen the footage, the content of which was undeniable. As the primary judge said at [95]-[97]:

95 Also important is that, at no point during the report does Ms Meldrum-Hanna assert, or put to Mr V’landys, that he, or Racing NSW, knew that New South Wales racehorses were being sent to the Meramist abattoir, or to knackeries in New South Wales, contrary to the rules and regulations that Racing NSW had put in place to prevent that occurring, and contrary to public assurances or the data provided by Racing NSW. **The ordinary reasonable viewer of a serious and respected current affairs program such as 7.30, and a serious report produced by an experienced journalist such as Ms Meldrum-Hanna, would no doubt expect that, if it was to be suggested that Mr V’landys was being untruthful and that, contrary to what he had claimed, he in fact knew that large numbers of New South Wales racehorses were being slaughtered in abattoirs and knackeries, Mr V’landys would, at the very least, have been asked in clear terms whether he was being untruthful. That did not occur.**

96 The only statement in the report that came close to saying that regulators, such as Racing NSW, knew that large numbers of racehorses were being slaughtered in abattoirs and knackeries, was a statement by Mr Celotto. As indicated in the summary of the report given earlier in these reasons, after Mr V’landys is shown telling Ms Meldrum-Hanna that Racing NSW’s “data” told him that no New South Wales horses were ending up in a knackery or abattoir, Mr Celotto is shown stating that “[t]hey produce data that they want to release to the general public to give the impression that they’re looking after these horses and they’re not”. **That statement does not directly assert that the regulators knew that racehorses were being slaughtered in abattoirs and knackeries, but it comes fairly close.**

97 Significantly, however, Ms Meldrum-Hanna did not embrace or endorse Mr Celotto’s statement. Rather, she stated: “[b]ut the regulator is confident its integrity is intact, its rules are working” and that “[i]t says it hasn’t found any proof of unauthorised slaughter at abattoirs interstate or at New South Wales knackeries”. A portion of Mr V’landys’ interview is then shown during which he says that if, contrary to what he believed to be the case, racehorses were ending up in abattoirs or knackeries, then “it means that the people have acted against the rules of racing” and that if Racing NSW had evidence that was occurring, those people would be “dealt with pretty severely”. Ms Meldrum-Hanna did not challenge that statement by Mr V’landys. She did not ask Mr V’landys whether that statement was untruthful, let alone suggest to him that he knew, or must have known, that racehorses were in fact ending up in abattoirs and knackeries, or that he had seen evidence of that occurring, or that he had in fact done nothing in terms of dealing with the offenders.

(emphasis added)

1. In addition, his Honour placed reliance on Ms Sales’ statement at the end of the report that following “the interview with Racing NSW”, being obviously a reference to Mr V’landys, the ABC had provided it with further information about the knackeries and abattoir mentioned in the report with the names of the horses it had revealed and that Racing NSW had said that it would commit to investigate all of those horses. The primary judge reasoned at [100] that:

… the overriding impression was that the regulators, including Mr V’landys, did not really know what was going on; that their “data” was inaccurate and unreliable and that, to the extent that rules and regulations had been put in place to address the problem of “wastage”, those rules and regulations were ineffective and inadequately enforced. **That may have conveyed that the regulators, including Mr V’landys, were somewhat incompetent or ineffective. It did not, however, convey that they were dishonest and untruthful.**

(emphasis added)

1. The primary judge found that the viewer would not have understood that the report was saying that Mr V’landys was one of the main guilty parties, but rather that “[t]he real ‘villains’ identified by the report” were the individuals who operated, worked at or were associated with Meramist abattoir and the two knackeries and others in the industry who were acting in breach of the rules or had lied to the regulators.
2. Accordingly, his Honour found that imputation 1 was not conveyed.
3. In considering whether imputation 2 was conveyed, the primary judge relied on his findings that the viewer would have understood the report to convey that Mr V’landys did not know thoroughbreds were being slaughtered at Meramist abattoir and had not seen the graphic footage of the cruelty and mistreatment there. He found that this understanding would have been reinforced by the statements in the report about the footage and “covert vision” at Meramist abattoir being taken of what occurred “behind closed doors”. In addition, his Honour found that the report did not suggest that Mr V’landys, as CEO of Racing NSW, had responsibility in respect of regulating, or any awareness of, what occurred in abattoirs in Queensland. He found that the viewer would have understood that Mr V’landys had not been shown the footage. Thus, his Honour found that imputation 2 was not conveyed.
4. His Honour found that imputation 3 was not conveyed because, once again the viewer would not have understood the report to convey that Mr V’landys either had asserted that no racehorses were sent to knackeries in New South Wales (as opposed to him saying that, together with its systems and processes, the “data” available to Racing NSW said that) or that he was making such an assertion with knowledge that it was untrue. Indeed, his Honour found that, in his exchanges with Ms Meldrum-Hanna, Mr V’landys said that Racing NSW’s processes and systems were fallible and that, if racehorses were ending up in knackeries, that was because “people have acted against the rules of racing” and no matter how good its processes and systems were, those would not prevent the small number in the industry intent on doing the wrong thing from breaching the rules. His Honour also said that the viewer would have understood that Mr V’landys had told the reporter that Racing NSW had to rely on the information given to it and that it did not have the resources to check on every horse. Thus, his Honour concluded, the report conveyed no more than that, based on the data available to him, Mr V’landys believed that no racehorses were sent to knackeries in New South Wales, but accepted that the data was fallible.
5. The primary judge found that even if the report had conveyed that Mr V’landys had made an unequivocal assertion that no racehorses were sent to knackeries in New South Wales, it did not also convey that Mr V’landys knew that assertion was untrue and thus he was being dishonest. Once again, in coming to that conclusion, his Honour found that the report conveyed that Mr V’landys was relying on the data available to him, Racing NSW’s processes and systems and their fallibility and, as the primary judge found in respect of imputation 1 at [125]:

… at no point during the report did Ms Meldrum-Hanna assert that anything said by Mr V’landys was deliberately untrue or dishonest. Nor did Ms Meldrum-Hanna put to Mr V’landys at any point that any of the answers that he had given were knowingly false or dishonest. The ordinary reasonable viewer of a report by an experienced ABC journalist on its flagship current affairs program would have expected that, if it was to be suggested that Mr V’landys was lying or being dishonest, that would have been put to him for his response, or at least would have been explicitly stated in the report. Given that neither of those things occurred, the ordinary reasonable viewer or reader would most unlikely understand or perceive that the report was not conveying or suggesting that Mr V’landys was lying or being dishonest.

1. The primary judge also found that imputation 4 was not conveyed because, essentially, the viewer would not have understood the report to be saying that Mr V’landys was dishonest and knew what he was saying to be untrue. He found at [129]-[131]:

There could be little doubt that the report conveyed that Mr V’landys had asserted that Racing NSW cared about the welfare of thoroughbred horses and had taken adequate steps to protect their welfare. There could also be little doubt that the report conveyed that the steps that had been taken by Racing NSW were not adequate. That, indeed, was essentially the main theme and main message conveyed by the report. For the reasons already given, however, **I am not persuaded that the report conveyed to the ordinary reasonable viewer that Mr V’landys’ assertions about the adequacy of the steps that had been taken by Racing NSW to protect the welfare of racehorses were deliberately untrue or dishonest.**

As with the other imputations, Mr V’landys’ contention that this imputation was conveyed essentially hinged on the claim that the report conveyed that he well knew that large numbers of New South Wales racehorses had been and were being slaughtered in abattoirs and knackeries and that he and Racing NSW had done nothing to stop that occurring. It was no doubt on that basis that Mr V’landys claimed that the report conveyed that the statements that he had made about caring for the welfare of racehorses and the steps that had been put in place to protect them were untrue and therefore disingenuous and duplicitous.

…

For the reasons given earlier, the ordinary reasonable viewer of the report would have expected that, if such serious allegations were intended to be conveyed, they would have been put to Mr V’landys and spelled out in terms in the report. The fact that that did not occur would have suggested to the ordinary reasonable viewer that the ABC and Ms Meldrum-Hanna were not suggesting that Mr V’landys was being deliberately untruthful or disingenuous.

# The grounds of appeal

1. Mr V’landys’ notice of appeal raised four grounds in seeking to challenge the primary judge’s conclusion that the report did not convey any of the four imputations. It is not necessary to deal in these reasons with the fifth ground, that sought to impugn his Honour’s *obiter* remarks about damages.
2. In essence, the four grounds of appeal concerning the imputations contended that his Honour erred by:
3. failing to find that the report conveyed each imputation to the ordinary reasonable viewer (ground 1) and to assess correctly whether the report conveyed each imputation from the perspective of the viewer as a person who was:
	1. more likely to view it more carefully and be less likely to engage in loose thinking than viewers of more sensationalist and less informative programs, despite his not having any evidentiary or proper basis to find that a viewer of *7:30* would understand it to be (at [73]) a respected current affairs program that is generally not prone to sensationalism, loose or imprecise journalism or reporting, and so (ground 4(b)); and
	2. prone to a degree of loose thinking, as Lord Devlin described in *Lewis v Daily Telegraph Ltd* [1964] AC 234 at 285, and instead his Honour reasoned from the perspective of a lawyer or person skilled in formal logic, including by having regard (at [70]) to his own initial impressions “very much” to inform the conclusions he reached (ground 2),

(the **viewer perspective grounds**);

1. failing, in reaching his conclusions, to take adequate account of his earlier findings that, *first*, the report had conveyed a negative impression of the racing industry, before Mr V’landys initially appeared when it portrayed him prominently as the industry’s only representative (at [80]), *secondly*, the statements of Mr Celotto and Professor McGreevy not only undermined and cast doubt on what Mr V’landys said, but were juxtaposed with his statements, their comments about, and footage of, racehorses at knackeries so as to convey to the viewer an overall negative impression of Mr V’landys and his assurances concerning the efficacy of the rules that Racing NSW had put in place to combat the problem of wastage in the industry and, *thirdly*, the overall negative impression that these juxtapositions and other editing in the presentation of the report had created (ground 3);
2. finding that imputations 1 and 2 necessarily suggested that Mr V’landys knew of the wholesale slaughter of, and or cruelty to which, thoroughbred racehorses were subjected at Meramist abattoir (ground 4(a));
3. finding that the viewer would not have understood the report to convey that Mr V’landys had said anything deliberately untrue or dishonest or was lying because:
	1. that finding could not be made on the basis that:
		1. Ms Meldrum-Hanna had not put to Mr V’landys that he was being deliberately untrue or dishonest, nor did she say so explicitly in the report (ground 4(c));
		2. Ms Meldrum-Hanna had not embraced or endorsed Mr Celotto’s statement that Racing NSW “produce data they want to release to the general public to give the impression they’re looking after these horses and they’re not”, in circumstances where, *first*, Ms Sales had introduced the report by saying “Publicly the industry says it cares for the race horses in its charge but what you are about to see challenges that assurance and raises serious questions about the sport's integrity" and, *secondly*, the report included footage of thoroughbred horses being cruelly treated at Meramist abattoir and taken to Luddenham Pet Foods for slaughter (ground 4(e));
	2. his Honour should have taken account of, and then found more probable than not, the alternative explanation for Mr V’landys’ answers to the reporter’s questions about New South Wales horses ending up in knackeries was that he was lying rather than ignorant about that matter (ground 4(d));
	3. his Honour erred by finding (at [99]), in the context of the grounds 4(a) to (e), that the viewer would have understood the report to convey that Mr V’landys’ assertions appeared somewhat naïve, misplaced, foolish, rather than, because the viewer with a proneness to a degree of loose thinking, especially in the context of the report’s juxtaposition of the graphic footage and “the extremely critical commentary of Mr Celotto and Professor McGreevy concerning the racing industry”, would have concluded that Mr V’landys’ assertions were callous and or dishonest (ground 4(f)),

(the **actual knowledge grounds**).

# Mr V’landys’ submissions

1. Mr V’landys’ written and oral submissions addressed grounds 1–4 of the notice of appeal compendiously. In substance he challenged the primary judge’s reasoning process in arriving at the conclusion that none of the imputations was conveyed.

## The new case on appeal

1. As became clear during the hearing of the appeal, Mr V’landys now seeks to advance a path of reasoning as to why each imputation was conveyed that was not put to his Honour. At the trial, Mr V’landys argued that the imputations arose because the report conveyed that he had actual knowledge of the scale of wastage of thoroughbred racehorses and the cruel, appalling slaughtering practices that the report so vividly portrayed.
2. However, on appeal, he sought to contend that the primary judge somehow erred in addressing the way in which he had put his case to his Honour being focused on what Mr V’landys’ actual knowledge was. He now argues that the primary judge should have found, instead, that the report conveyed that Mr V’landys had turned a ‘Nelsonian blind eye’ to what he must have known was occurring and was not being dealt with by him as the CEO of the regulator, Racing NSW. He relied on Ms Sales’ remark in her introduction about “an obligation not to turn a blind eye”.
3. The case on appeal was that, because the regulator had had a new policy to ensure that thoroughbred racehorses would not be sent to slaughter, together with complementary rules of racing and intelligence gathering systems to enforce the policy, the viewer would have understood the report to convey that Racing NSW, through Mr V’landys, had made a deliberate choice not to look at what was obviously occurring. Mr V’landys contended that the report conveyed that, because the wastage, which should not have occurred, was in fact occurring on such a significant scale as the report graphically showed, he must have known, and then chosen not to do anything, about it. Mr V’landys submitted that the report conveyed that the purpose of introducing the new policy and rules was to stop thoroughbreds being sent to a knackery at the end of their racing days, yet the regulator was allowing the shocking treatment of those animals, depicted in the program, go on unchecked right under its nose. He argued that the viewer would infer that anyone could see the horses being sold openly if they went to the Camden auctions and also could see, as the persons from the Coalition taking the broadcast footage in the program had done, some of the brutal mistreatment of horses as they were unloaded if they stood outside the fence at Meramist abattoir. It would follow in the viewer’s mind, he argued, that the regulator (and Mr V’landys as its CEO) must have known about, or chosen not to look for, the obvious evidence of the ongoing wastage in the industry despite what the regulator’s new policies and rules, for which he was responsible, sought to portray to the public about its supposed concern.
4. In other words, Mr V’landys contended that, by juxtaposing the shocking footage, the openness of Camden auctions, what could be seen from outside the fence at Meramist abattoir, and the criticisms by Mr Celotto and Professor McGreevy, with his own interview and the industry’s statements about its supposed new regulatory regime that had been announced as directed to stopping the practices depicted, the report conveyed to the viewer that the regulator, and, though what it showed him saying, Mr V’landys in particular did not in fact care about the welfare of thoroughbred racehorses. He submitted that the viewer would understand that he was being characterised as in the imputations because of the report’s repeated juxtapositions of Mr V’landys’ statements with yet more distressing evidence of the systematic carnage of thoroughbreds together with the adverse comments of Mr Celotto and Professor McGreevy.
5. Mr V’landys argued that the imputations were conveyed because of the substantial discrepancy between the facts and footage that the report portrayed so graphically and the position of Mr V’landys, as the regulator, who ought to have been able to do something, and was expressing the intent, to prevent what was occurring. He asserted that the viewer would understand that this conveyed the impression he was callous and or dishonest in his protestations to the contrary of the juxtaposed footage and statements. He contended that, consistently with the reasoning in *Trkulja v Google LLC* (2018) 263 CLR 149 at 161 [32], the viewer was more likely than a lawyer to draw a derogatory meaning.

## Mr V’landys’ submissions as to each imputation

1. **As to imputation 1:** Mr V’landys submitted that the primary judge had misapprehended that imputation 1 suggested that he (Mr V’landys) knew about, or ever had been shown footage of, the slaughter of thoroughbreds at either Meramist abattoir or the two knackeries in New South Wales named in the report. Rather, he asserted, his Honour should have found that the words ‘callously permitted’ as used in imputation 1 conveyed that Mr V’landys had wilfully shut his eyes to the obvious, just as in the test applicable to determining whether a person has knowingly assisted in the breach of a fiduciary’s obligations: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 163 [174]-[177]. Mr V’landys also accepted that, although he had put such a case orally to his Honour, he had not relied on the viewer understanding that he had been shown the footage when he was interviewed by Ms Meldrum-Hanna “as an essential premise” of his case on imputation 1.
2. Mr V’landys argued that his Honour’s use of his own impressions (being those of a judge and trained lawyer) on first viewing the report in arriving at his findings of fact that none of the imputations was conveyed eschewed the task of putting himself into the position of the ordinary reasonable viewer who was prone to loose thinking. He submitted that his Honour erred in [97] by failing to apply the viewer’s “loose thinking” to assess what the ordinary reasonable person would have understood from Ms Meldrum-Hanna’s statement, “But the regulator is confident its integrity is intact, its rules are working. It says it hasn't found any proof of unauthorised slaughter at abattoirs interstate or at New South Wales knackeries”, that she made after Mr Celotto’s criticism that the data that the industry published gave “the impression that they’re looking after these horses and they’re not”. Mr V’landys contended that, given the overall negative impression that the report conveyed about the racing industry generally, and him in particular, the viewer was likely to have considered that the report adopted Mr Celotto’s view and so conveyed imputation 1. Next, Mr V’landys submitted that the viewer would have understood from Ms Sales’ concluding remarks, that because the ABC had provided Racing NSW with “**further**” information about the abattoir, knackeries and New South Wales thoroughbred racehorses featured in the report, when interviewed he had already been aware of the slaughter of thoroughbreds in a general way, regardless of their names or the identity or location of any slaughterhouses.
3. He argued that imputation 1 was premised on the viewer understanding that the report conveyed, not that he knew of what was occurring at Meramist abattoir, but that he “had a general awareness of the wholesale slaughter of racehorses wherever that was occurring” and so, had callously permitted such wholesale slaughtering to occur. He noted that MrBruce **McClintock SC** who had appeared for him at the trial, had submitted that “callously ignoring” that the rules were being complied with “is very close to the concept of moral blindness which is actual[ly] used. Moral blindness being, of course, the equivalent of actual knowledge … of shutting one’s eyes to the obvious both in equity and in … crime”.
4. **As to imputation 2:** Mr V’landys argued that imputation 2 was unlike imputations 3 and 4 because it “concerns his response (or lack thereof), not merely to the general phenomenon of racehorses being slaughtered at abattoirs and knackeries, but to the practices at a specific venue, namely, the Meramist abattoir”. He contended that, in order to make out imputation 2, the viewer did not have to have understood from the report that Mr V’landys actually knew what was occurring at Meramist abattoir. Rather, he submitted:

If, because of his indifference to the suffering of horses, **he had wilfully shut his eyes to the obvious fact of horses being slaughtered in large number at abattoirs and knackeries both interstate and in New South Wales, then it would have been correct to say that such indifference had caused him to ignore what was occurring at such venues**, including the Meramist abattoir, **even if he was not specifically aware of the practices there**.

1. Alternatively, he asserted that, if it were essential for the report to convey that he knew of those practices in order to establish that imputation 2 was carried, Ms Sales’ concluding remarks enabled the viewer to conclude that he did know. That was because, he argued, *first*, what Ms Sales said conveyed that, after his interview, the ABC had put Racing NSW and Mr V’landys on notice of those practices and they were then in a position to do something to ameliorate the situation at Meramist abattoir and, *secondly*, the report had told the viewer that, while Racing NSW’s rules prohibited thoroughbred racehorses from that State being sent to slaughter in places like Meramist abattoir, the Queensland rules of racing did not, so that the viewer would form the impression that the response to the ABC that Racing NSW and Mr V’landys would investigate what the footage showed, subject to issues about jurisdiction, was a failure and “a woefully inadequate response”.
2. **As to imputation 3:** Mr V’landys contended that his Honour erred in concluding that the viewer would have understood that when he told Ms Meldrum-Hanna that “zero” thoroughbred racehorses were sent to knackeries for slaughter in New South Wales, he was relying on the data available to Racing NSW. He submitted that the report conveyed that, despite Mr V’landys’ statements that “we have to rely on the information that’s given to us” and “you’ll never eradicate the one per cent no matter how hard you try”, in substance, the viewer would understand that Mr V’landys was nonetheless asserting that no, or virtually no, racehorses were sent to knackeries in New South Wales. Next, he argued, the viewer would have understood that the report endorsed, as applying to Mr V’landys, Mr Celotto’s criticism that the regulators “produce data that they want to release to the general public to give the impression that they’re looking after these horses and they’re not”. He contended that the viewer would form the impression that the regulator’s data “were false or at least misleading” and, based on Mr Celotto’s remark, Mr V’landys’ expressed reliance on that data was dishonest. In addition, Mr V’landys submitted that the primary judge erred in reasoning that, based on his Honour’s finding that Ms Meldrum-Hanna had not put to Mr V’landys that any of his statements was untrue, the viewer would evaluate the report in the same way a lawyer would in applying in *Browne v Dunn* (1893) 6 Rep 67.
3. **As to imputation 4:** Mr V’landys argued that the viewer would have understood from Ms Sales’ introduction and the fact that he was the sole interviewee in the report representing the racing industry that it was challenging the integrity of his and the industry’s assertions that it cared about, and had taken adequate steps to protect, the welfare of racehorses. He contended that he had confirmed this in his interview, but in her introduction of him into the narrative, Ms Meldrum-Hanna’s had juxtaposed his stance with her characterisation of the rules (that he had urged be adopted in 2016) as being part of a “PR offensive”, Mr Celotto’s assertions about the falsity of the industry’s data and the regulator not looking after retired racehorses, the extensive footage demonstrating the sheer scale and inhumanity of slaughter and the report’s contrast between what occurred at Meramist abattoir and Mr V’landys’ attempt to compare the treatment of racehorses to that of domestic animals. Mr V’landys submitted that, in this context, the viewer would form the impression that the report conveyed that regulators, including him, did not care about the welfare of thoroughbred racehorses and that their public assertions of taking steps to promote their welfare were not genuine. He asserted that, while the footage of cruelty at Meramist abattoir had occurred behind “closed doors”, the footage of the unauthorised Camden auctions was taken “in broad daylight” and included one person there admitting that horses sold would “go to the doggers” (i.e. dog meat knackeries). He argued that, in the viewer’s mind, this objective footage would undermine the credibility of the regulators’, and in particular, Mr V’landys’, professions of care for the welfare of race horses and the efficacy of their rules to prevent wastage. As a result, he contended, the viewer would infer, using loose thinking, that the report was challenging his truthfulness.
4. In oral submissions, Mr V’landys accepted that he had to demonstrate error by the primary judge in order to succeed on his appeal. He argued that the viewer would understand that the program was not simply saying that he was an incompetent administrator, but was asserting that he was dishonest and would infer that the report was doing so by retorting to Mr V’landys’ assertions in the interview: “How can you possibly be heard to say this stuff isn’t happening when you’ve set up something which is so pathetically unavailing?”.

# Consideration

1. Both sides accepted that the approach to appellate review of a trial judge’s findings as to whether or not a publication conveyed an imputation is that of a rehearing where the appeal court is in as good a position as the judge was to determine the proper inference to be drawn from the objective evidence, being here the report, as in *Warren v Coombes* (1979) 142 CLR 531 at 547 per Gibbs ACJ, Jacobs and Murphy JJ.
2. Neither side sought to support the *obiter dicta* of the Court of Appeal of the Supreme Court of Victoria in *Gatto v Australian Broadcasting Corporation* [2022] VSCA 66 that a finding by a trial judge as to whether a matter complained of conveyed an imputation was a discretionary judgment, in respect of which appellate review should proceed in accordance with the principles in *House v The King* (1936) 55 CLR 499 at 504–505 per Dixon, Evatt and McTiernan JJ. In *Bazzi v Dutton* (2022) 289 FCR 1, Rares and Rangiah JJ at 7 [22]–[28] and Wigney J at 15 [53] held that those *dicta* in *Gatto* [2022] VSCA 66 were not correct.

## The viewer perspective grounds

1. The tribunal of fact, be it judge or jury, evaluates a publication using the moral or social standards of the community to determine what it conveyed to the ordinary reasonable person: *Readers Digest Services Pty Ltd v Lamb* (1982) 150 CLR 500 at 505-506 per Brennan J with whom Gibbs CJ, Stephen, Murphy and Wilson JJ agreed. Here, the report was published primarily as a television broadcast and the viewer would have seen it uninterrupted. While other versions of the report were able to be replayed on the internet using a browser or read as a transcript, the ordinary reasonable viewer or reader of those versions is also likely to have watched or read it once without pausing, or going back over parts of it. Kiefel CJ, Bell, Keane, Nettle and Gordon JJ explained in *Trkulja* 263 CLR at 160-161 [32] the task of analysing the capacity of a publication to convey a defamatory imputation. They said:

… **that exercise is one in generosity not parsimony.** The question is not **what the allegedly defamatory words or images in fact say or depict but what a jury could reasonably think they convey to the ordinary reasonable person** (*Favell* (2005) 79 ALJR 1716 at 1721 [17]; 221 ALR 186 at 192 per Gleeson CJ, McHugh, Gummow and Heydon JJ); **and it is often a matter of first impression.** **The ordinary reasonable person is not a lawyer who examines the impugned publication over-zealously but someone who views the publication casually and is prone to a degree of loose thinking** (*Morgan v Odhams Press Ltd*[1971] 1 WLR 1239 at 1245; [1971] 2 All ER 1156 at 1162-1163 per Lord Reid). He or she may be taken to “read between the lines in the light of his general knowledge and experience of worldly affairs” (*Lewis*[1964] AC 234 at 258 per Lord Reid;*Favell*(2005) 79 ALJR 1716 at 1719–1720 [10]; 221 ALR 186 at 190 per Gleeson CJ, McHugh, Gummow and Heydon JJ), but **such a person also draws implications much more freely than a lawyer, especially derogatory implications** (*Lewis* [1964] AC 234 at 277 per Lord Devlin; *Chakravarti v Advertiser Newspapers Ltd*(1998) 193 CLR 519 at 573–574 [134] per Kirby J; Favell (2005) 79 ALJR 1716 at 1720 [11]; 221 ALR 186 at 190 per Gleeson CJ, McHugh, Gummow and Heydon JJ), and takes into account emphasis given by conspicuous headlines or captions (*Mirror Newspapers Ltd v World Hosts Pty Ltd* (1979) 141 CLR 632 at 646 per Aickin J; *Rivkin*(2003) 77 ALJR 1657 at 1661–1662 [26]; 201 ALR 77 at 83 per McHugh J; at 1699 [187] per Callinan J; *Favell* (2005) 79 ALJR 1716 at 1719 [8]; 221 ALR 186 at 189 per Gleeson CJ, McHugh, Gummow and Heydon JJ). Hence, as Kirby J observed in *Chakravarti v Advertiser Newspapers Ltd* ((1998) 193 CLR 519 at 574 [134]), “[w]here words have been used which are imprecise, ambiguous or loose, **a very wide latitude will be ascribed to the ordinary person to draw imputations adverse to the subject”**.

(emphasis added)

1. In addition, in *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186 at 190 [10]–[12], Gleeson CJ, McHugh, Gummow and Heydon JJ said in relation to the capacity of a publication to convey a meaning:

**In determining what reasonable persons could understand the words complained of** to mean, the court must keep in mind the statement of Lord Reid in *Lewis v Daily Telegraph Ltd* [[1964] AC 234 at 258]:

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.

Lord Devlin pointed out, in *Lewis v Daily Telegraph Ltd*, [[1964] AC at 277] that whereas, for a lawyer, an implication in a text must be necessary as well as reasonable, **ordinary readers draw implications much more freely, especially when they are derogatory**. That is an important reminder for judges. In words apposite to the present case, his Lordship said: [[1964] AC at 285]

It is not … 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.**

A *mere* statement that a person is under investigation, or that a person has been charged, may not be enough to impute guilt. [*Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293] **If, however, it is accompanied by an account of the suspicious circumstances that have aroused the interest of the authorities, and that points towards a likelihood of guilt, then the position may be otherwise. There is an overlap between providing information and entertainment, and the publishing of information coupled with a derogatory implication may fall into both categories. It may be that a bare, factual, report that a house has burned down is less entertaining than a report spiced with an account of a suspicious circumstance.**

(bold emphasis added; italic emphasis in original)

### The characterisation of the ordinary reasonable viewer of 7:30

1. I reject Mr V’landys’ argument that there was no evidence or other basis entitling the primary judge to make and act on his following findings about the characteristics of the ordinary reasonable viewer of *7:30*, namely:

[72] The first general observation is that the report was broadcast as part of an episode of one of the ABC’s flagship news and current affairs programs. That program, 7.30, is a half-hour long program which the ordinary reasonable viewer would understand generally includes well-researched reports by experienced journalists and social and political commentators concerning serious issues of public interest or concern. It should be noted, in this context, that, somewhat unusually for the 7.30 program, the report in question was almost 50 minutes long and occupied the entire episode of 7.30 on 17 October 2019.

[73] Returning to the nature of the program generally, while views may of course differ, the ordinary reasonable viewer of 7.30 would most likely understand that the program was a respected current affairs program which was generally not prone to sensationalism, or loose or imprecise journalism or reporting. The ordinary reasonable viewer of 7.30 would be a person interested in watching a program containing serious and well-researched reporting about important issues. Such a viewer would generally be more likely to view the program carefully and be less likely to engage in loose thinking and speculation than viewers of more sensationalist and less informative programs aimed more at entertainment than serious journalism.

1. It has long been the law that, as Lord Selborne LC said in *Capital and Counties Bank v Henty* (1882) 7 App Cas 741 at 745:

The test, according to the authorities, is, whether **under the circumstances in which the writing was published**, reasonable men, **to whom the publication was made**, would understand it in a libellious sense.

(emphasis added)

1. In a defamation action, the mode or manner of publication is a material fact in determining whether any of the meanings or imputations alleged was conveyed to an ordinary reasonable reader, listener or viewer of a publication: *Farquhar v Bottom* [1980] 2 NSWLR 380 at 386 [23]–[24] per Hunt J; *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158 at 164D–169B per Hunt CJ at CL with whom Mason P and Handley JJA agreed. And, as Lord Reid said in *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239 at 1245G–H (and see too at 1254C–D per Lord Morris of Borth-y-Gest):

If we are to follow *Lewis'* case [*Lewis v Daily Telegraph Ltd*] [1964] AC 234 and take the ordinary man as our guide then **we must accept a certain amount of loose thinking**. 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.

**The publishers of newspapers must know the habits of mind of their readers and I see no injustice in holding them liable if readers, behaving as they normally do, honestly reach conclusions which they might be expected to reach.**

(emphasis added)

1. In *Skuse v Granada Television Ltd* [1996] EMLR 278 at 286, Sir Thomas Bingham MR, giving the judgment of himself, Beldam and Kennedy LJJ said (drawing upon what Diplock LJ had said in *Slim v Daily Telegraph Ltd* [1968] 2 QB 157 at 171):

In the present case we must remind ourselves that **this was a factual programme, likely to appeal primarily to a seriously minded section of television viewers**, but it was a programme which, even if watched continuously, would have been seen only once by viewers many of whom may have switched on for entertainment. **Its audience would not have given it the analytical attention of a lawyer to the meaning of a document**, an auditor to the interpretation of accounts, or an academic to the content of a learned article. **In deciding what impression the material complained of would have been likely to have on the hypothetical reasonable viewer we are entitled (if not bound) to have regard to the impression it made on us**.

(emphasis added)

1. I am of opinion that the primary judge correctly evaluated the characteristics of the ordinary reasonable viewer of *7:30* and how that viewer would have understood what the report conveyed. His process was substantially similar to how Lord Reid explained the ordinary reasonable person would act in *Lewis* [1964] AC at 259-260, namely:

Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. **One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question.** So let me suppose a number of ordinary people discussing one of these paragraphs which they had read in the newspaper. No doubt one of them might say — “Oh, if the fraud squad are after these people you can take it they are guilty.” **But I would expect the others to turn on him, if he did say that, with such remarks as — “Be fair. This is not a police state. No doubt their affairs are in a mess or the police would not be interested. But that could be because Lewis or the cashier has been very stupid or careless.** We really must not jump to conclusions. The police are fair and know their job and we shall know soon enough if there is anything in it. Wait till we see if they charge him. **I wouldn't trust him until this is cleared up, but it is another thing to condemn him unheard.”**

What the ordinary man, not avid for scandal, would read into the words complained of **must be a matter of impression.** I can only say that I do not think that he would infer guilt of fraud merely because an inquiry is on foot.

(emphasis added)

1. Lord Kerr of Tonaghmore JSC made the same point in giving the judgment of Lord Reed DPSC, Lady Black, Lord Briggs, Lord Kitchin JJSC and himself in *Stocker v Stocker* [2020] AC 593 at 605 [39]. He held 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 circumstances in which it was made”: see too *Horlick v Associated Newspapers Ltd* [2010] EWHC 1544 (QB) at [8], [10] per Eady J; *John v Times Newspapers Ltd* [2012] EWHC 2751 (QB) at [19] per Tugendhat J; *Chau v Australian Broadcasting Corporation (No 3)* (2021) 386 ALR 36 at 46–47 [35]–[37] per Rares J; *Gatley on Libel and Slander* (13th ed, 2022, Sweet & Maxwell) at [3-030] fn 318; Collins, *The Law of Defamation and the Internet* (3rd ed, 2010, Oxford University Press) at [8.15].
2. The ordinary reasonable reader, listener or viewer is a person whose understanding of what the matter complained of in a defamation action conveys necessarily must be representative of the class of ordinary reasonable members of the community who read, listened or viewed the publication. Different classes of readers, listeners or viewers will have different appreciations of what a publication is saying. Thus, the readers of a technical scientific journal that allegedly conveys a defamatory meaning, and those readers’ characteristics or approach, are not likely to be the same as those of ordinary reasonable persons who read a tabloid newspaper or a weekly gossip magazine.
3. Likewise, the characteristics and approach of the viewing audience for a serious daily current affairs program broadcast after 7pm such as *7:30* are likely to be different to those of an audience for a program dealing with random dance partners of celebrities, or people for whom the audience votes as to whether they should get married or leave a shared house, to which the viewers have devoted their attention by watching over numerous episodes. In the former case the viewer is seeking to be informed about what may be significant issues of the day, whereas in the latter he or she is seeking to be entertained by the on screen antics of the performers or those who wish to display some aspect of their personalities to the watching audiences.
4. Depending on the nature of the program that the viewer has selected to watch, his or her focus may be to learn from what is broadcast or to be informed, amused, distracted or entertained by it. It is a feature of everyday life that people change their approach to absorbing or comprehending communications that they read, hear or see depending on the context of the publication and the person’s purpose in reading, listening to or viewing it. A person may be expected to read a tabloid newspaper with a different degree of care and attention to how he or she would read a scientific or learned paper, an important business document or an email or letter from a friend or relative.
5. But in every case where the question is whether a video or television publication conveys a defamatory imputation, the hypothetical viewer is an ordinary reasonable member of the type of audience who watches a program of the kind in issue in the way in which such a person ordinarily does. This required his Honour to take into account, in assessing how the viewer would understand the report and whether it conveyed the imputations, the degree to which such a program’s viewers had a proneness to loose thinking.
6. Contrary to Mr V’Landys’ argument, his Honour did not arrive at his findings that none of the imputations was conveyed by approaching the report as if the viewer would have reasoned as a trained lawyer who was aware of the legal rule in *Browne v Dunn* 6 R 67. Rather, the primary judge made his findings about each imputation from the perspective of an ordinary reasonable viewer who watched the report as a whole. As the publishers put, his Honour’s approach was not scholarly or lawyer-like, but rather was informed by common sense.
7. In the end, this attribution of the characteristics and approach of the viewer is a matter that, in a jury trial, the jurors would undertake based on their membership of the community and general knowledge about publications of the type that carried the matter complained of. It is not, as Mr V’landys argued, a question of judicial notice or for evidence. Publication of allegedly defamatory matter to persons in an intended audience takes place in the context of our experience of everyday life.
8. Obviously there was a lot more in the report than the mere reporting of a charge, as had been the position in *Lewis* [1964] AC 234. But, as his Honour reasoned, the viewer would have understood from the context of the report as a whole, including the way in which Mr V’landys was interviewed, the absence of any challenge by Ms Meldrum-Hanna to the veracity of what he said or the making of any direct suggestion that he had seen or was aware of any of the covert or other footage gathered over the preceding two years of the report’s “investigation”, that it was saying that he might have been, or probably was, incompetent as a regulator, and that, even though people like Mr Celotto were accusing him of knowing what that footage and other material showed, the reporter and the ABC were not endorsing that accusation.
9. For these reasons, I am of opinion that his Honour correctly identified (at [72]–[73] of his reasons as quoted in [#75] above) the characteristics and approach of the ordinary reasonable viewer of *7:30* in order to assess the degree of care and attention with which he or she would have watched the broadcast.

### The primary judge’s use of impressions

1. I reject ground 2, namely that the primary judge erred in relying on his own impressions that the report did not convey any of the imputations, both after first viewing the report and their substantial confirmation after considering the evidence, arguments and several re-viewings of the report extensively in preparing his reasons. The submission assumed, wrongly, that a judge, sitting without a jury, who first reads, listens to or sees a publication for the purpose of a defamation action will not do so from the perspective of the ordinary reasonable reader, listener or viewer of such a publication. The purpose for which his Honour first viewed the report was to form an impression of what it conveyed, from the perspective of the ordinary reasonable viewer, just as each member of this Full Court did before the hearing of the appeal, and is, as Sir Thomas Bingham MR explained in *Skuse* [1996] EMLR at 286, unexceptionable.
2. Of course, a judge, as an individual judicial officer, will be a professional with the experience and ability to assess evidence, including a matter complained of, and reason objectively. But, just as with any other aspect of judicial fact finding, a judge can be expected to use those professional attributes in accordance with the rules and principles of law applicable to the determination of the issues in the particular proceeding, such as in a case where a judge in a defamation action first reads, listens to, or views the matter complained of. The judge can be expected to seek to place himself or herself in the same position as a jury, using the moral or societal standards of the community, and be obedient to the legal tests for determining, as an ordinary reasonable reader, listener or viewer would, whether an imputation is conveyed by the matter complained of. In doing so, the judge will form an impression about whether the particular publication conveyed that alleged meaning. As I said in *Chau* 386 ALR at 45-46 [32]:

Moreover, the tribunal of fact must also put itself into the position of an ordinary reasonable viewer of the particular publication. **This involves some mental agility.** The degrees of meaning that a Shakespearean play will both be capable of conveying and that it actually conveys can depend on the education of the audience, its knowledge of Shakespeare and its ability to penetrate what is often the bard’s layers of meanings.

1. The judge must engage in some mental agility, for the very reason that he or she is a judge and not a member of a jury. But this does not entail that the primary judge was wrong to record, as he did, his first and last impressions and to take those into account as he was entitled to do: *Skuse* [1996] EMLR at 286. Once the issues in a defamation trial have been explored by argument and evidence, the tribunal of fact (judge or jury) must return to evaluate the matter complained of afresh to determine whether, *first*, it conveys the imputations to an ordinary reasonable reader, listener or viewer and, if so, *secondly*, they are defamatory. In doing so, the judge or jury must put to one side the fact that the matter complained of will have been read, listened to or shown multiple times during the trial and also while the judge or jury is deliberating. A first impression of an alleged defamatory publication can be a useful check in later evaluations of the matter complained of, including whether the imputations pleaded (or ones not differing in substance) occurred to the judge’s or jury’s mind as a first impression before that person’s mind was affected by the intense analysis of the publication as an integral part of the conduct of the trial.
2. I am of opinion that there is nothing in the primary judge’s reasons or in Mr V’landys’ submissions to suggest that, when forming his first and final impressions, his Honour did not put himself in the position of the ordinary reasonable viewer as required by legal principles that he correctly identified, including assessing the degree to which the viewer engaged in any loose thinking. Indeed, I also tried to view the report initially and thereafter as the ordinary reasonable viewer would have and came to the same first and final impression, namely that it did not convey any of the imputations.
3. For these reasons the viewer perspective grounds fail.

## The actual knowledge grounds

1. There is a preliminary issue as to whether the Full Court should entertain Mr V’landys’ argument on appeal against the primary judge’s conclusion that none of the imputations was conveyed if it raises a new case as to ‘Nelsonian blindness’ that he did not put at trial.
2. Of course, the question as to whether a matter complained of conveys an imputation depends only on the evidence comprising the publication itself (unless an innuendo meaning is pleaded) and so can be considered on appeal in the same way as a new question of law that, had it been in issue at the trial, would not have been capable of any answer by different evidence. However, ordinarily, it is fundamental to the proper administration of justice that the substantial issues between the parties are settled, and a party will be bound by the conduct of his, her or its case, at the trial: *Coulton v Holcombe* (1986) 162 CLR 1 at 7–8. There, Gibbs CJ, Wilson, Brennan and Dawson JJ approved what Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ had said earlier in *University of Wollongong v Melwally (No 2)* (1985) 59 ALJR 481 at 483:

It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, **it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.**

(emphasis added)

1. I have thought it better to deal with the substance of Mr V’landys’ new way of putting the case than to refuse him leave to depart from how he put the case at trial because, *first*, the publishers were able to meet the new argument, and, *secondly*, there was no evidence that could have been led had the argument been put at the trial.
2. In final address, the primary judge clarified with Mr McClintock SC, who appeared below for Mr V’landys, the nature of his case when discussing Mr Celotto’s remark about the industry producing “data” to give the public the false impression that it cared about retired racehorses (set out in the quoted excerpt at [#28] above), in the following exchange:

HIS HONOUR: … this exchange here, I think, shows up **what is really the key issue between the parties** here whether what’s being conveyed here is that the regulator has these rules, but is unable to enforce them or it doesn’t know what the real situation or **as you would have it, that it’s conveying that the regulator knows full well that its rules aren’t being complied with.**

MR McCLINTOCK: **Or is callously ignoring it**. There’s a point that comes later – it comes later on, your Honour, which is very close, **the concept of moral blindness** **which is actual[ly] used. Moral blindness being, of course, the equivalent of actual** **knowledge, you know, of shutting one’s eyes to the obvious both in equity and … in crime.**

(emphasis added)

1. As noted above, on appeal Mr V’landys relied on *Farah Constructions* 230 CLR at 162–164 [172]–[177], where Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ discussed the principles for determining whether a person has acted dishonestly. They said (at 162 [173]):

As a matter of ordinary understanding, and as reflected in the criminal law in Australia (*Macleod v The Queen* (2003) 214 CLR 230 at 242 [36]-[37]), **a person may have acted dishonestly, judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards**. Further, as early as 1801, Sir William Grant MR **stigmatised those who “shut their eyes” against the receipt of unwelcome information** (*Hill v Simpson* (1801) 7 Ves Jr 153 at 170 [32 ER 63 at 69]. See further *May v Chapman and Gurney* (1847) 16 M & W 355 at 361 [153 ER 1225 at 1228]; *Jones v Gordon* (1877) 2 App Cas 616 at 625, 628-629, 635; *English and Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2 QB 700 at 707-708).

(emphasis added)

1. Their Honours held that “knowledge”, for the purposes of determining whether a person had assisted a trustee or fiduciary with knowledge of a dishonest or fraudulent design on the latter’s part, the person had to have (1) actual knowledge of the design (2) wilfully shut his or her eyes to the obvious, (3) wilfully and recklessly failed to make such inquiries as an honest and reasonable man would make or (4) knowledge of circumstances which would indicate the facts to an honest and reasonable man (230 CLR at 163–164 [176]–[177]).
2. In *Banditt v The Queen* (2005) 224 CLR 262 at 265–266 [2]–[3], Gummow, Hayne and Heydon JJ discussed the concepts of recklessness in tort and criminal law as follows:

When “reckless” is used in applying the principles of the tort of negligence, the yardstick is objective rather than subjective. On the other hand, to sustain an action in deceit, fraud is proved when it is shown “that a false representation has been made **(1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false**”. (The formulation is that of Lord Herschell in *Derry v Peek* (1889) 14 App Cas 337 at 374). But (3) is but an instance of (2) because, as Lord Herschell put it in *Derry v Peek* (14 App Cas at 374): **“[O]ne who makes a statement under such circumstances can have no real belief in the truth of what he states.”** This reasoning is akin to that which supports the evidentiary inference explained by Lord Esher MR as being that **one who wilfully shuts his eyes to what would result from further inquiry may be found to know of that result** (*English and Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2 QB 700 at 707-708)

To these expositions of the civil law by Lord Herschell and Lord Esher there may be added the following statement by Lord Edmund-Davies in his dissenting speech in *Commissioner of Metropolitan Police v Caldwell* ([1982] AC 341 at 358. The majority decision in *Caldwell* was unanimously overruled in *R v G* [2004] 1 AC 1034) :

“So **if a defendant says of a particular risk, ‘It never crossed my mind,’ a jury could not on those words alone properly convict him of recklessness simply because they considered that the risk *ought* to have crossed his mind, though his words might well lead to a finding of negligence**. But a defendant's admission that he ‘closed his mind’ to a particular risk could prove fatal, for, ‘**A person cannot, in any intelligible meaning of the words, close his mind to a risk unless he first realises that there is a risk; and if he realises that there is a risk, that is the end of the matter’**. (See *Glenville Williams, Textbook of Criminal Law* (1978) p 79)”

(bold emphasis added; italic emphasis in original)

1. At trial, as Mr McClintock SC’s submission quoted at [#97] above explained, Mr V’landys’ case involved him asserting that the viewer would have understood that he had actual knowledge of, or its equivalent wilful blindness to, the wastage and appalling cruelty portrayed in the report. In other words, Mr McClintock SC’s argument was that Mr V’landys actually knew that the industry was flouting the new rules and sending horses to slaughter or that he shut his eyes to what was obvious to him. His Honour dealt comprehensively in his reasons with that case and rejected it. Mr V’landys’ conduct of the trial was at all times of a case that the report conveyed that he actually knew what the footage depicted and, accordingly, had lied about that reality in his interview.
2. The case put to his Honour was not in the category, to use the example of Lord Edmund Davies in *Commissioner of Metropolitan Police v Caldwell* [1982] AC 341 at 358D, where Mr V’landys asserted that it was sufficient to say that it never crossed his mind that the wastage and cruel treatment of thoroughbred racehorses was occurring in the way the program reported.
3. Mr McClintock SC’s submissions, that “callously ignoring” was equivalent to actual knowledge, reinforced the correctness of the primary judge’s understanding that Mr V’landys’ case at trial was that the report conveyed imputations that he had actual knowledge of the inhumane slaughtering of thoroughbreds on the scale depicted in the report or realised that there was such a risk and had closed his mind to it. At trial, Mr V’landys had relied on the proneness of the viewer to engage in loose thinking to support the argument that the viewer would understand that the report conveyed the imputations. His Honour found that the viewer would have understood Ms Sales’ concluding remarks, in the context of both Ms Meldrum-Hanna’s hypothetical questioning of Mr V’landys and his expressed reliance on Racing NSW’s data and systems, to convey that he might have been “asleep at the wheel”. But, the primary judge found, the viewer would not have understood the report to convey that Mr V’landys had any actual knowledge or awareness of the matters that his imputations asserted.
4. On appeal, the new argument was that the report conveyed to the viewer that Mr V’landys “must have known” about the cruelty, flouting of the rules and wholesale slaughter of thoroughbred racehorses because of what the report depicted about those matters. It was not put as a case that the viewer would have understood that Mr V’landys buried his head in the sand about what was obviously going on around him and he should have realised that those misdeeds were occurring. However, Mr V’landys’ new Nelsonian blindness argument eschewed the significance of the report not portraying him being confronted with the damning footage or questions that suggested that he knew, or deliberately had avoided making any enquiry or undertaking any checking process to ascertain whether, that shocking treatment and wastage of thoroughbred racehorses was occurring.
5. On appeal, Mr V’landys also relied on Ms Sales’ introductory statement, that people who had ever placed a bet on the Melbourne cup or enjoyed a day at the races had “an obligation not to turn a blind eye”, as supporting his new contention that the viewer would draw an inference that this was one of the serious questions that the report would raise about the sport’s integrity. However, at the trial he did not suggest that Ms Sales’ opening statement would have been understood by the viewer to convey that he had turned a blind eye to what he knew was occurring. His Honour did not err by dealing with Mr V’landys’ case as put. Moreover, after watching the report as a whole, the viewer would not have concluded that Ms Sales’ opening remark, in context, conveyed that Mr V’landys knew, or had chosen to avoid enquiring, about the abuses of thoroughbred racehorses or breaches of Racing NSW’s new rules of racing that the report revealed.
6. A viewer’s propensity to engage in loose thinking exists in combination with his or her other characteristics as an ordinary **reasonable** person, including the ability to say “be fair” when an extreme meaning is suggested, as Lord Reid explained in *Lewis* [1964] at 259-260. Mason J explained in *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 at 301, albeit in reasons dealing with the capacity of a publication to convey an imputation as opposed to whether in fact it did:

It is one thing to say that a statement is capable of bearing an imputation defamatory of the plaintiff because the ordinary reasonable reader would understand it in that sense, drawing on his own knowledge and experience of human affairs in order to reach that result. It is quite another thing to say that a statement is capable of bearing such an imputation merely because it excites in some readers a belief or prejudice from which they proceed to arrive at a conclusion unfavourable to the plaintiff**. The defamatory quality of the published material is to be determined by the first, not by the second, proposition. Its importance for present purposes is that it focuses attention on what is conveyed by the published material in the mind of the ordinary reasonable reader.**

(emphasis added)

1. The legal test for determining whether an imputation is conveyed involves an element of reasonableness that ordinary members of the community bring to bear in forming their general impression of what a matter complained of conveys when read, heard or seen as a whole.
2. The fact that the authorities, such as *Trkulja* 263 CLR at 160-161 [32] and *Lewis* [1964] AC 234, contemplate that the ordinary reasonable reader, listener or viewer can draw defamatory meanings more easily than a lawyer and can do so after engaging in loose thinking, does not entail that in any particular case the tribunal of fact will come to the conclusion that an alleged imputation is conveyed. That is because the hypothetical person is reasonable and the tribunal of fact, in deciding what meaning or imputation a publication conveys, is not bound to select the most damaging, or any other in a range of, available meanings: *Stocker* [2020] AC at 604 [34]-[35], 605 [37]-[38], 607 [50]. There (at 604 [35]) Lord Kerr endorsed the guidance that Sir Andrew Clarke MR had given in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 at [14], including the statement that “the governing principle is reasonableness”. I agree.

## Did the report convey that Mr V’landys was a liar?

1. It may be accepted that the report conveyed a negative impression of Mr V’landys as ground 3 (summarised at [#56(2)] above) asserted. However, ground 3 also presupposes that the negative impression would have conveyed the imputations, rather than any other meaning, when the viewer formed impressions of what the report was saying about Mr V’landys after watching it as a whole.
2. As the primary judge noted, the viewer would have appreciated that, in contrast to her interview with Mr V’landys, when Ms Meldrum-Hanna interviewed Mr Dumesny, the CEO of Harness Racing NSW, she confronted him directly with the reality that his organisation had done nothing at all to prevent slaughter or wastage of standardbred trotters in the three years since its public statement that promised lifelong tracking and care for those horses.
3. The program informed the viewer that Racing NSW had introduced its new policy, changed the rules of racing, and purchased three properties as “retirement paradises” for retired thoroughbred racehorses. Mr V’landys said that the data showed no wastage, in the context of saying he had never heard and had no evidence about what Ms Meldrum-Hanna said was a “rumour” that New South Wales racehorses were being fed to greyhounds as fuel. But, when the reporter then asked him hypothetical questions about such conduct, he acknowledged that, if that were happening, it was “against the rules of racing and if we have evidence of that, they will be dealt with pretty severely”. The viewer would have realised that Ms Meldrum-Hanna did not challenge Mr V’landys’ responses with the wealth of material that the viewer knew she had and, as Ms Sales made clear, it was only after his interview that the ABC had provided him with some of that information.
4. After Mr V’landys said that his (Racing NSW’s) data was telling him that zero New South Wales horses were ending up at a knackery or abattoir, and the viewer saw the splice in of Mr Celotto’s criticism of the untruth of the data, Ms Meldrum-Hanna only put to him: “What if I told you that’s not correct. That there are New South Wales horses ending up at a knackery and an abattoir?” The viewer would have understood that this hypothetical question was not accusing Mr V’landys of lying and also would have been mindful of his response:

Well, **if there is**, it means that the people have acted against the rules of racing and **if we have evidence of that, they will be dealt with pretty severely.**

**We’ll put the full force of the rules of racing against anyone** that does that because it’s a severe breach of our rules and our terms and conditions of being in the thoroughbred racing industry.

(emphasis added)

1. In particular, the viewer would have appreciated that Ms Meldrum-Hanna never put to Mr V’landys any of the hard evidence in the covert and other footage which showed, seemingly incontrovertibly, that New South Wales thoroughbred racehorses were being brutally slaughtered at Meramist abattoir or sold at Camden auctions to the two local knackeries. Instead, the viewer saw that she put to him only “a rumour” and theoretical questions, despite the fact that she had reviewed footage showing the graphic reality with, and obtained critical comments from, Mr Celotto and Professor McGreevy, which the report interspersed with Mr V’landys’ interview excerpts. And the viewer would know that the reporter had spoken on air to the trainer, Mr Pfeiffer, who could not explain why, and sounded genuinely shocked when told that, Tahitian Black, a racehorse that he had retired, was still listed in Racing NSW’s data as “active” when, as the report demonstrated, that horse had been slaughtered at Burns Pet Foods.
2. No doubt, the viewer would have perceived that the report was being critical of the conduct of regulators, including Racing NSW and Mr V’landys as its CEO, in respect of the enforcement, effectiveness and efficacy of their measures to prevent wastage, slaughtering of and cruelty to horses. The viewer would have formed a negative impression of Mr V’landys and thought that he was not doing a good job and was probably incompetent as a regulator because he and Racing NSW should have picked up the activities that the report was exposing.
3. However, the viewer would also have understood that, as Ms Sales said in her introduction and Ms Meldrum-Hannah reiterated when introducing and referring to the inhumane slaughter, the report was presenting the results of a two year investigation using considerable covert footage taken over those years at Meramist abattoir and footage of the more overt activity at the Camden auction. The viewer would also have understood that, while this footage obviously showed that horses were being cruelly treated and slaughtered in considerable numbers at the abattoir, there was no footage of any cruelty or conditions inside the two New South Wales knackeries where horses were slaughtered for pet food.
4. Even accepting that the viewer would have understood that a regulator, such as Racing NSW, could have sent an investigator to Meramist abattoir, the two knackeries or the monthly public auctions at Camden, who would or could have observed the treatment, sale or slaughter of horses as it occurred and also could have researched on its database whether any of those horses were thoroughbred racehorses, the viewer would not have concluded that Mr V’landys knew that such treatment, slaughter and sales were occurring or had known of, but closed his mind to, the risk of this happening.
5. Moreover, the viewer would have understood from the report that, *first*, the Queensland regulators were not prepared to answer any questions at all about their conduct or the activities at Meramist abattoir but, *secondly*, Mr V’landys was willing to answer all questions asked of him, none of which suggested that he knew, or was aware of but had closed his mind to the risk that there was, wastage and inhumane treatment of thoroughbred racehorses in the nature of that depicted and discussed in the report.
6. I reject Mr V’landys’ argument. I am of opinion that the ordinary reasonable viewer would not have concluded that Mr V’landys was saying on national television what he knew to be lies. This is especially so in circumstances where the viewer would understand that Mr V’landys could expect the report in which his interview would air would show him up to be lying if he in fact knew of the huge scale of wastage and or the appalling cruelty of the persons depicted at Meramist abattoir. Moreover, as the report concluded, Ms Sales reinforced the impression that Mr V’landys and Racing NSW did not know about what the covert and other footage in the report had disclosed had been happening to New South Wales thoroughbred racehorses at the two knackeries and Meramist abattoir. That is because she told the viewer that “**following our interview** with Racing New South Wales” (i.e., Mr V’landys) the ABC had given it “further information” and it had committed to investigating those matters but had raised questions about jurisdictions (which the viewer would infer related to its ability to deal with the brutal treatment of horses at Meramist abattoir, given that it was in Queensland).
7. The viewer would have been drawn to the impression that Mr V’landys did not know of those matters, but he probably should have. The ordinary reasonable viewer, however, would not have understood the report to be saying that Mr V’landys had turned a blind eye to the risk that the kind of activities that the report’s two year investigation had exposed were occurring. And, the viewer would not have concluded that Mr V’landys was a liar.
8. Ground 3 must be rejected.

## Were the imputations conveyed?

1. In my opinion, the primary judge correctly found that the report did not convey the imputations for the reasons that his Honour gave. None of Mr V’landys’ challenges to those findings has substance.

### Imputation 1: Mr V’landys, as CEO of Racing NSW, callously permitted the wholesale slaughter of thoroughbred horses.

1. There is no substance in Mr V’landys’ submission that the primary judge proceeded on a misapprehension about the content of imputation 1. His Honour dealt with the case that Mr V’landys put at trial and correctly rejected it. Imputation 1 cannot be considered in a vacuum, divorced from the content of the report by which Mr V’landys alleged it was conveyed. The report focussed on the slaughter of thoroughbred racehorses at Meramist abattoir and the two knackeries in New South Wales. The only instances of wholesale slaughter shown in the report were at those at Meramist abattoir and, the viewer would infer, at the two knackeries. His Honour did not err in concluding that the report did not convey the generalised meaning in imputation 1.
2. I reject Mr V’landys’ argument that imputation 1 does not require the viewer to have understood that Mr V’landys actually knew of the wholesale slaughter of thoroughbred racehorses. As explained above, the viewer would not have understood the report to convey that Mr V’landys knew about the slaughtering of thoroughbred racehorses as depicted. The use of the words “callously permitted” in imputation 1 connotes that he made a deliberate decision to allow what he knew to be occurring to continue unchecked. Yet the viewer was not told in the report that Mr V’landys knew or even had, as he argued, “a general awareness of the wholesale slaughter of racehorses wherever that was occurring”. Such a conclusion in the context of the report, viewed as a whole, would be fanciful. The viewer would not have understood that the wholesale slaughter was “obvious” to Mr V’landys (or even that he knew of the risk that it was occurring and had shut his eyes to it), as opposed to being led to a conclusion that while he should have been aware of it, he was portrayed, as his Honour observed, “asleep at the wheel”.
3. The primary judge considered that the juxtaposition of Mr Celotto’s statement that “the regulators “produce data that they want to release to the general public to give the impression that they’re looking after these horses and they’re not” with Mr V’landys’ statement that Racing NSW’s “data” told him no New South Wales horses were ending up in a knackery or abattoir came fairly close to a direct assertion that the regulators knew that racehorses were being slaughtered in abattoirs and knackeries (see [#47] above). However, as his Honour found, this fell short of conveying that Mr V’landys knew, in fact, that the data was false. That is because the viewer, considering the report as a whole, would have understood that the “data” to which he referred was not detecting what was really happening, as opposed to conveying that his reliance on that “data” was a deliberate concoction of what he knew to be false.
4. The viewer would not have concluded that Mr V’landys was knowingly allowing the wholesale slaughter of thoroughbred racehorses to occur, especially when Ms Meldrum-Hanna did not put such an accusation to him, as the ordinary reasonable viewer would expect a fair journalist to do if that was what the report was intended to convey. While a publisher’s intention to convey a meaning is irrelevant to the evaluation of whether a matter complained of does convey a particular imputation, the viewer, acting reasonably and using his or her knowledge of ordinary human experience and common sense, can think about what the publisher intends to tell him or her, to arrive at a conclusion. The viewer would be drawn to think that Mr V’landys and Racing NSW had pretty ineffective systems and processes in place because they could not find what the two year investigation had uncovered, some of which was occurring in plain sight. But, since the viewer knew that Ms Meldrum-Hanna and the report as a whole had not directly accused Mr V’landys of acting in that way, the viewer would not have concluded that it conveyed that he already knew about the wholesale slaughter of thoroughbred racehorses that the two year investigation had uncovered and callously had allowed it to go on unchecked.

### Imputation 2: Mr V’landys, because of his indifference to their suffering, ignored the cruelty to which thoroughbred horses were subjected to in a Queensland abattoir

1. Mr V’landys’ argument, that, for imputation 2 to be found to have been conveyed, it was not essential that the report conveyed to the viewer that he actually knew what was occurring at Meramist abattoir, has no substance.
2. *First*, the viewer could only arrive at such a conclusion from some belief or prejudice of his or her own, not from what an ordinary reasonable person, after seeing the report as a whole, would have understood it to convey: *Harrison* 149 CLR at 301. *Secondly*, the viewer would know from the report that the footage taken at Meramist abattoir was obtained covertly over two years and had occurred in Queensland, which was outside Mr V’landys’ and Racing NSW’s regulatory control. *Thirdly*, there was nothing in the matter complained of (as the submissions seemed to accept) to suggest that Mr V’landys had ever heard of Meramist abattoir, let alone that he knew of the cruelty practiced on horses there. Nor was there any other material in the report to show that any other abattoirs or knackeries engaged in the same vile treatment toward horses as the workers filmed at Meramist abattoir. *Fourthly*, Ms Sales’ concluding remarks (and Ms Meldrum-Hanna’s hypothetical questioning of him) would have conveyed that, at the time of his interview, Mr V’landys had not been told and did not know of the appalling mistreatment of horses depicted on the covert footage from Meramist abattoir or that he and Racing NSW could have had some kind of power or regulatory responsibility for matters occurring in Queensland and about which the report had told viewers the Queensland authorities had not been prepared to speak to *7:30*. *Fifthly*, the viewer would have understood from Ms Sales’ closing remarks, in light of the preceding parts of report considered together, that the ABC had only given Mr V’landys and Racing NSW the information about Meramist abattoir, the two knackeries and the New South Wales thoroughbred horses mentioned in the report after his interview and that, as a result, they had been spurred into action which, the viewer was invited to think, may have been about time.
3. Imputation 2 was fanciful. It would not have been drawn by the ordinary reasonable viewer who saw the report as a whole.

### Imputation 3: Mr V’landys dishonestly asserted that no racehorses were sent to knackeries for slaughter in New South Wales, when he knew that was untrue

1. The report did not convey Imputation 3 to the viewer. *First*, the imputation asserts that Mr V’landys lied in the interview when, as I have already found, the viewer would have not formed that understanding. *Secondly*, contrary to Mr V’landys’ argument, the viewer’s capacity to engage in a degree of loose thinking and propensity to draw derogatory implications is dependent on what he or she **reasonably** can understand the publication to convey when viewed in context as a whole. That context included Mr V’landys’ reference to the need to rely on the data given to him and Racing NSW.
2. Of course, looking at the report as a whole, the viewer would have understood it to be critical of Mr V’landys, but not that it was portraying him as a blatant liar. The primary judge was correct to conclude that an ordinary, reasonable viewer of *7:30* would not jump to the conclusion that the report was saying that Mr V’landys was telling lies to the reporter, particularly when the viewer also would infer that, if he knew what he was saying was untrue, he also would know that there was a wealth of objective evidence available to expose such a lie.
3. Thus, his Honour correctly inferred that the viewer would have perceived (or stepped back and said, in Lord Reid’s words, “be fair”) that the reporter was not confronting Mr V’landys with the hard evidence, being the footage she had shown Mr Celotto, Professor McGreevy and the viewer, as the viewer would have expected if the message really was that Mr V’landys was lying. The viewer had seen Ms Meldrum-Hanna tackle Mr Dumesny’s prevarications head on and would have understood that her questioning of Mr V’landys, although cynical of the efficacy of his regulatory actions, was not attacking his veracity. If the viewer contemplated the possibility that the report was conveying that Mr V’landys was lying about zero racehorses being sent for slaughter to knackeries in New South Wales, he or she would have taken a step back and thought that, given what the matter complained of had shown Ms Meldrum-Hanna knew, she must not have had anything to use to accuse Mr V’landys of being dishonest, as opposed to asleep at the wheel.
4. The viewer would have understood from the report that Mr V’landys and Racing NSW had taken steps to provide for and said that they cared about the welfare of thoroughbred horses, but that it had exposed those steps to have failed to achieve their purpose in significant respects. The viewer would also have understood the report to question the integrity of those in the industry who engaged in the conduct of cruelty to horses and wastage that it exposed.
5. The viewer would also have understood that, while critical of him as an effective regulator, the report did not suggest that Mr V’landys knew of the appalling cruelty to horses that it depicted at Meramist abattoir or at the auctions of racehorses at Camden, their sale to knackeries and “doggers”.

### Imputation 4: Mr V’landys dishonestly asserted that Racing NSW cared about the welfare of thoroughbred horses and took adequate steps to protect their welfare when he knew that was untrue

1. As I have explained above, the viewer would not have concluded that the report conveyed that Mr V’landys was lying about the matters on which he was interviewed. The introduction referred to a challenge that the report would make to the racing industry’s integrity and it fulfilled that forecast. The viewer would have understood that the racing industry had many participants including horse owners and trainers as well as regulators.
2. However, in the context of the report as a whole, the viewer would not read between the lines or think loosely that it was accusing Mr V’landys of lying on national television if he knew that, despite the new rules of racing and steps that he and Racing NSW had taken, thousands of thoroughbred racehorses were still ending up being slaughtered in abattoirs and knackeries. The viewer would have understood that Mr V’landys’ comparative reference to the treatment of domestic cats and dogs with that of racehorses was somewhat defensive, but that he had made it in the context of explaining that “you’ll never eradicate the one per cent”.
3. The viewer would have been entitled to think that if the publishers were seeking to convey in the report that Mr V’landys was lying about his and Racing NSW’s care for thoroughbred racehorses and what they had done to protect their welfare, they would have said so. After all, the viewer would have known that the publishers had the objective facts in the covert and other footage to put directly to him so as to show him up as a mendicant. But, the viewer would realise that Ms Meldrum-Hanna did not do that and put only “rumour” and hypothetical questions to Mr V’Landys, without challenging his answers directly, in sharp contradistinction to her questioning of Mr Dumesny: *Stocker* [2020] AC at 604 [35], see [#107]-[#108] above.
4. I am of opinion that his Honour correctly decided that imputation 4 was not conveyed

## Other matters

1. It is understandable that Mr V’landys was upset by the publication of the report. It treated him very shabbily because, although Ms Meldrum-Hanna had a wealth of evidence, such as the covert footage and the information about the Camden auctions, on which she could have sought his comments or confronted him, she deliberately never put that to him. Instead, the publishers put the program to air with Mr V’landys’ interview spliced between the criticisms of Mr Celotto and Professor McGreevy and the covert footage that conveyed hard hitting criticism of Mr V’landys without giving him the opportunity to respond directly. This was not high quality journalism or fair or decent treatment of him.

# Conclusion

1. For the reasons above, the appeal should be dismissed with costs.

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| --- |
| I certify that the preceding one hundred and thirty-nine (139) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rares. |

Associate:

Dated: 26 May 2023

REASONS FOR JUDGMENT

KATZMANN J:

1. I agree with Rares J.

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| --- |
| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice Katzmann. |

Associate:

Dated: 26 May 2023

REASONS FOR JUDGMENT

O’CALLAGHAN J:

1. I agree with Rares J.

|  |
| --- |
| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Justice O’Callaghan. |

Associate:

Dated: 26 May 2023