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Supreme Court of Western Australia

RAYNEY -v- THE STATE OF WESTERN AUSTRALIA [No 9] [2017] WASC 367 (15 December 2017)

Last Updated: 21 December 2017

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

IN CIVIL

CITATION : RAYNEY -v- THE STATE OF WESTERN AUSTRALIA [No 9] [2017] WASC 367

CORAM : CHANEY J

HEARD : 1-31 MARCH, 311, 1921, 2628 APRIL, 8, 9, 12, 16 MAY, & 1719, 2428 JULY 2017

DELIVERED : 15 DECEMBER 2017

FILE NO/S : CIV 2177 of 2008

BETWEEN : LLOYD PATRICK RAYNEY

Plaintiff

AND

THE STATE OF WESTERN AUSTRALIA

Defendant

Catchwords:

Defamation - Press conference by police - Meaning of words used - Alternative imputations - Imputations of guilt or suspicion of guilt - Qualified privilege - Whether occasion of qualified privilege - Whether conduct of defendant reasonable - Whether imputations true - Conduct rule

Damages - Non-economic loss - Purpose served by noneconomic damages for defamation - Proper construction of *Defamation Act 2005* (WA), s 35 - Cap on damages - Aggravated damages - Causation - Mitigation - Damages or compensation received in other proceedings

Damages - Economic loss - Causation - Intervening events causing loss - Break in chain of causation

Legislation:

Defamation Act 2005 (WA), s 30, s 35, s 38

Result:

Judgment for the plaintiff

Category: A

Representation:

Counsel:

Plaintiff : Mr M L Bennett & Mr J D MacLaurin

Defendant : Mr T K Tobin QC, Ms R Young & Ms K A T Pedersen

Solicitors:

Plaintiff : Bennett + Co

Defendant : State Solicitor for Western Australia

Case(s) referred to in judgment(s):

Table of Contents

CHANEY J:

Summary of decision

1 The plaintiff, Mr Lloyd Patrick Rayney, claimed damages for defamation arising from a series of media conferences conducted by Detective Senior Sergeant Jack Lee during the course of an investigation into the murder of the plaintiff's wife, Mrs Corryn Rayney. The plaintiff claimed that the words used by DSS Lee in four media conferences conducted by him, or alternatively the words spoken at the last of the four conferences on 20 September 2007, bore the imputation that the plaintiff had murdered his wife. In the alternative, the plaintiff pleaded that the words meant that the plaintiff had so conducted himself as to give rise to a reasonable suspicion that he had murdered his wife.

2 The defendant, the State of Western Australia, denied that the words used bore either of the meanings pleaded by the plaintiff. It contended, however, that if the words did bear the plaintiff's alternative meaning, they were true. The defendant pleaded that the words used by DSS Lee bore a different meaning being that the police suspected the plaintiff of having murdered or unlawfully killed his wife and had reasonable cause for so suspecting, and that that imputation was true. The defendant also contended that if, contrary to its denial, the words did bear either of the meanings pleaded by the plaintiff, then they were uttered on an occasion which attracted the defence of qualified privilege, either under the *Defamation Act 2005* (WA) or at common law.

3 For the reasons set out, I have reached the following conclusions:

That the words used by DSS Lee on 20 September 2007 stand alone as a separate publication, and should be construed on their own.
That the words used by DSS Lee on 20 September 2007, in their entirety, bore the imputation that the plaintiff murdered his wife. The defendant did not assert that that imputation was true.
That the defence of qualified privilege, either under the *Defamation Act* or at common law, is not available to the defendant in the circumstances of the defamatory publication by DSS Lee.
That it follows that the plaintiff is entitled to be awarded damages for the defamation.

4 I have also concluded that the publication was attended by circumstances of aggravation which make the statutory cap on damages for noneconomic loss inapplicable. In those circumstances, I have determined that the damages for noneconomic loss, which are designed to compensate the plaintiff for the damage to his personal and business reputation, personal hurt and distress caused by the defamation and vindication of the plaintiff's reputation, should be assessed at $600,000.

5 In relation to damages for economic loss, to which the plaintiff is also entitled, I have concluded that the defamatory statements made by DSS Lee caused the plaintiff to suffer economic loss by way of loss of income for the period from the date of the defamation until the date of his arrest and charge with murder on 8 December 2010. I have concluded that thereafter the defamatory statements ceased to be a cause of economic loss and will not be a cause of loss in the future. Rather, the damage to the plaintiff's practice from that date onwards is attributable entirely to other causes. I have resolved the points of difference between the expert witnesses called by each party for the purpose of quantifying the plaintiff's losses, and propose that quantification of the amount of the plaintiff's economic loss be undertaken having regard to the findings made in these reasons following conferral between the parties and their experts.

6 In light of the conclusions I have reached as to the meaning of the words, any question of the truth of the imputations, with which most of the very long trial was concerned, has no bearing on the outcome. I have, however, reviewed all of the evidence and made findings in relation to those matters for the sake of completeness. Had it been necessary to determine those matters, I would have concluded that, in the circumstances known to the Western Australian Police as at 20 September 2007, and in light of the plaintiff's conduct then and subsequently known, it cannot be said that there were reasonable grounds to suspect that the plaintiff murdered his wife or that he had so conducted himself as to give rise to that suspicion. Rather, those matters gave rise to no more than a basis, which clearly did exist, for police to continue, as part of their wider investigation, to investigate whether the plaintiff may have had any involvement in his wife's death.

Introduction

7 On 7 August 2007, Mrs Corryn Rayney, then a registrar of the Supreme Court of Western Australia, went missing after attending a boot scooting class in Bentley, a suburb of Perth. Nine days later, on 16 August 2007, her body was found buried off a bush track in Kings Park. She had been murdered. From the time of her disappearance, the police carried out extensive investigations in what was referred to as 'Operation Dargan'. DSS Lee was the officer in charge and was designated as the police media liaison officer in relation to the investigation.[1]

8 A number of media conferences were conducted by DSS Lee in relation to the investigation. In particular, conferences were conducted by him, or at least media statements made, on 16 August 2007, 22 August 2007, 29 August 2007 and 20 September 2007.

9 The plaintiff, Lloyd Patrick Rayney, was the husband of the late Mrs Rayney. At the media conference on 20 September 2007, DSS Lee said that the police believed that Mrs Rayney had been killed at her home in Monash Avenue, Como, and that Mr Rayney was a suspect in the matter. When asked whether he was the prime suspect, DSS Lee responded that 'he's our only suspect at this time' and that 'he is the primary person of interest or, or the suspect'.

10 The plaintiff claims that the words spoken by DSS Lee to representatives of the media on 20 September 2007, construed in the context of words previously spoken by DSS Lee to the media on 16 August 2007, 22 August 2007 and 29 August 2007 (oral utterance), or alternatively the words spoken by DSS Lee on 20 September 2007, taken alone (alternative utterance), conveyed the defamatory imputation that the plaintiff murdered or unlawfully killed his wife (guilt imputation), or alternatively that he so conducted himself as to give rise to a reasonable suspicion that he murdered or unlawfully killed his wife (conduct imputation).

11 In December 2010, more than three years after DSS Lee described the plaintiff as the prime and only suspect, the plaintiff was charged by the police with the murder of his wife. After a lengthy trial which took place in 2012 over a period of four months, before Brian Martin AJ[2] sitting alone without a jury, Mr Rayney was acquitted of the charge. The State appeal in relation to that verdict was dismissed in September 2013.

12 Prior to September 2007, Mr Rayney conducted a successful practice as a barrister, having previously held senior positions in the Office of the Australian Government Solicitor (AGS) and the Office of the Director of Public Prosecutions (ODPP) for Western Australia and, for a period, in Bermuda. It is apparent that the events which occurred subsequent to Mrs Rayney's murder resulted in significant damage to Mr Rayney's legal practice. He attributes the oral utterance, or the alternative utterance, as a cause of the damage to his practice and the substantial financial losses which have flowed from it. He seeks to recover those losses, together with general and aggravated damages for destruction of his reputation and hurt caused by the utterances from the defendant, the State of Western Australia, on the basis that it is liable pursuant to s 137(5) of the *Police Act 1892* (WA) for the publication by DSS Lee, the publication not having been made with corruption or malice.

13 The defendant denies that the oral utterance, or the alternative utterance, bear the defamatory imputations asserted by the plaintiff; it pleads that if, contrary to its denial, the words conveyed the conduct imputation, then they were substantially true. In the alternative, the defendant pleads that each of the oral utterance and the alternative utterance conveys the imputation that the police suspected the plaintiff of having murdered or unlawfully killed his wife and had reasonable cause for so suspecting (suspicion imputation), and that imputation was true. It does not contend that the guilt imputation was true. The defendant also pleads a defence that the words are protected by statutory qualified privilege under s 30 of the *Defamation Act 2005* (WA) or by qualified privilege at common law.

Background

14 Mr and Mrs Rayney met in 1986. At that time, Mr Rayney was working as a solicitor at the AGS and Mrs Rayney was an articled clerk. They commenced a relationship in 1987 and were married in March 1990. In 1992, they purchased their home at 6 Monash Avenue, Como, in which they were still living at the time of her death. Their first child, Caitlyn Grace Rayney was born in March 1994. Their second daughter, Sarah Grace Rayney was born in February 1997. Both children attended Penrhos College, which is located not far from the Rayney residence.

15 Mr Rayney left the employment of the AGS in 1988, and commenced employment with the Commonwealth ODPP where he worked until 1989. He then commenced work at the Crown Solicitor's Office in Perth where he predominantly practiced in the area of criminal law, appearing as counsel in criminal

trials and also before various boards and tribunals. He was promoted at the Crown Solicitor's Office to the position of senior prosecutor.

16 From 1992 to 2003, and then again in 2004 to 2005, Mr Rayney was employed at the ODPP in Perth. He prosecuted a number of matters involving serious and complex trials and appeals. From 1998 to 2002, he was second in charge to the Director of Public Prosecutions (DPP).

17 While working for the ODPP in 2002, an opportunity arose for Mr Rayney to apply for the position of senior crown prosecutor at the ODPP in Bermuda. He applied for that position and was successful, commencing work at the ODPP in Bermuda in April 2003.

18 Mr Rayney said that, before applying for the position, he discussed with his wife whether he should apply and they agreed that he should. By that time, Mrs Rayney had commenced employment at the Supreme Court of Western Australia as an acting registrar. Mr Rayney said that the plan was that she would take leave without pay and join Mr Rayney with their daughters in Bermuda. To that end, he said that Mrs Rayney and his daughters visited him in Bermuda and holidayed with him on four occasions. On the first occasion in 2003, Mr Rayney said that they looked at schools for the children and completed applications for them to attend a private girls' school, paying the admission and enrolment fees. Mrs Rayney sat for, and obtained, her Bermudan driver's licence. Mr Rayney's contract with the ODPP in Bermuda was for three years, but he left after about 16 months. He said that the reason for his early return was that Mrs Rayney was unable to obtain leave without pay from the Supreme Court because she was not permanently employed and because he was missing his family 'terribly'.

19 It is apparent that before Mr Rayney travelled to Bermuda there had been tensions in his relationship with Mrs Rayney as a result of Mr Rayney's gambling habits. Those, and other, tensions were the subject of a number of emails passing between Mr and Mrs Rayney in late 2003. It is apparent from those emails that there were stressors in the marriage. One of those emails generally supports Mr Rayney's account of the plans associated with his move to Bermuda and the reason that those plans did not come to fruition. In particular, on 8 October 2003, Mrs Rayney emailed Mr Rayney making clear that her 'work is clearly the determining factor', and was the cause of her reluctance to move to Bermuda.[3]

20 Mr Rayney returned to work at the ODPP in Perth in August 2004. Mrs Rayney continued to work as a registrar and subsequently her position at the Supreme Court was made permanent.

21 Mr Rayney moved to practice as a barrister at the independent bar in June 2005. That move was made after considerable discussion between Mr and Mrs Rayney; Mr Rayney suggesting that his wife was concerned at the risk of a reduction in his income if he was to move to the bar. Mrs Rayney's attitude on that matter changed when Mr Rayney told her that Ms Gina Rinehart, a prominent businesswoman, wanted Mr Rayney to do legal work for her in relation to three litigation matters in which Ms Rinehart, or her company Hancock Prospecting Pty Ltd, was involved. Mr Rayney's practice at the independent bar was successful and profitable up until September 2007.

22 It is apparent that in the early months of 2007, significant tensions arose in Mr and Mrs Rayney's relationship. That is a topic dealt with in more detail later in these reasons. In light of that deteriorating relationship, both Mr and Mrs Rayney consulted family law practitioners. In the context of that deteriorating relationship, Mr Rayney took steps to record certain of Mrs Rayney's conversations. The first time Mr Rayney attempted to record his own conversations with his wife was around April 2007 when he used a portable dictaphone to do so. Those substantially unsuccessful attempts were abandoned not long after they commenced. Later in late July or early August 2007, Mr Rayney engaged the services of a Mr Timothy Pearson to install a recording device on Mr and Mrs Rayney's home phone line. Those are topics dealt with in more detail later in these reasons.

23 As previously noted, Mrs Rayney went missing on the evening of 7 August 2007 after leaving a boot scooting class in Bentley. At that time, Mr Rayney was in the course of representing Superintendent Brandham in proceedings before the Corruption and Crime Commission (CCC) relating to the conduct of the police enquiry in relation to Mr Andrew Mallard. Mr Mallard's conviction for murder had been overturned by the High Court,[4] which had ordered a retrial that was ultimately not pursued by the DPP. The enquiry by the CCC examined the conduct of the police and a State prosecutor in relation to the investigation and trial of Mr Mallard at first instance. During a morning break at the CCC hearing, Mr Rayney received a phone call from his secretary who advised him that she had received a phone call from the Supreme Court advising that Mrs Rayney had not arrived at work that day. Mr Rayney then called the number he had been given, and called Mrs Rayney's family members to enquire whether they knew of her whereabouts. Following the phone calls, Mr Rayney explained what was happening to Superintendent John Brandham, and told him that he wished to go to Mrs Rayney's office. Superintendent Brandham agreed, offering his assistance if required. After arranging for his apologies to be conveyed to the Commissioner, Mr Rayney went to the Supreme Court where he spoke to staff. He said that he told them that he did not see Mrs Rayney come home the previous evening, and presumed that she had gone to work before he got up. Mr Rayney's sister, Ms Raelene Johnston, joined him at the court and they made a number of phone calls to hospitals in case Mrs Rayney had been involved in an accident. They also made phone calls to her family and friends, but no one was able to identify where she was.

24 Mr Rayney said that he was offered the opportunity by one of the court staff to read her work diary, but he declined to do so on the basis that he expected that, by virtue of her position, there would be confidential material which he ought not view.

25 Mr Rayney said that at some point, he asked Mrs Rayney's staff if they had looked at her emails to see if that would assist in locating her. He was told that they had not looked at the emails because of a password lock, but that the password could be unlocked if permission were obtained from the Chief Justice. Mr Rayney offered to see the Chief Justice for that purpose, which he did. By this time Superintendent Brandham had come to the court to offer assistance. The Chief Justice gave permission for the court's information technology staff to unlock Mrs Rayney's computer so that police could have access to her emails. Mr Rayney said that he told Superintendent Brandham, who was to look at the emails, that the emails would be embarrassing to Mr Rayney because of the numerous accusations which his wife had made against him in email communications from her place of work.

Operation Dargan

26 Operation Dargan was the responsibility of the Major Crime Squad (MCS) of the WA Police. Superintendent Jeff Byleveld was the officer in charge of the Major Crime Division. The officer in charge of the MCS was DSS Lee. The senior investigating officer (SIO) of Operation Dargan was DS Carlos Correia. He filled that role from 10 August 2007 until Mr Rayney's criminal trial commenced in July 2012.

27 The MCS consisted, in August 2007, of three investigation teams, and in addition included the Missing Persons Unit which, at the time, was headed up by DS Robinson.

28 DS Correia said that the structure of the team developed over time and subsequent to 10 August 2007, but in the early weeks of the investigation, the operation team developed as follows:

DS Robinson was initially media liaison officer and later he became the office manager whose task was to assist DS Correia and oversee quality control of statements, actions and running sheets;
DS Moore was appointed as forensic liaison officer;

DS McKenzie was the family liaison officer for Operation Dargan and was assisted by DC Tan who was attached to the Kensington Detectives Office;
DI Prins was the operations manager for all jobs at the MCS, including Operation Dargan. In that capacity he was responsible for allocating resources, strategic planning and consulting with the police hierarchy as necessary for resourcing issues. He was the relieving officer for DSS Lee and could provide advice on 'going forward in the operations';
DSC Casilli was the pathology liaison officer and special projects officer. Special projects involved liaising with and making requests of the covert team. He was chosen for that role as he was experienced in special projects; and
DSC Williams assisted as forensic liaison officer with the forensic team to examine Mrs Rayney's vehicle after it was located.

29 During the course of Operation Dargan, the number of officers assigned to the operation changed and at one point the team had about 30 officers, including unsworn police officers, although not all worked fulltime on Operation Dargan.

30 DSS Lee explained his role in Operation Dargan as being kept informed of progress by DS Correia, DS Robinson, DS McKenzie and others as to the progress of the investigation, discussing strategy and providing advice and direction. He said that he needed to be wellinformed about investigations being run by the MCS so that he could ensure adequate resourcing and professional handling of the investigation in accordance with guidelines and to enable him to provide briefings to executive management such as the Assistant Commissioner of Crime and others within the Western Australian Police as required.

31 DSS Lee explained that in MCS, briefings for the investigation team typically took place each morning and afternoon. At those briefings, investigators were provided with updates regarding their particular lines of enquiry. Briefings would include updates obtained by investigators from other persons such as forensic scientists, pathologists, chemists, botanists and senior DPP prosecutors, and would examine investigative materials that had been obtained.

32 It is clear that the various officers referred to above who were involved in the investigation of Operation Dargan generally attended those briefing sessions and shared information they had obtained as a result of their investigations.

33 Each of the officers involved maintained records of their investigations. Those records comprised notebooks, referred to as 'red books'; an official police diary which usually contained little more than a general reference to a day's activities; and running sheets which were subsequently loaded onto the database known as 'VIPER'. The contemporaneous notes from a red book would be used to formulate running sheet entries or uploaded to VIPER directly. Running sheets provided a record of tasks and enquiries relevant to an investigation and were entered onto the VIPER system and linked to particular actions.[5]

34 VIPER is the case management system utilised by the WA Police, including the MCS, for all major investigations. Every investigative task receives an individual VIPER 'action number'. Access to individual investigations within VIPER is restricted to officers who have involvement with the particular investigation and who are generally approved by the investigation's SIO. All matters relating to an investigative task were recorded on VIPER against the particular action number as either 'items' or 'attachments', which could then be accessed through the individual VIPER action. It was also possible to link electronic records and other documentation to individual VIPER action numbers.[6]

Significant events in Operation Dargan

35 According to Mr Rayney (and I accept), between the period from 8 August 2007 until Mrs Rayney's body was found, police attended the Rayney residence every day, and were made welcome by him. Usually it was DC Tan and DS McKenzie who attended.

36 Statements were obtained by police on 7 August 2007 from Mr Rayney, his daughter Caitlyn, Ms Sharon Coutinho and various friends of the Rayneys, including Ms Cheryl Gay, Mr Glen Dale, Ms Shana Russell, Mr John Tinker, Ms Janine Gillett and Ms Julie Porter. On 9 August 2007 a statement was obtained from Sarah Rayney, Mr Da Silva (Mrs Rayney's father), a friend of Mrs Rayney's, Mr Ervin Vukelic, and Ms Narelle Morris, a Supreme Court employee.

37 Over the following days, a number of statements were obtained from other persons.

38 Mrs Rayney's car was located in Kershaw Street, Subiaco, on 14 August 2007, and her body was located the following day buried off a bush track in Kings Park. A DNA test confirmed that the body was that of Mrs Rayney. A preliminary postmortem examination was carried out later that day and a full postmortem autopsy was conducted on 17 August 2007.

39 On 22 August 2007, police executed a search warrant at the Rayney residence and DSS Lee addressed a media conference outside that property. Mr Rayney claimed legal and professional privilege in relation to certain documents seized during that search and on 24 August 2007 an application was made to the Perth Magistrates Court to determine that claim.

40 On 27 August 2007, the police obtained a warrant to intercept Mr Rayney's home phone and his mobile phone.

41 On 29 August 2007, as a result of information which had been obtained during the course of the police investigation, the police executed a search warrant on the home of Mr Pearson in relation to matters which are dealt with in more detail later in these reasons.

42 Mrs Rayney's funeral was held on 1 September 2007.

43 On 20 September 2007, a second search warrant for the Rayney residence was executed by police. The circumstances of the execution of that warrant are also dealt with in more detail later in these reasons. On that day, Mr Rayney accompanied DS Gregor Hart and DS Craig Carter to Curtin House where he was interviewed, but exercised his right to silence. He was subsequently charged with one count pursuant to s 5(1)(a) of the *Surveillance Devices Act 1998* (WA) and released on bail from Curtin House. It was later that afternoon that DSS Lee held the press conference in respect of which these proceedings are focused.

44 A further claim for legal professional privilege in relation to documents seized during the second search was made by Mr Rayney on 24 September 2007.

45 On 22 October 2007, police substituted the original charge under s 5(1)(a) of the *Surveillance Devices Act* with a charge under s 7(1)(a) of the *Telecommunications (Interception and Access) Act 1979* (Cth).

The words spoken

46 There is no issue in these proceedings as to the words spoken by DSS Lee at any of the four media conferences. The words spoken by DSS Lee on 16, 22 and 29 August 2007 are set out in annexure A to these reasons. The words spoken on 20 September 2007 were as follows:

> INSPECTOR HATCH: All right guys, thanks for comin'. Umm, it's standing room only today obviously. Ah, Detective Senior Sergeant Jack Lee as you all know already. Ah, Jack will be giving obviously an update on Operation Dargan. He'll be, umm, briefly reading a pre-prepared statement to start off with and then we will take questions. I'll just relieve you that Jack does have another briefing to go to at 3:30, so it's not

going to be excessively long. So, I'll hand over to Jack.

LEE: Thanks mate. Yeah, thanks ladies and gentlemen for coming in this afternoon. Ah, today, operation Dargan detectives executed Criminal Investigation Act search warrants at a further two premises, ah, the Rayney home in Monash Avenue in Como and Mr Rayney's business premises at the Francis Burt Chambers in the City. Our ongoing investigations and forensic evidence have led us to believe it is very likely that Mrs Rayney was murdered at her Monash Street home, on Tuesday evening the 7th of August. The purpose of our examination today is to expand our forensic examination of, of this scene. Police executed force, forced entry, ah, to the...I'll start that again sorry. Police executed a forced entry to the home after access was denied this morning. A minor damage was caused to the rear door. As a result of further investigations this morning, including the interview of Mr Rayney, he is now a suspect in the murder of his wife. He has been arrested and will be charged with an unrelated matter today. And I'll take your questions.

PRESS: What makes you believe...

PRESS: What has he been charged with?

LEE: He has been charged with an offence under the Surveillance Devices Act, ah, section 5. That relates to, umm, the installation of a telephone tap on a, umm, on Corryn Rayney's phone.

PRESS: The work phone or home phone? Or?

LEE: It was the home phone.

PRESS: Jack what, what, makes you believe that Corryn Rayney was murdered at the home?

LEE: Ah, as I said our, our forensic evidence, which we - we've been working behind the scenes for a long time as we've indicated. Umm, we've interviewed a lot of people. We've got a lot of forensic evidence and that evidence is starting to come back. Ah, we now believe that, umm, that, that is the most likely place where this offence occurred.

PRESS: Where abouts inside the home?

PRESS: Can you tell us where abouts in the house was that it is likely to have occurred?

LEE: No, I don't wish to disclose the, the, exact area that we, we, think that has occurred at.

PRESS: Are you able to say if it was inside the actual building or to the outside of the building?

LEE: No, I, I don't want to go down that path, it's giving away information that at this stage we would like to keep, umm, confidential.

PRESS: Do you have a murder weapon?

LEE: I don't, I don't intend to discuss the murder weapon or whether there was a weapon or the cause of death or anything of that nature.

PRESS: Are you going to charge him with murder today?

LEE: The invest - the interview with Mr Rayney is on-going at this very moment. Umm, subject to the result of that interview, ah, we'll know whether Mr Rayney's been charged in relation to that particular offence. He will be charged in relation to the Surveillance Devices Act offence and that offence will, he will, for that offence he will be released on bail.

PRESS: Was the surveillance device government property?

LEE: Sorry?

PRESS: Do you believe that one of the children was at the house when the...

LEE: Oh look as far as pinning it down to an actual time frame, that's, that's very difficult. We know that the children were at the house over night, umm, so I suppose the answer to that is yes, but I can't speculate on that.

PRESS: Have you interviewed the children?

PRESS: How long was the phone tapping...?

LEE: Pardon?

PRESS: You've interviewed the children?

LEE: No, we would like to interview the children. We've, ah, spoken to them early in the investigation. We would like to interview them again.

PRESS: What's stopping you?

LEE: Sorry?

PRESS: Obviously that's very important in terms of Mr Rayney's alibi and things...

LEE: Oh look extremely important. Yes, yes we would like to speak to the children again.

PRESS: What is stopping you?

PRESS: Are they at home today Jack?

LEE: Ah, my belief is that they went to school before we arrived at the house.

PRESS: What is stopping you from interviewing the children?

LEE: Ah, Mr Rayney is.

PRESS: So he has refused to let you talk to them?

LEE: Umm

PRESS: Do you need his consent?

LEE: Yes we do need the consent of the parent to interview children. Yes we do.

PRESS: What about when that parent has been elevated to a suspect in a murder inquiry, do you still need their consent?

LEE: What?

Press: When they have been, once they have been elevated to a suspect as opposed to a POI in a murder do you still need...

LEE: Oh look I, I think we are speculating as to, to what...

PRESS: No its pretty, like you were saying, if the parent needs to give consent, if they are a suspect in a murder inquiry, do you still need consent?

PRESS: Is there a way you can get around that?

LEE: Oh it's, it's simply as a suspect. Yeah we still need the consent of a parent to interview a child, absolutely. We, we are constricted by rules.

PRESS: Is Mr Rayney your prime suspect now Jack?

LEE: He's our only suspect at this time. We do have a number of persons of interest. Umm, some persons of interest have been excluded from this investigation, umm, some remain and I have no doubt that some will be injected into the investigation in the future. At this time, he is the primary person of interest or, or the suspect.

PRESS: Do you think he worked with other people to do this, because you said they might come into the investigation at some time?

LEE: Oh, I wouldn't like to speculate on whether this offence occurred, umm, was the result of one or more persons.

PRESS: Why were the lawyers at the house today?

LEE: Ah, ask the lawyers.

PRESS: Were they asked by you? Did you invite them to attend?

LEE: Ah, we didn't invite any lawyers to attend the house, no.

PRESS: Has Mr Rayney...

PRESS: Extrapolate on the actual entry to the house this morning. Did he sort of yell out from inside, 'No you can't come in', or did you just have no answer?

LEE: Oh look I wasn't there when the warrant was, umm, executed.

PRESS: What have you heard happened at the time?

LEE: My understanding was we demanded entry, umm, we tried to contact the house, we were aware Mr Rayney was inside the house and he didn't answer the door. Umm after knocking several times, we forced entry.

PRESS: Do you think one...

PRESS: Was that, was that lack of, lack of, umm, cooperation if you like at the time, was that explained by the fact he was in the shower or anything like that later on the track?

LEE: No, no it's not explainable.

PRESS: Do you think one or more people buried her, buried her, in Kings Park?

LEE: Do I think there was one or.

Press: Or more people?

LEE: Oh look I, I wouldn't like to speculate on that. If we knew the answers to those sorts of questions, we probably would be having a totally different conference now.

PRESS: Has Mr Rayney been cooperating?

PRESS: Are you aware of the children, sorry...

PRESS: Has Mr Rayney been cooperating with you today?

LEE: Ah, no.

PRESS: Has he refused to answer questions?

LEE: Umm, the, the interview of Mr Rayney is on-going at this time. Umm, I am not currently aware of the status of that so that may have changed but he has not cooperated with police today. That was why he was arrested at the scene and that was why we forced entry into the house.

Press: ...have they found

LEE: Sorry?

PRESS: Have they found the digging implement?

LEE: Oh look we, we found a number of digging implements. We don't know yet whether we've got the correct one. Umm, we have so many forensic, umm, samples in relation to this investigation and we are investigating many other offences of course. Ah, we simply don't know if we've got the right one at this stage.

PRESS: Have you forensically linked him to the disposal scene?

LEE: Oh, I don't wish to discuss particular, umm, I don't wish to discuss particular items of evidence or particular forensic results. That, that wouldn't be appropriate.

PRESS: Yeah hold on. But you have told us that you've got forensic evidence that suggests that she was in fact murdered at the house, so we've got that detail. Have you got any forensic evidence...

LEE: Yeah, look and that's a broad brush. We, we do believe that, ah, that's the most likely place where she was killed. Umm, we can't say definitively but we believe that's the most likely. Umm, there, there are, ah, many forensic results which have to come back which give us that, that indication. Umm, we can not exclude at this time that it happened elsewhere. But we believe it, it is most likely that it, it occurred at that house.

PRESS: ...that charge, is that a state or a federal offence that surveillance thing? It's an offence to tap your phone?

LEE: It's the Surveillance Devices Act. It's a West Australian statute. Umm, we've charged him under section 5(1) I believe.

PRESS: You can't tap your own phone?

LEE: You can't tap a phone if you are recording someone else's conversation and they're not party to that.

PRESS: How long do you believe that was in place for?

LEE: Ah look - that's not appropriate for me to discuss, the, the actual, ah, particulars of an offence that's goin' before court. That is sub judice.

PRESS: Jack do you ...

PRESS: What is your allegation though? What's the allegation why he might have done that?

LEE: Oh, look that's why we're interviewing Mr Rayney today. You know, I've, we have evidence, that he was the one that, that coordinated the, the, installation of the device. Umm, as to the reasons why, umm, that's, that's why we're interviewing him.

PRESS: Are there other parties that you need to talk to about the actual installation? Is there a private investigator or someone else who's perhaps been called in to install this?

LEE: Ah, there, there are other people who will be charged in relation to that offence, yes.

PRESS: Who are those people?

LEE: Oh, I don't wish to discuss that at this stage.

PRESS: Is one of them a private investigator?

LEE: Umm, oh, I don't know what their, oh I am not aware if they are.

PRESS: Is that how you found out about it, through the other parties?

LEE: I don't want to, I don't want to go there.

PRESS: Jack, do you believe the two girls were in the house when their mother was murdered?

LEE: I suppose that, that's, that's the problem with speculation. Once you, you go on from yes we believe that it is most likely she was murdered at that house, we believe it was most likely occurred on that night and from the, the information that we have, we believe the girls were at home for most of that night. So, I suppose the answer is yes but it's as a series of, oh, it's a conclusion. Umm, we don't have evidence to say they, they saw something, if that's where you're goin'.

PRESS: Potentially though, they could be your key witnesses?

LEE: Absolutely.

PRESS: Can you now say how she was murdered?

LEE: Ah, no I'm not prepared to discuss that.

PRESS: Can you say where the blood was found in the car?

LEE: Ah, no I'd, I'd rather not, because it leads on to other areas that I, I don't wish to discuss.

PRESS: Have the girls spoken about the night's events with anybody else, a family member perhaps?

LEE: I don't know.

PRESS: Have you spoken to neighbours? Did they hear an argument or anything at the house?

LEE: All the neighbours have been interviewed. I, I can't go into specifics of what people have told police and what they've said in their statements but we have interviewed all of the neighbours in the street, yes.

POLICE OFFICER: Look, we'll go to the last question now.

PRESS: Apart from the phone taps is there any evidence that links Lloyd Rayney to the murder?

LEE: Ah, look, I am not suggesting that the phone tap links him to the murder. I'm simply saying that as a result of our investigations we've uncovered an illegal, umm, practice and we, we are prosecuting in relation to that.

PRESS: So why is Lloyd Rayney your prime suspect?

LEE: He is our prime suspect because our, our evidence at this time leads us to believe the offence occurred at that house and he is the, the occupant of that house.

PRESS: Jack, where are the girls now and who's looking after them?

LEE: Ah, the girls were removed from school today by a family member and I don't currently know where they are.

PRESS: Jack can you just clarify again for us, you said earlier that there is a possibility, you're not sure at this stage, but there could be a charge of murder sometime later today.

LEE: No sorry I don't want anyone to be misled in relation to that. We are interviewing Mr Rayney in relation to the murder of his wife. Umm, pending the outcome of that interview, umm, that would be the only time, if Mr Rayney was to make some level of admission, that would be the only time, today, we would prefer that charge. At this time we have no intention and no evidence to suggest that Mr Rayney is in fact guilty of or is in fact, umm, responsible for this offence.

PRESS: So you're closer but you're not close enough yet.

LEE: We, look, we, we've have worked very hard behind the scenes in relation to this and there's been a lot of work has gone on by a very dedicated team. We've excluded a lot of people, we've included some people, ah, we've substantially raised the level of one particular person in relation to this. We now think we know where the offence occurred. Umm, yeah, I'd say we are substantially further than we were. Umm, there's still a long way to go and, umm, we, as I've said many times I think we have the evidence. It's a matter of actually working out where it all fits together.

PRESS: Is it usual for you to come out now today, publically, and name Lloyd Rayney as your prime suspect without having enough evidence to charge him with anything.

LEE: Ah, no look, that, that was simply a matter of had we been able to arrest Mr Rayney at his house and take him away, then we would never have named him, had the media not been present. Umm, you know, once it's out there then, then obviously there's, umm, there's a fair degree of speculation as to what he is being charged with or what he's been taken away in relation to, and it only fair, not only on him, but on the community.

PRESS: What have you seized from Francis Burt Chambers today?

LEE: Ah, I honestly don't know. Umm, that, that search I believe is still underway. Umm, so, so I don't know.

PRESS: Was there any family members at the Como house today?

LEE: Yes there was. Umm, but again, I don't have all the details. I, I believe Mr Rayney's mother was there, initially.

POLICE OFFICER: Ok, thanks guys.

PRESS: Thanks Jack.

PRESS: Do you know what the penalty is for the for the, the surveillance devices?

LEE: Ah, yes a $5000 fine or 12 months' imprisonment.

POLICE OFFICER: Okay, if you want cut-aways guys, you gotta get them now.

PRESS: $5000 fine and sorry I didn't hear the last bit?

LEE: Or 12 months.

PRESS: Or 12 months imprisonment.

PRESS: What's the actual charge called?

LEE: Ah, yeah, good one, I've never heard it before. Oh sorry, umm, look it's, it's an offence under section 5 of the Surveillance Devices Act, it's, umm, which regulates the use, installation and maintenance of listening devices. Okay, what the actual short name of the charge is I, I don't know.

PRESS: When do expect him to appear in court on it?

LEE: Umm, he'll be bailed to a day next, next week, I should imagine.

PRESS: Jack, what was the purpose of installing those?

LEE: Ah, you have to ask Mr Rayney. That's the, that's why we're interviewing him.

PRESS: Do police have any idea at this stage?

LEE: No, I'd have, I'd have to speculate. Yes.

PRESS: Did you say he will be bailed until a day next week?

LEE: Yes.

PRESS: He will definitely get bail will he? Do you know what it's going to be?

LEE: Oh look, he'll, he'll be out on his own person recognisance. Umm, you know, he's not run away in the last five weeks. Why would we expect him to run away now because he's been charged with a minor offence?

PRESS: Will you be lodging him at the lock up or will you be letting him out of the front door of Curtin House?

LEE: I, I don't know, I don't know. We've got, we have teams that are working in relation to each of the specific areas of, of this investigation and one team is, is, umm, conducting the interview of Mr Rayney. When they've completed that interview, and subject to, umm, any admissions or confessions he may make, they'll determine what if any offences he's going to be charged with. He will be charged with that particular offence, and then they'll determine his bail and he, he will be released on bail. And whether that's done from Curtin House or whether it's done from East Perth I, I don't know.

PRESS: Thanks Jack.

POLICE OFFICER: Thanks ladies and gentlemen. Thanks guys. Good on ya.

PRESS: Under the Act, how long can you keep him there without charging him with that other offence?

LEE: Umm, it's multiples of 6 hours.

PRESS: Thank you.

Determination of the meaning of the words used

47 As noted at the outset of these reasons, the parties between them put forward three different imputations which they say the words were capable of carrying. The plaintiff puts forward two alternative meanings. His primary position is that the words conveyed the guilt imputation. Alternatively, he contends that the words conveyed the conduct imputation.

48 The defendant denies that the words used by DSS Lee were capable of bearing either of the meanings contended for by the plaintiff, but pleads, and then seeks to justify, the suspicion imputation. The defendant also pleads that if, contrary to its denial, the words bore the conduct imputation, then that imputation is true.

49 In the absence of a jury, it falls to the judge to determine the ordinary and natural meaning of the words. At common law, there can be only one innuendo meaning.[7]

50 The meaning of the words is to be ascertained by the sense in which fairminded ordinary reasonable members of the general community would understand the published words. In ***Lewis v Daily Telegraph Ltd***,[8] Lord Reid said:

> 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.

51 Referring to ***Morgan v Odhams Press Ltd***,[9] McHugh J in ***John Fairfax Publications Pty Ltd v Rivkin***[10] said:

> A reader may be acting reasonably even though he or she engages in 'a certain amount of loose thinking'.

52 This is because, as Lord Reid also pointed out:

> 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.

53 In ***John Fairfax Publications Pty Ltd v Rivkin***, McHugh J speaking in relation to written publications said:[11]

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

54 The mode and manner of publication is material to consideration of the meaning of the words. As Tobias JA (with whom Sheller JA and Young CJ agreed) said in ***Griffith v John Fairfax Publications Pty Ltd***:[12]

> The reader of a book, for example, is assumed to read it with more care than he or she would read a newspaper. The more sensational the article in a newspaper, the less likely it is that the ordinary reasonable reader will have read it with the degree of analytical care which may otherwise have been given to a book and the less the degree of accuracy which would be expected by the reader.

55 That observation is apposite to the context of statements made at press conferences where there is an expectation of republication in the form of short 'grabs' that reduce the likelihood of analytical care in construing the whole of the words used.

56 The meaning of the words is not determined by evidence from the plaintiff as to what he understood the words to mean, nor of the defendant as to what the defendant intended the words to mean. The meaning is to be determined by an assessment of the ordinary reasonable person's understanding of the words.

57 The ordinary reasonable person does not interpret the publication in a precise manner, but rather forms a general impression of the meaning from the words used.[13]

58 In ***Favell v Queensland Newspapers Pty Ltd***[14] in their joint judgment, Gleeson CJ, McHugh, Gummow and Heydon JJ said:

> Lord Devlin pointed out, in ***Lewis v Daily Telegraph Ltd***, 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:
>
> > '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. 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. (footnotes omitted) (original emphasis)

59 Although a lengthy passage, it is helpful to have regard to Kirby J's outline of the principles to be applied to the determination of whether a publication is defamatory in ***Chakravarti v Advertiser Newspapers Ltd***[15] where he said:

1. The matter complained of should be considered in the way that a reasonable person, receiving it for the first time, would understand it according to its natural and ordinary meaning. The recipient has been variously described as a 'reasonable reader', a 'rightthinking [member] of society', or an 'ordinary man, not avid for scandal'. Sometimes qualities of understanding have been attributed, such as the 'reader of average intelligence'. The point of these attempts to describe the notional recipient is to conjure up an idea of the kind of person who will receive the communication in question and in whose opinion the reputation of the person affected is said to be lowered. Special knowledge is excluded. So are extremes of suspicion and cynicism (on the one hand) or naivety and disbelief (on the other). The basic question which is posed is whether the matter complained of, understood in its natural and ordinary meaning, would tend to lower the subject in the estimate of such an evocation of the ordinary, reasonable, member of society. In practice, the tribunal of fact, judge or jury, will ask itself about its own response to the matter complained of. To a very large extent that response will be impressionistic, subjective and individual to the decisionmaker. The point of the invocation of the hypothetical reasonable person is to remind decisionmakers that they may, or may not, reflect the response of the average recipient of the communication and should make allowance for that possibility.

2. In the nature of a defamation action, the matter complained of will be analysed most closely during the trial. It will be studied and taken apart by lawyers, line by line, in a way that the average reader or viewer would never do. This fact presents significant dangers, especially for publishers. It is therefore necessary to remember that relatively few readers will be lawyers reading the matter in question with the attention appropriate to a large, complex and expensive defamation case. The ordinary person is a layman, not a lawyer. He or she approaches perception of the matter complained of in an undisciplined way and with a greater willingness to draw inferences and to read between the lines than a lawyer might do, used to precision. Where 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. That is the price which publishers must pay for the use of loose language.

3. Different views have been expressed concerning the care and attention that will be attributed to the ordinary person and the way in which that person considers the matter complained of. Long ago, it was suggested that the ordinary person, being reasonable, would read the entirety of the matter complained of. Such a person would refrain from drawing inferences adverse to the reputation of another simply because part of the publication included matters discreditable to the subject. This reasoning has lately been endorsed by the House of Lords in ***Charleston v News Group Newspapers Ltd***. In that case, photographs of the faces of the plaintiffs, wellknown television actors, were superimposed upon nearnaked bodies of models engaged in pornographic poses. The headline read 'Porn shocker for Neighbours stars'. When the text of the publication was closely examined it contained expressions of purported outrage about a pornographic computer game which could superimpose the faces of individuals without their knowledge or consent upon the bodies of others. Their Lordships upheld the decisions of the primary judge and of the English Court of Appeal, sustaining the publisher's objection that the publications were incapable of being defamatory. They rejected the proposition that 'the prominent headline, or as here the headlines plus photographs, may found a claim in libel in isolation from its related text, because some readers only read headlines'. They declared that such reasoning was 'unacceptable'. Respectfully, I cannot agree with their Lordships' opinion. In my view it ignores the realities of the way in which ordinary people receive, and are intended to receive, communications of this kind. It ignores changes in media technology and presentation. It removes remedies from people whose reputation may be greatly damaged by casual or superficial perception of such publications. And it overlooks the purpose of defamation law which is to provide redress when reputations are damaged in fact, not to reserve remedies to those cases only where detailed and thorough analysis of the matter complained of has been undertaken. I agree with the criticisms which have been voiced about ***Charleston***. Many people, including not a few judges and jurors, do not look beyond headlines and photographs. If this is the environment in which reputations may be harmed, it would be contrary to the purposes of the law of defamation to withhold redress from cases where harm was held to be done. To the extent that dicta in ***Charleston*** or other cases suggest that the courts should attribute to the recipients of matter published in the mass media a close and careful attention to the entirety of the item published, I would not follow that opinion. I would not adopt its reasoning as part of the common law of Australia. To do so would be to defy common experience and, if I may say so, commonsense.

4. The ordinary reader will draw conclusions from general impressions. He or she will not reread or review the matter complained of ...

5. Nevertheless, in considering whether, as claimed, the matter complained of actually harms the reputation of the plaintiff, it is appropriate for the decisionmaker to keep in mind the importance attached to freedom of communication. This too is a fundamental human right. Reconciling the attainment of freedom of communication in circumstances where the individual's reputation is also protected is a function of the law of defamation. Allegedly defamatory matter must be read in a way appropriate to a society such as Australia which, by its Constitution and otherwise, enjoys a high measure of freedom of expression. Although reporting that a person has been arrested and charged undoubtedly occasions damage to some degree to the reputation of that person, this must be tolerated on the basis of the legitimate public interest in the reporting of such facts. Only if the publisher goes on to 'say or suggest that the charge was well founded' will such a report carry an imputation of guilt and sustain a remedy in defamation. In a relatively open society, it could not be disputed that the ordinary person would have had an interest to receive fair and accurate reports of proceedings of an important Royal

Commission. A mass circulation daily newspaper would have been failing to fulfil its function if it had not reported on the proceedings of such a Royal Commission. Nevertheless, the potential damage to the reputation of those affected made it essential that its reports be fair and accurate. Otherwise, suspicion or accusation might be elevated in the public's mind to guilt in fact. That could leave a stain on the reputations of those affected which would do them serious and unjustifiable harm. (footnotes omitted)

Imputations of suspicion and guilt

60 Considerable emphasis was placed by the defendant on the passage from the judgment of Mason J (with whom Gibbs CJ, Wilson and Brennan JJ agreed on the point) in ***Mirror Newspapers Ltd v Harrison***[16] where he said:

> As we have seen, there is now a strong current of authority supporting the view that a report which does no more than state that a person has been arrested and has been charged with a criminal offence is incapable of bearing the imputation that he is guilty or probably guilty of that offence. The decisions are, I think, soundly based, even if we put aside the emphasis that has been given to the process of inference on inference that is involved in reaching a contrary conclusion. The ordinary reasonable reader is mindful of the principle that a person charged with a crime is presumed innocent until it is proved that he is guilty. Although he knows that many persons charged with a criminal offence are ultimately convicted, he is also aware that guilt or innocence is a question to be determined by a court, generally by a jury, and that not infrequently the person charged is acquitted.
>
> In this situation the reader will view the plaintiff with suspicion, concluding that he is a person suspected by the police of having committed the offence and that they have ground for laying a charge against him. But this does not warrant the conclusion that by reporting the fact of arrest and charge a newspaper is imputing that the person concerned is guilty. A distinction needs to be drawn between the reader's understanding of what the newspaper is saying and judgments or conclusions which he may reach as a result of his own beliefs and prejudices. 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.

61 It should be noted that Mason J's observations were concerned with 'a *report that does no more than* state a person has been arrested and has been charged'. In referring to that passage from ***Harrison***, McHugh J in ***John Fairfax Publications Pty Ltd v Rivkin*** described Mason J's conclusion as being that 'an ordinary reader would not draw that imputation of guilt from a *bare* report that a person has been arrested and charged with a criminal offence' (emphasis added). McHugh J went on to say that 'an ordinary reasonable reader does not infer that a person is involved in a crime as serious as murder unless the terms of the article point irresistibly to that conclusion'.[17]

62 A number of cases dealing with statements concerning the existence of a police investigation, or the charging of a person for an offence by the police, have considered the possible imputations of the statement as potentially falling within three categories.

63 That approach was discussed by the Full Court of the Supreme Court of South Australia in ***Sands v State of South Australia***[18] where the court said:

> On the other hand, as a matter of human experience and convention, a statement about a person's guilt or a speaker's perception of a person's guilt is often understood as falling into one of a discrete number of common categories. Three such categories are that there are grounds for inquiry whether a person is guilty, that there are reasonable grounds to suspect a person is guilty and that a person is guilty. Thus, in ***Lewis v Daily Telegraph Ltd*** Lord Devlin said:
>
> > 'In the present case, for example, there *could have been* three different categories of justification - proof of the fact of an inquiry, proof of reasonable grounds for it, and proof of guilt.'
>
> In ***Flood v Times Newspapers Ltd***, Lord Phillips said:
>
> > 'In ***Chase v News Group Newspapers Ltd*** Brooke LJ identified three *possible* defamatory meanings that *might be* derived from a publication alleging police investigations into the conduct of a claimant. These have been adopted as *useful shorthand* in subsequent cases. The Chase level 1 meaning is that the claimant was guilty. The Chase level 2 meaning is that there were reasonable grounds to suspect that the claimant was guilty. The Chase level 3 meaning is that there were grounds for investigating whether the claimant was guilty.' (original emphasis) (footnotes omitted)

64 In pointing out that those commonly encountered meanings are not exhaustive, the Full Court said:[19]

> That these three commonly encountered meanings are not exhaustive has been made clear by this Court in ***Channel Seven Adelaide Pty Ltd & Anor v S, DJ***, in which Debelle J (with whom Anderson J agreed) said:
>
> > 'The noun "suspect" is not a word of precise meaning. It is capable of conveying a number of meanings according to context. ... The variety of the meanings of "suspect" is emphasised when regard is had to the meaning of the verb "to suspect". It may include imagining something wrong or evil or undesirable in a person on slight or on no evidence, or believing something wrong or evil or undesirable in a person on insufficient proof or evidence. It also includes believing that a person has committed an act, lawful or unlawful, where the grounds for that belief may range from mere gossip through a belief on slight or insufficient proof or evidence to a belief reasonably grounded on evidence, even to a belief on strong grounds. Generally speaking, dictionaries define a suspect in the context of a person suspected of a crime as a person imagined to be guilty on insufficient or no proof: see *Oxford English Dictionary* and *Macquarie Dictionary*. With respect that is too narrow a meaning. The frequency of press reports of criminal investigation and of court proceedings have made the ordinary man and woman familiar with the fact that the grounds on which a person may be suspected of a crime may range from slight to reasonable, if not also to strong grounds, depending upon the state of the evidence.

...

> I do not ... accept the submissions of Channel Seven and the ABC that the word "suspect" is entirely neutral as to the quality of the suspicion. Instead, it is a word of imprecise meaning capable of conveying to different viewers or listeners different perceptions as to the quality of the suspicion, ranging from slight through reasonable to strong grounds.'

and in ***Sands v Channel Seven Adelaide Pty Ltd & Anor***, in which Gray J (with whom Nyland and Vanstone JJ agreed) said:

> 'The noun "suspect" is not a word of precise meaning. A statement that someone is suspected of something may, depending on the context, convey a number of different meanings. To the extent that the use of the word "suspect" conveys anything about the grounds upon which suspicion is based, it may suggest either suspicion based on slight or no evidence, suspicion based upon reasonable grounds, or, suspicion based upon reasonable grounds founded in direct evidence of the suspect's own conduct. In determining the meaning conveyed by the word in a particular case, it is important to distinguish those authorities which address the independent issue of whether a particular meaning is capable of being conveyed.
>
> A number of authorities suggest that a statement that a person is suspected of something may imply reasonable grounds for the suspicion. However, such implication will necessarily depend on the context arising in the particular proceeding and in some cases less speculation may be appropriate. A bare statement that a person is suspected of something may not necessarily convey any information about the basis for, or nature of, the suspicion, beyond the mere fact that the person is suspected of that thing.' (footnotes omitted)

Context of the 20 September 2007 press conference

65 It is clear that there was exceptional media interest surrounding Mrs Rayney's murder. The extent of that interest is relevant to three pleaded issues. The first of those issues is the question of whether the meaning of the words used by DSS Lee on 20 September 2007 should be considered in the context of his earlier press statements, or simply viewed in isolation. The second is the extent that that context informs the meaning of the words used. The third issue is the availability of the statutory and common law defences of qualified privilege.

66 The level of media interest following Mrs Rayney's disappearance was intense, no doubt fuelled by the respective occupations and prominence of Mr and Mrs Rayney. For the purposes of the trial in this action, a media bundle containing publications in the print media, online and in the electronic media was tendered. The media bundle contained:

(a) 44 news items published between the time of Mrs Rayney's disappearance and the discovery of her body six days later in Kings Park;

(b) a further approximately 200 news items in relation to Mrs Rayney's murder published between 16 August 2007 and 20 September 2007;

(c) a further 103 news items largely dealing with the information conveyed in DSS Lee's media conference of 20 September 2007 published between 20 September 2007 and 22 September 2007; and

(d) a further approximately 200 news items dealing with aspects of the Rayney investigation published between 23 September 2007 and the end of that year.

67 DSS Lee described the media interest as 'incredibly intense' and said that he had never worked on any enquiry before or since with that level of media interest.[20] He said that the media involvement in the case 'sometimes got in the way of the investigation and when it did, we tried to dampen it down'.[21] DSS Lee said that as early as 10 August 2007, shortly after Mrs Rayney went missing but before her body had been found, he recorded in his diary discussions with a number of media personalities and 'allegations that police were going soft on Lloyd Rayney'.[22] He explained that was a reference to a television journalist, Ms Dixie Marshall, who threatened to report DSS Lee to the CCC for being corrupt for not pursuing Mr Rayney because he was a former DPP prosecutor.[23]

68 Inspector Peter Hatch was involved in Operation Dargan in 2007, when he then held the rank of Inspector, in the role of media manager within the police media unit. He described the press conference on 20 September 2007 as 'the largest and most intense conference I had experienced' with the room filled to capacity with about 35 media representatives, including cameramen.[24]

69 The extent of media interest was confirmed by the representatives of the media who gave evidence in this trial, Mr Sean Cowan, the then principal crime reporter for *The West Australian* newspaper; Mr David Cooper, a Channel 7 journalist; Mr Grant Taylor, then a Channel 9 news reporter in Perth; and Ms Carolyn Monaghan, then an ABC reporter. Mr Taylor described the Rayney investigation as 'the biggest story at the time'.[25] Ms Monaghan said that 'if there is an eminent person involved it goes up the ranks as being a good story'. She said that she knew from the beginning that there was a high level of media interest from the number of reporters covering the story and the newspaper and TV coverage.[26]

70 On 23 August 2007, the director of news at Channel 7 emailed Mr Neil Poh, a media advisor within the police department, referring to 'intense public interest in the investigation into the murder of Supreme Court Registrar, Corryn Rayney'. The letter referred to 'much rumour, speculation and innuendo in the community regarding this case - and the fact that a murderer remains at large'. It posed a number of questions to the Commissioner of Police. One of the last of those questions was 'is Lloyd Rayney a suspect now?' Mr Cooper, who said he would have briefed Mr Menegola in relation to the letter, and perhaps drafted it, said that question would have arisen in his mind because many murder cases involving married women upon which he had reported resulted in the victim's partner being charged.[27]

71 It is apparent from the evidence referred to above, and from the content of the extensive media publications concerning the Rayney investigation that, by the time DSS Lee held the press conference on 20 September 2007, there was intense media interest in, and much speculation in the community as to, the identity of Mrs Rayney's killer.

72 Any press conference held by police concerning an ongoing investigation requires particular care, a matter reflected in the West Australia Police Media Guide (which is discussed below). The context in which the press conference of 20 September 2007 occurred called for very careful attention to the words being used.

73 DSS Lee said that when he held media conferences in relation to Operation Dargan, he was usually dealing with the same reporters; in particular, he referred to Mr Cowan, Ms Sue Short, Mr Taylor and Mr Cooper.[28] Inspector Hatch also said that, to his knowledge, there was continuity of reporters covering the story of Mrs Rayney's disappearance.[29] Mr Cooper said that it was part of his role as a 'good crime reporter' to follow reports by other media organisations in relation to the story.[30] Ms Monaghan said that she had a practice of keeping up to date with what all the other media outlets were saying about the case.[31] Mr Cooper said that he attended each of the conferences on 16 August, 22 August, 29 August and 20 September 2007. Mr Taylor and Mr Cowan each gave evidence that they attended the conferences on 16 August, 22 August and 20 September 2007, but were not asked about their attendance at the conference on 29 August 2007. Apart from the journalists who gave evidence, the evidence does not reveal who of the large number of journalists present on 20 September 2007 attended any or all of the previous press briefings by DSS Lee. It is clear that each of the four conferences was attended by a number of reporters from a range of media organisations, particularly the mainstream news services of Channel 7, Channel 9, the Australian Broadcasting Corporation and, at least at the conference of 20 September 2007, Channel 10 and *The Sunday Times* newspaper.

74 Each of the four press conferences received significant media coverage. The media bundle which was tendered in the course of the trial reveals that the statements made by DSS Lee at Kings Park on 16 August 2007 were reported by the Channel 9 news, the Channel 7 news, ABC online, the *Subiaco Post* newspaper, *The West Australian* and various eastern states newspapers.[32]

75 DSS Lee's statements to the press on 22 August 2007 and, in particular, his statement that Mr Rayney had fully cooperated with police and was not a suspect in the investigation, were reported by AAP, Networked Knowledge, *The West* online, *The Age* newspaper, Channel 7 news, ABC news, *The West Australian*, the *Northern Territory News*, *The Australian* newspaper, News.com.au and various other interstate publications.[33]

76 DSS Lee's statements to the media on 29 August 2007 were reported by Channel 7 news, ABC news, *The Australian* (under the byline of Ms Alana BuckleyCarr, who was identified as being at the conference of 20 September 2007) and *The Mercury* newspaper.[34]

77 The media bundle contains in excess of 140 newspaper, television and radio reports of DSS Lee's news conference of 20 September 2007.[35]

78 Those reports included reports by PerthNow, *The West Australian*, AAP, Channel 7 news, Channel 10 news, ABC news, *The Australian*, News.com.au and numerous interstate and international news providers.

Should the words used on 20 September 2007 be construed in context of earlier press statements?

79 The plaintiff submits that the significance of the previous press conferences can be viewed in a number of ways.

80 The first is that it gives context to the press conference on 20 September 2007, which was held at Curtin House where the principal officers involved in Operation Dargan were based. The earlier media conferences had been held at Kings Park (16 August 2007), outside the Rayney residence (22 August

2007), and at Police Headquarters (29 August 2007). The plaintiff submits that the conference on 20 September 2007 was to be a dramatic and significant press conference, heightening the expectations of those attending.[36]

81 Whilst I consider that the context in which the press conference occurred is significant, I do not accept that the different location of the conference of 20 September 2007 served to provide any emphasis to, or to affect the proper meaning of, the words used by DSS Lee. The location of previous press conferences was of no significance to the meaning of what was said on 20 September 2007. The conference did, however, follow what appeared to be dramatic developments in the investigation, namely the further searches of the Rayney residence and Mr Rayney leaving his home with police and being taken to Curtin House. I agree that those developments were likely to have heightened the expectations of the journalists who attended the press conference, a matter confirmed by the large attendance.

82 The plaintiff also notes that Mr Cooper, at least, attended all four press conferences. There were stories in respect of all four press conferences run by the major media outlets in Perth and the journalists giving evidence confirmed that they monitored news reported by other media organisations. Against that background, the plaintiff identifies various statements made by DSS Lee at the earlier press conferences. They included a statement at the press conference of 22 August 2007 to the effect that Mr Rayney was not a suspect in the investigation, and the statement on 29 August 2007 that 'there is no evidence against Mr Rayney having committed any crime, he is not a suspect in this matter'. The plaintiff also refers to statements made by DSS Lee at the conference on 29 August 2007 expressing confidence that the crime would be solved.

83 The plaintiff relies on the observations of Hunt J in ***Burrows v Knightley***[37] where his Honour said:

> Where the matter of which the plaintiff complains consists of related material published by the defendant on different occasions, and where there is apparent on the face of the matter complained of itself *either* an intention on the part of the defendant that it be read together *or* direct references internally one to the other so that the reader may reasonably be expected to read it together, it is acceptable practice to plead all of the material in the one paragraph of the statement of claim and to identify the imputations said to have been conveyed by the material as a whole. It is not necessary to plead each part separately and to add 'true' innuendoes where material published on one occasion is relied upon to give a statement published on another occasion a meaning beyond that which it conveys when considered in isolation. (original emphasis)

84 The evidence makes clear that the press conference of 20 September 2007 was being held in the context of the ongoing Operation Dargan investigation. Inspector Hatch prepared a list of likely questions that might be asked of DSS Lee at the press conference. He did so to enable DSS Lee to prepare for the conference. Some of the questions contained references back to statements that had been made by DSS Lee at the earlier press conferences.[38] Inspector Hatch agreed that he anticipated that journalists who came to the press conference on 20 September 2007 would include journalists who had been at the press conferences on 22 and 29 August 2007.[39] There were in fact questions posed at the 20 September 2007 press conference by journalists referring back to earlier statements by DSS Lee in previous press conferences.

85 Notwithstanding that context, I do not consider that the words spoken by DSS Lee at all four press conferences can be treated as, in effect, a single publication. The press conference of 20 September 2007 was given at a time when there were new developments in the investigation, in particular the further searches of the Rayney residence and Mr Rayney's office and the proposal to charge him in relation to the telecommunications matter. The position

had changed, so far as the public position of the police was concerned, from one where they had expressly stated (contrary to the private view of a number of officers) that Mr Rayney was not a suspect, to a position where he was now to be publicly considered a suspect. In those circumstances, the words used by DSS Lee on 20 September 2007 stood alone as a separate publication and should be construed on their own. The words to which meaning is to be attributed are therefore those referred to as the 'alternative utterance' in the statement of claim.

The meaning of the words

86 From the cases discussed above, the following principles emerge:

the meaning of the words is to be ascertained by the sense in which fairminded ordinary reasonable members of the general community would understand them;[40]

persons who hear the words (or read a republication of oral statements) may be acting reasonably even if they engage in a certain amount of loose thinking although they are not persons 'avid for scandal';[41]

listeners try to strike a balance between the most extreme meaning that the words could have and the most innocent meaning;[42]

listeners consider the context as well as the words used;[43]

the bane and antidote must be taken together;[44]

listeners do not formulate reasons in their mind, but form a general impression from the words used;[45]

when words used are imprecise, ambiguous or loose, a very wide latitude will be ascribed to the ordinary person to draw inferences adverse to the subject;[46]

ordinary readers draw implications more freely than lawyers, especially when they are derogatory;[47]

the mode and manner of publication is material. The more sensational the publication, the less care in its analysis is likely to be exercised by listeners;[48]

statements concerning police investigations into a plaintiff commonly give rise to three possible defamatory meanings, namely that the plaintiff is guilty, that there are reasonable grounds to suspect that the plaintiff is guilty, or that there are grounds for investigating whether the plaintiff is guilty.[49] Those three meanings are not exhaustive;[50]

the word 'suspect' may, depending on its context, convey a number of different meanings;[51]

a bare statement that says no more than that a person has been arrested and charged does not bear the imputation that the person is guilty of the offence charged.[52]

87 In the course of this trial I have watched the video recording of DSS Lee's 20 September 2007 press conference a number of times. In the course of crossexamination of witnesses, and in the course of the submissions by counsel, different passages from the transcript were reviewed and commented upon. In the course of writing these reasons I have again viewed the video recording to assist me in my consideration of the submissions as to what imputation is to be drawn from the words used by DSS Lee. I am mindful that that process of analysis creates a real danger of departing from the task of assessing the meaning of the words in a way that a reasonable person, receiving the information for the first time, would understand them according to their ordinary and natural meaning.[53] It also tends to lead to the risk of analysis as a lawyer and of overlooking the 'important reminder for judges' that ordinary readers and listeners draw implications much more freely, especially when they are derogatory.[54]

88 At first blush, having regard to the proposition that a bare statement that a person has been arrested and charged does not carry with it an implication of guilt, a statement that a person is a suspect and has not yet been charged, coupled with a statement that the police do not yet have sufficient evidence to charge him, would appear less likely to impute guilt. It is essentially that proposition which underlies the defendant's contention as to the meaning of DSS Lee's words. The task, however, is to ascertain the overall meaning and effect of the words.

89 For reasons which I will explain, I have come to the conclusion that the ordinary person hearing or reading DSS Lee's words would (and I have no doubt that many did) conclude that, reading between the lines, his words conveyed the imputation that Mr Rayney murdered his wife. To explain that conclusion, it is necessary to review the significant statements made in the course of the press conference, both those that tend to implicate Mr Rayney and those which might be classified as antidote.

90 DSS Lee's prepared statement commenced with the following assertion:

> **LEE**: ... **today, operation Dargan detectives executed Criminal Investigation Act search warrants at a further two premises, ah, the Rayney home in Monash Avenue in Como and Mr Rayney's business premises at the Francis Burt Chambers in the City. Our ongoing investigations and forensic evidence have led us to believe it is very likely that Mrs Rayney was murdered at her Monash Street home, on Tuesday evening the 7th of August. The purpose of our examination today is to expand our forensic examination of, of this scene.**

91 This initial assertion that it was 'very likely' that Mrs Rayney was murdered at her home was reinforced several times later in the conference. When, responding to a question, DSS Lee said:

> PRESS: Jack what, what, makes you believe that Corryn Rayney was murdered at the home?
>
> **LEE: Ah, as I said our, our forensic evidence, which we - we've been working behind the scenes for a long time as we've indicated. Umm, we've interviewed a lot of people. We've got a lot of forensic evidence and that evidence is starting to come back. Ah, we now believe that, umm, that, that is the most likely place where this offence occurred.**

92 It can be noted in passing that, as at 20 September 2007, the basis upon which the police suspected that the offence occurred at the Rayney residence was the presence of Liquidambar fruit pods in Mrs Rayney's hair, a small piece of diosma flower located on a spot of blood in Mrs Rayney's car, and some as yet unanalysed brick dust found on her boots. The words 'we've got a lot of forensic evidence' that 'is starting to come back' somewhat overstated the basis of the belief. Nothing said in the interviews of 'a lot of people' provided any basis for a suspicion as to the location of the offence. Inherent in DSS Lee's response is a suggestion that the police had more to support the suspicion as to location than in fact they had. That suggestion was reinforced when the following answer was given by DSS Lee:

> PRESS: Yeah hold on. But you have told us that you've got forensic evidence that suggests that she was in fact murdered at the house, so we've got that detail. Have you got any forensic evidence...

LEE: Yeah, look and that's a broad brush. We, we do believe that, ah, that's the most likely place where she was killed. Umm, we can't say definitively but we believe that's the most likely. Umm, there, there are, ah, many forensic results which have to come back which give us that, that indication. Umm, we cannot exclude at this time that it happened elsewhere. But we believe it, it is most likely that it, it occurred at that house.

93 Again there is an implication that the forensic examination results that were expected would serve to confirm the location of the offence. As at 20 September 2007, the only possible forensic results that might have supported that theory would have been the results from testing and searches at the Rayney residence. That search was still underway when DSS Lee held his press conference, and indeed continued for two more days. When he spoke to the press, DSS Lee knew nothing of anything done by those carrying out the search and had no basis for expressing an expectation that forensic results would support his theory. The operational orders for the search of the Rayney residence show that the object of the search was to find items that might support the conclusion that the offence occurred at those premises, including luminol testing.[55] DSS Lee agreed in crossexamination that he expected that the search would lead to further information coming forward that would confirm that the offence occurred at the Rayney residence, and that that would enable him to charge Mr Rayney.[56] The objective implication that I consider can be drawn from this part of DSS Lee's comments reflects what he acknowledges to have been his subjective state of mind.

94 Not surprisingly, the press seized on the proposition that the murder occurred at the Rayney residence. The following exchange ensued:

PRESS: Can you tell us whereabouts in the house it was that it is likely to have occurred?

LEE: No, I don't wish to disclose the, the, exact area that we, we, think that has occurred at.

PRESS: Are you able to say if it was inside the actual building or to the outside of the building?

LEE: No, I, I don't want to go down that path, it's giving away information that at this stage we would like to keep, umm, confidential.

95 It was the fact that the police had absolutely no evidence that would have enabled them to assess where, in the sense of inside or outside, at the residence any assault had occurred. DSS Lee's answers gave the distinct impression that the police knew 'the exact area' where the offence occurred,

thus heightening the suggestion that the offence occurred at the Rayney residence and the strength of the suspicion of Mr Rayney. Whilst in the circumstances the decision to take questions at all is difficult to understand, if the question was asked and answered, simply answering 'no' would not only have been accurate, but would not have implied that the police had more information than they in fact had that might have implicated Mr Rayney.

96 It is apparent that at least some of the journalists present treated DSS Lee's statements that it was 'very likely' or that 'we believe' that the murder occurred at the Rayney residence as establishing that fact. That can be seen from the following exchanges.

> PRESS: Do you believe that one of the children was at the house when the ...
>
> **LEE: Oh look as far as pinning it down to an actual time frame, that's, that's very difficult. We know that the children were at the house over night, umm, so I suppose the answer to that is yes, but I can't speculate on that.**

97 And further:

> PRESS: Jack, do you believe the two girls were in the house when their mother was murdered?
>
> **LEE: I suppose that, that's, that's the problem with speculation. Once you, you go on from yes we believe that it is most likely she was murdered at that house, we believe it was most likely occurred on that night and from the, the information that we have, we believe the girls were at home for most of that night. So, I suppose the answer is yes but it's as a series of, oh, it's a conclusion. Umm, we don't have evidence to say they, they saw something, if that's where you're goin'.**
>
> PRESS: Potentially though, they could be your key witnesses?
>
> **LEE: Absolutely.**

98 That a journalist construed DSS Lee's statements as suggesting Mr Rayney was guilty is inferred by the following exchange:

> PRESS: Do you think he worked with other people to do this, because you said they might come into the investigation at some time?

LEE: Oh, I wouldn't like to speculate on whether this offence occurred, umm, was the result of one or more persons.

99 DSS Lee made no effort in response to that question to disabuse the journalist of the premise to the question, namely that Mr Rayney 'did this'.

100 There were a number of responses to questions by DSS Lee that tended to cast Mr Rayney in a bad light and reinforce the suggestion of guilt. The first assertion made in the context of the prepared statement was the gratuitous assertion that Mr Rayney had denied access to his house for the purpose of the police search. Whether or not that was true, it reinforced the suggestion of guilt. That was further reinforced by the following exchange:

PRESS: Extrapolate on the actual entry to the house this morning. Did he sort of yell out from inside, 'No you can't come in', or did you just have no answer?

LEE: Oh look I wasn't there when the warrant was, umm, executed.

PRESS: What have you heard happened at the time?

LEE: My understanding was we demanded entry, umm, we tried to contact the house, we were aware Mr Rayney was inside the house and he didn't answer the door. Umm after knocking several times, we forced entry.

PRESS: Was that, was that lack of, lack of, umm, cooperation if you like at the time, was that explained by the fact he was in the shower or anything like that later on the track?

LEE: No, no it's not explainable.

101 In fact, as was well known to police, Mr Rayney was on the phone when police were seeking to enter his house. The circumstances surrounding this issue are dealt with in more detail later in these reasons. Whether or not being on the phone may have been a satisfactory explanation, the assertion 'it's not explainable' overstates the position. The gratuitous reference to denial of access was obviously unnecessary and tended to suggest conduct

consistent with guilt. So too was the response that asserted that Mr Rayney was not cooperating with police. In relation to cooperation, the following exchange took place:

> PRESS: Has he refused to answer questions?
>
> **LEE: Umm, the, the interview of Mr Rayney is on-going at this time. Umm, I am not currently aware of the status of that so that may have changed but he has not cooperated with police today. That was why he was arrested at the scene and that was why we forced entry into the house.**

102 In fact, Mr Rayney was not arrested at the scene because he had not cooperated with police. The decision to arrest him was made at least some days in advance of the police attending to carry out the search warrant.[57] What was said by DSS Lee was false, a fact that he acknowledged.[58] Its significance is not however its falsity, but the implication of Mr Rayney's conduct being consistent with guilt.

103 A similar implication of guilt can be drawn from DSS Lee's responses about obtaining statements from Mr and Mrs Rayney's children and the potential importance of them as witnesses.

> PRESS: You've interviewed the children?
>
> **LEE: No, we would like to interview the children. We've, ah, spoken to them early in the investigation. We would like to interview them again.**
>
> PRESS: What's stopping you?
>
> **LEE: Sorry?**
>
> PRESS: Obviously that's very important in terms of Mr Rayney's alibi and things...

LEE: Oh look extremely important. Yes, yes we would like to speak to the children again.

....

PRESS: What is stopping you from interviewing the children?

LEE: Ah, Mr Rayney is.

PRESS: So he has refused to let you talk to them?

LEE: Umm.

104 In his prepared statement, DSS Lee said:

As a result of further investigations this morning, including the interview of Mr Rayney, he is now a suspect in the murder of his wife

105 This statement suggested that some investigation that morning or something said in the interview had resulted in his arrest as a suspect for murder. That was not true. As noted earlier, the evidence clearly demonstrates that the decision to arrest Mr Rayney in relation to the murder was made, at the latest, some days before the search warrant was executed on 20 September 2007. The statement suggested that there was more to the suspicion than the 'forensic evidence' leading to the belief that the offence occurred at the Rayney residence.

106 On two occasions DSS Lee referred to the possibility that Mr Rayney might confess, in which case he would be charged that day. Those occasions were as follows:

PRESS: Are you going to charge him with murder today?

LEE: ... the interview with Mr Rayney is ongoing at this very moment. Umm, subject to the result of that interview, ah, we'll know whether Mr Rayney's been charged in relation to that particular offence

107 And later:

PRESS: Jack can you just clarify again for us, you said earlier that there is a possibility, you're not sure at this stage, but there could be a charge of murder sometime later today.

LEE: No sorry I don't want anyone to be misled in relation to that. We are interviewing Mr Rayney in relation to the murder of his wife. Umm, pending the outcome of that interview, umm, that would be the only time, if Mr Rayney was to make some level of admission, that would be the only time, today, we would prefer that charge. At this time we have no intention and no evidence to suggest that Mr Rayney is in fact guilty of or is in fact, umm, responsible for this offence.

108 And at the conclusion of the conference:

PRESS: Will you be lodging him at the lock up or will you be letting him out of the front door of Curtin House?

LEE: I, I don't know, I don't know. We've got, we have teams that are working in relation to each of the specific areas of, of this investigation and one team is, is, umm, conducting the interview of Mr Rayney. When they've completed that interview, and subject to, umm, any admissions or confessions he may make, they'll determine what if any offences he's going to be charged with. He will be charged with that particular offence, and then they'll determine his bail and he, he will be released on bail. And whether that's done from Curtin House or whether it's done from East Perth I, I don't know.

109 The fact was that the interview had concluded some fifty minutes before DSS Lee gave the press conference[59] and Mr Rayney had declined to answer any questions. It is surprising that DSS Lee was unaware of that fact and that he made comments about the possible outcome of the interview in total ignorance of the state of the interview. The implication that Mr Rayney might be in a position to confess to murder is reinforced when the suggestion is considered with the later response to a question as to how close the police were to solving the crime, namely:

PRESS: So you're closer but you're not close enough yet.

LEE: We, look, we, we've, I've have worked very hard behind the scenes in relation to this and there's been a lot of work has gone on by a very dedicated team. We've excluded a lot of people, we've included some people, ah, we've substantially raised the level of one particular person in relation to this. We now think we know where the offence occurred. Umm, yeah, I'd say we are substantially further than we were. Umm, there's still a long way to go and, umm, we, as I've said many times I think we have the evidence. It's a matter of actually working out where it all fits together.

110 There were questions which, had DSS Lee answered either honestly or in an appropriately equivocal way, would have demonstrated how far the police were from having evidence that might support the laying of a charge of murder. For example:

PRESS: Have they found the digging implement?

LEE: Oh look we, we found a number of digging implements. We don't know yet whether we've got the correct one. Umm, we have so many forensic, umm, samples in relation to this investigation and we are investigating many other offences of course. Ah, we simply don't know if we've got the right one at this stage.

111 DSS Lee could have added that no digging implements were found at the Rayney residence, and the police were aware that a neighbour had, unbeknown to Mr Rayney, borrowed his spade some months before Mrs Rayney went missing, and had not returned it until he rang Mr Rayney during the search on 22 August 2007 and told him that he had the spade.

112 A further example is:

PRESS: Have you forensically linked him to the disposal scene?

LEE: Oh, I don't wish to discuss particular, umm, I don't wish to discuss particular items of evidence or particular forensic results. That, that wouldn't be appropriate.

113 Aside from the finding of a place card bearing Mr Rayney's name some distance from the grave site in Kings Park, a matter that DSS Lee initially considered to be of no particular significance, there were no 'particular items of evidence or forensic results linking Mr Rayney to the disposal site'. The answer given by DSS Lee left open the inference that such evidence might have been in the possession of the police.

114 And further:

PRESS: Have you spoken to neighbours? Did they hear an argument or anything at the house?

LEE: All the neighbours have been interviewed. I, I can't go into specifics of what people have told police and what they've said in their statements but we have interviewed all of the neighbours in the street, yes.

115 In fact, as DSS Lee was undoubtedly aware, no neighbours had reported hearing any argument or seeing anything unusual on the night in question. Someone hearing an argument would have been particularly significant. The lack of any suggestion (including from Sarah Rayney) of an argument was also of significance. The fact that DSS Lee left open the possibility that a neighbour may have reported hearing an argument as a live possibility was consistent with a general approach of avoiding comment on anything that might have been inconsistent with the suspicion of Mr Rayney, but making comments which tended to raise a spectre of guilt.

116 Importantly in the context of the imputation to be drawn from DSS Lee's words, is his use of the words 'only suspect', 'prime suspect' and 'primary person of interest, or the suspect'. Taken in isolation it can be accepted that the expressions 'prime suspect' or 'only suspect' do not necessarily impute guilt. That was a conclusion reached by Kelly J in ***Sands v State of South Australia***,[60] where her Honour rejected the proposition that if there is only one suspect, that logically leads to the conclusion that there are strong grounds to suspect guilt. The Full Court of South Australia expressly agreed with that conclusion.[61] That discussion was in the context of consideration of the particular words used at the press conference in question and the particular imputation pleaded. In my view, the use of those words, including the choice of adjectives, by DSS Lee served strongly to reinforce the implication drawn from the whole of the words said in the press conference that Mr Rayney was guilty of his wife's murder. The word 'prime' was not used to convey that Mr Rayney was one of a number of suspects in respect of whom there was inconclusive proof, as the following exchanges demonstrate.

PRESS: Is Mr Rayney your prime suspect now Jack?

LEE: He's our only suspect at this time. We do have a number of persons of interest. Umm, some persons of interest have been excluded from this investigation, umm, some remain and I have no doubt that some will be injected into the investigation in the future. At this time, he is the primary person of interest or, or the suspect.

117 There was no reference to the possibility that Mr Rayney might, in the future, be excluded from suspicion. The reference to there being no doubt that some persons of interest may be injected in the future can readily be construed as a suggestion that Mr Rayney may not have been acting alone. That was clearly the construction adopted by the journalist who asked the next question:

PRESS: Do you think he worked with other people to do this, because you said they might come into the investigation at some time?

LEE: Oh, I wouldn't like to speculate on whether this offence occurred, umm, was the result of one or more persons.

118 DSS Lee explained his use of the word 'prime' by reference to the process of logic that he was employing to support his suspicion.

> PRESS: So why is Lloyd Rayney your prime suspect?
>
> **LEE: He is our prime suspect because our, our evidence at this time leads us to believe the offence occurred at that house and he is the, the occupant of that house.**

119 There are of course things said by DSS Lee that run counter to an imputation of guilt.

> PRESS: Jack can you just clarify again for us, you said earlier that there is a possibility, you're not sure at this stage, but there could be a charge of murder sometime later today.
>
> **LEE: No sorry I don't want anyone to be misled in relation to that. We are interviewing Mr Rayney in relation to the murder of his wife. Umm, pending the outcome of that interview, umm, that would be the only time, if Mr Rayney was to make some level of admission, that would be the only time, today, we would prefer that charge. At this time we have no intention and no evidence to suggest that Mr Rayney is in fact guilty of or is in fact, umm, responsible for this offence.**

120 I have commented above on the reference to a possible admission. That reference tended to undermine the acknowledgement that there was no evidence to suggest Mr Rayney was guilty, as did the words 'at this time', particularly when considered with the agreement to the proposition that police were 'closer but not close enough yet' and the statement shortly afterwards that 'I think we have the evidence. It's a matter of actually working out where it fits together'.

121 DSS Lee did disavow the proposition that the phone tap charges linked Mr Rayney to the murder. It was not surprising that such a link might be made given that his arrest on that charge (albeit described as 'unrelated') was announced at the conclusion of his prepared statement that dealt mostly with the belief as to the location of the scene of the murder and Mr Rayney's status as a suspect. The exchange went as follows:

> PRESS: Apart from the phone taps is there any evidence that links Lloyd Rayney to the murder?
>
> **LEE: Ah, look, I am not suggesting that the phone tap links him to the murder. I'm simply saying that as a result of our investigations we've uncovered an illegal, umm, practice and we, we are prosecuting in relation to that.**

122 Interspersed in some of the statements set out above are words of qualification which might be thought to require a less sinister imputation to be drawn from the totality of the words used. These include:

In relation to the location of Mrs Rayney's murder; 'we can't say definitively but we believe that's the most likely' (place where she was killed), and that 'we cannot exclude at this time that it happened elsewhere'.
In relation to how close the police were to laying a charge of murder; '... there's still a long way to go'.
123 What is apparent from those qualifications is that each was itself qualified. In saying that the police could not say definitively where the offence took place, DSS Lee reiterated that it was 'most likely' that it occurred at the Rayney residence. The statement that they still had a long way to go was preceded by saying 'we are substantially further than we were'.

124 Having undertaken that fairly detailed analysis in the way that an ordinary reasonable and fairminded member of the public would not do, it is necessary for me to stand back and identify my own response to the words complained of and then to ask whether that response reflects the response of the fairminded reasonable recipient of the communication.[62] My own response, having had the benefit of seeing and hearing the words delivered by DSS Lee, is that they bear the guilt imputation. I am satisfied that, objectively viewed, that is the imputation that the ordinary fairminded listener would draw. Although in assessing the imputation to be drawn, I have not brought to bear the evidence of subjective responses to the words spoken by DSS Lee, I take some comfort in the conclusion that I have reached from the fact that many people with whom Mr Rayney came in contact or had dealings after 20 September 2007 appear to have taken the words to convey the guilt imputation.

125 As is apparent, I reject the defendant's primary argument that DSS Lee's words cannot, as a matter of law, give rise to the guilt imputation because that proposition is contrary to ***Mirror Newspapers v Harrison***.[63] The trial judge's summary of the case as pleaded in ***Mirror Newspapers v Harrison*** is set out in the judgment of Mason J as follows:

> The report was published on the first and second pages of the *Daily Mirror* newspaper on 14 August 1980.
>
> On the front page, in headlines two inches high, the article says:
>
> 'BALDWIN: 4 ARRESTS'
>
> and, in smaller type:

'3 MEN, WOMAN HELD IN RAIDS.'

The headline on the second page is:-

'BALDWIN - 4 ARRESTED'

and, in smaller type:-

'Police raid city homes.'

On each of the two pages there is a photograph of the plaintiff (with part of his face blocked out) as one of the three men arrested. The article states that the arrests were made 'in dawn raids today over the bashing of State Labour MP Peter Baldwin'. Mr Baldwin is said to have been 'viciously bashed by at least two men' and to have suffered 'shocking facial injuries and a fractured skull and requiring more than 50 stitches in his wounds' necessitating 'almost two weeks in hospital'. The article reminds its readers that Mr Baldwin had earlier made allegations of voterigging and of the infiltration of organized crime into innerCity Labor Party branches, and implies that the attack upon him was in reprisal for those allegations.

The arrests are said to have followed a month of 'intensive investigation by a special squad of detectives' who had 'worked around the clock to fulfil a directive from the Deputy Premier, Mr Ferguson, that the culprits be found'. The article says that a fourth man may be arrested and that all five are expected to appear in Court later that day, to be charged with 'conspiracy and fraud'. The article states that tight security will surround the Court when they so appear.

The two imputations at issue are in the following terms:

'(i) That the plaintiff was directly or indirectly involved in the vicious bashing of Mr. Peter Baldwin on the night of 17th July 1980 whereby Mr. Baldwin suffered shocking facial injuries and a fractured skull, required treatment consisting of more than fifty stitches in his wounds and spent almost two weeks in hospital;'

'(ii) That the plaintiff was guilty of a criminal offence in connection with the said bashing'.

126 It can immediately be noticed that nothing was said about the basis of the suspicion about the plaintiff in that case, nor about any conduct of the plaintiff that related to the suspicion. The article simply reported that the plaintiff and three others had been arrested and charged. Otherwise, the article discussed the background to the offence and the investigation that had followed. As Mason J said, the question in the case was whether a 'mere newspaper report of the fact of arrest and charge is capable of bearing an imputation of guilt of the offence charged'. That is not this case.

127 In this case no charge had been laid, but Mr Rayney had been arrested as a suspect for the purpose of interview in relation to Mrs Rayney's murder under the *Criminal Investigation Act 2006* (WA) (CI Act) and was to be charged with what DSS Lee described as an unrelated charge under the *Surveillance Devices Act*. Had DSS Lee confined himself to a bare report of those facts, then the circumstances would have given rise to the approach explained in ***Mirror Newspapers v Harrison***. He chose, however, to venture into a level of detail as to the basis for suspicion and, in my view, conveyed the imputation that the suspicion was wellfounded.

128 There is, I think, a further distinction to be drawn between this case and cases like ***Mirror Newspapers v Harrison*** and ***John Fairfax Publications Pty Ltd v Rivkin***. Those cases concern newspaper reports in relation to police investigations and the consequences of reports as to apparent suspicion by the police. They thus concern third party statements as to police suspicion. This case is concerned with a statement, as it were, straight from the horse's mouth. I have set out above the circumstances, in terms of media interest, that preceded the press conference on 20 September 2007 and, in particular, the speculation as to the identity of Mrs Rayney's killer. Against that context, the likelihood of listeners drawing adverse inferences from any loose or ambiguous language was heightened, not because the listeners were 'avid for scandal', but because of speculation rife in the community and, no doubt, among representatives of the media.[64] The media (and, in turn, the public to whom republication was not only inevitable but was intended) were not left to draw inferences from the mere fact of arrest, but were given information directly from the police spokesman as to why there were strong grounds for suspicion of Mr Rayney. It is a small step, and one that I consider ordinary reasonable people hearing the words would have taken, to construe DSS Lee as saying, in effect, 'he is guilty - but we have to wait to garner some more evidence, that we either already have or will have after the search of his home is complete, before charging him'. It follows that I am satisfied that DSS Lee's statements had the legal capacity to bear the guilt imputation.

129 The defendant argued that even if the words were capable of supporting the guilt imputation, they did not in fact give rise to the imputation. Much of the basis for that submission turns on the various passages of the press conference which I have discussed above and it is not necessary to revisit those matters. The defendant also prayed in aid of its argument the passage from ***Mirror Newspapers v Harrison*** where Mason J said:[65]

> The ordinary reasonable reader is mindful of the principle that a person charged with a crime is presumed innocent until it is proved that he is guilty. Although he knows that many persons charged with a criminal offence are ultimately convicted, he is also aware that guilt or innocence is a question to be determined by a court, generally by a jury, and that not infrequently the person charged is acquitted.

130 That observation was made in explanation of the principle concerning publications that 'do no more than state that a person has been arrested and charged'. It does not mean that an imputation of guilt can never be attributed to a statement by a police officer before a conviction is obtained. That is well recognised in the cases discussed earlier in these reasons which speak of the possible categories of defamatory meaning arising from statements of suspicion.

131 For the reasons I have set out, I am satisfied that the words spoken by DSS Lee on 20 September 2007, in their entirety and taken alone (that is, the alternative utterance), bore the guilt imputation.

Qualified privilege under the *Defamation Act*

132 Because the defendant does not seek to justify the guilt imputation as true, it is necessary to consider whether the publication is protected by qualified privilege under the *Defamation Act* or at common law.

133 The defendant asserts that the statements made by DSS Lee at each of the four press conferences, including on 20 September 2007, were made on an occasion of qualified privilege for the purposes of the defence under s 30 of the *Defamation Act.* A defence of qualified privilege in relation to the publication of defamatory matter exists under that section if the defendant proves that the recipient of the publication has an interest or an apparent interest in having information on some subject, the matter is published to the recipient in the course of giving information on that subject, and the conduct of the defendant in publishing the matter is reasonable in the circumstances. The recipient of the information has an apparent interest in having information on some subject if and only if, at the time of the publication, the defendant believes on reasonable grounds that the recipient has that interest (s 30(2)).

134 Section 30(3) of the *Defamation Act* provides:

> (3) In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account
>
> (a) the extent to which the matter published is of public interest;
>
> (b) the extent to which the matter published relates to the performance of the public functions or activities of the person;

(c) the seriousness of any defamatory imputation carried by the matter published;

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts;

(e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously;

(f) the nature of the business environment in which the defendant operates;

(g) the sources of the information in the matter published and the integrity of those sources;

(h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person;

(i) any other steps taken to verify the information in the matter published; and

(j) any other circumstances that the court considers relevant.

Interest or apparent interest of the recipient in having information on some subject

135 The defendant identified the interest of the recipients in [37(h)] of the Defence as follows:

(h) those media representatives present during the Oral Utterance and, or in the alternative, during the Alternative Utterance had an interest or apparent interest in being provided with the information provided by DSS Lee and DSS Lee believed on reasonable grounds that they had that interest or apparent interest;

Particulars

(i) the information provided by DSS Lee related to an ongoing murder investigation;

(ii) the interest of media representatives and the public in the status of the investigation into the murder of Corryn Rayney necessarily extended to an interest in details of that investigation which were publicly observed and for which an explanation was sought;

(iii) a number of DSS Lee's statements were made in answer to questions from media representatives about aspects of the investigation;

(iv) DSS Lee's statements reflected his knowledge of and belief about the status of the investigation at the time and the need to protect the integrity of the police investigation;

(v) the defendant repeats paragraph 37 (f) above.

136 Paragraph 37(f) pleads that it was in the public interest that the media conference be held promptly after the occurrence of certain matters referred earlier in the pleading, and because the widely publicised disappearance of Mrs Rayney, appeals for public assistance to find her, the execution of search warrants, the arrest of the plaintiff, and the fact that he was driven away in police custody, are all matters which of their nature concern the administration of justice and are, for that reason, of public interest. The matters referred to earlier in the pleading concerned the circumstances surrounding the execution of a search warrant that morning, including that a number of lawyers attended the premises, Mr Rayney was driven away by police to MCS headquarters at Curtin House, and that several of these events were observed by members of the media.

137 The requirement of s 30(1) that the recipient have an interest or apparent interest in having information on some subject was addressed in the course of crossexamination of three journalists called by the plaintiff; Mr Cooper, Mr Cowan and Mr Taylor. Mr Cooper agreed that it was part of his job to get as much information as he could from the police to cover crime stories, but the police would have limitations on the amount of information they would provide having regard to matters such as the need to avoid interference with the investigation or the protection of victims or their families.[66] He also accepted that Channel 7, for whom Mr Cooper worked in 2007, and still works, would frequently convey requests for witnesses to contact Crime Stoppers so as to potentially help police investigations.[67] He acknowledged that he saw himself as fulfilling a role of assisting in providing information which might reassure the public in a context of there being considerable rumour, speculation and innuendo in the community regarding Mrs Rayney's murder.[68]

138 Mr Cowan, who was in 2007 the principal crime reporter for *The West Australian*, was of the view that Mrs Rayney's disappearance and murder was a very significant story requiring considerable coverage.[69] He held the view that *The West Australian* might assist the police, directly or indirectly, in the investigation that they were conducting into her disappearance. He saw it as his task to provide as much information as possible to the public[70] and in so doing to provide reassurance to the public. Mr Cowan said that he held the view that the media, and his contribution within it, played an important role in assisting police in investigations and, in that sense, *The West Australian* provided a public service.[71]

139 In relation to the media conference by DSS Lee on 20 September 2007, Mr Cowan said that he considered the purpose of the conference as being to inform the public, to reassure the public and to benefit the police enquiry. He noted however, that while he took that 'to be the general police purpose for holding any press conference, the purpose and effect [are] different things, of course'.[72]

140 Mr Taylor agreed that, in much of the press coverage involving reports on police investigations, the story ends with an invitation to the public to call the Crime Stoppers number with any information that might be helpful to police. He described that as 'something of a loose arrangement that exists between news organisations and Crime Stoppers' in order to 'centralise the flow of information to police' in cases where police need witnesses or information.[73]

141 The defendant submitted that the term 'interest' should not be construed narrowly and encompasses a matter of genuine interest to the recipients of news media. In support of that contention, it relied upon ***Austin v Mirror Newspapers Ltd***[74] where the Privy Council said in relation to the equivalent provision in the *Defamation Act 1974* (NSW):

> As to s 22(1)(a) it was submitted on behalf of the appellant that the readers of the newspaper did not have 'an interest' in having information on the subjectmatter of the article, which, it was agreed between the parties, could be taken to be the performance of teams in the rugby league competition and the alleged training methods of conditioners. It is possible as a matter of construction to place a narrow or a broad construction on the words 'an interest'. The narrow construction would equate 'an interest' with that type of interest which is usually looked for as an ingredient of the defence of qualified privilege at common law, that is to say, an interest material to the affairs of the recipient of the information such as would for instance assist in the making of an important decision or the determining of a particular course of action. It is for this narrow construction that the appellant contends. But it is clear that the courts in New South Wales have placed a broader construction upon the words 'an interest' and have taken them to include any matter of genuine interest to the readership of the newspaper. In ***Wright v Australian Broadcasting Commission*** [1977] 1 NSWLR 697 Reynolds JA, with whom Glass JA agreed, said (at 711), when

considering s 22(1)(a) in respect of a television broadcast: It cannot be denied that the recipient, in this case the general public, had an interest in having information on the subject of public affairs. In ***Morosi v Mirror Newspapers Ltd*** [1977] 2 NSWLR 749 the Court of Appeal drew a contrast between the interest required to find qualified privilege at common law with the wider interest referred to in s 22. They said (at 797):

> 'The limited application of the common law principles of qualified privilege to publications in newspapers has already been discussed. Section 22 was designed to enlarge the protection afforded by these principles to defamatory publications generally, and it has a particular relevance to publications in newspapers; but it gives no carte blanche to newspapers to publish defamatory matter because the public has an interest in receiving information on the relevant subject. What the section does is to substitute reasonableness in the circumstances for the duty or interest which the common law principles of privilege require to be established.'

In ***Barbaro v Amalgamated Television Services Pty Ltd*** (1985) 1 NSWLR 30 Hunt J said (at 40):

'... The word "interest" is not used in any technical sense; it is used in the broadest popular sense, to connote that the interest in knowing a particular fact is not simply a matter of curiosity, but a matter of substance apart from its mere quality as news.'

In ***Field v John Fairfax & Sons Ltd*** (Court of Appeal, 23 May 1974, unreported), it was held that the public had an interest in the greyhound racing industry.

Bearing in mind that this Act was clearly intended to widen the scope of the common law defence of qualified privilege, their Lordships see no reason to differ from the wider construction adopted by the courts in New South Wales and, applying this construction, accept the view of both the trial judge and the Court of Appeal that the readership of this daily newspaper had an interest in the performance and training of the Manly Rugby Football Club within the meaning of s 22(1)(a).

142 I accept that the media may have an interest of the character that attracts the operation of s 30 of the *Defamation Act*. The more difficult question is whether the information that was conveyed by the alternative utterance is information within the scope of the information that the interest protects. As the New South Wales Court of Appeal said in a passage from ***Morosi v Mirror Newspapers***[75] cited in ***Austin v Mirror Newspapers Ltd***, statutory qualified privilege does not give media organisations (or those giving information to media organisations) carte blanche to publish defamatory matter simply because the public has an interest in receiving information on the relevant subject. There is something of an overlap between the determination of whether

the information conveyed is within the scope of the interest, whether publication of the defamatory information occurred in the course of giving information on the subject in respect of which the interest is held (s 30(1)(b)) and the question of reasonableness.

143 The starting point is to identify the interest relied upon. I have set out above the pleaded interest. The pleading refers to an interest 'in being provided with the information provided'. The interest is explained a little more in the particulars which plead that the interest 'extended to an interest in the details of that investigation which were publicly observed and for which an explanation was sought'.

144 As will be seen, DSS Lee's evidence as to why he held the press conference falls short of identifying a clear purpose to which the conference was directed. In its written closing submissions, the defendant explained the relevant interest as follows:

2888. The media's interest in the subject matter was obvious given the following.

2888.1 The information provided by DSS Lee related to an ongoing murder investigation.

(a) It is trite to observe that the progress of a homicide investigation is usually of public interest.

(b) However, the fact that the victim was a judicial officer, and that her husband was previously a highranking prosecutor, elevated the public interest in the progress of this particular investigation.

(c) DSS Lee had not then, and has not since, been involved in a homicide investigation with the level of media interest as Operation Dargan. This evidence is particularly striking in view of the fact that DSS Lee has some 20 years' experience in homicide investigations.

2888.2 The number of media reports and the number of reporters attending previous media conferences indicated a high level of media interest in the investigation into the disappearance and murder of Ms Rayney.

(a) The evidence in this case establishes that, between 10 August 2007 and 19 September 2007, there were at least 242 media publications regarding the disappearance and murder of Ms Rayney.

2888.3 The interest of the media representatives and the public in the status of the investigation into the murder of Ms Rayney necessarily extended to an interest in details of that investigation which were publicly observed and for which an explanation was sought.

(a) The media and the public knew that the plaintiff had been taken away from the Rayney premises in the company of police and suspected that he had been arrested.

(b) The media representatives had made many and frequent requests of the PMU and of DSS Lee for an explanation of what had occurred on 20 September 2007.

(c) That followed the numerous requests made by media prior to 20 September 2007 for the release of information about, or the provision of a police spokesperson to speak to, the progress of the investigation.

(d) On 20 September 2007, the media were particularly inquiring as to whether and when the plaintiff would be charged with or arrested for Ms Rayney's murder. (footnotes omitted)

145 Taking the pleading and the submissions together, I take the defendant's case to be that the interest of the media, and in turn the public, was to be kept informed as to the progress of the investigation, to understand what had been observed to have happened that day at the Rayney residence and, in particular, the basis upon which Mr Rayney had left his home in the company of police. I am satisfied that the interest of the media, and in turn the public, in those matters was, given the broad construction explained in ***Austin v Mirror Newspapers Ltd***, capable of attracting qualified privilege under s 30 of the *Defamation Act*. I note in passing that the pleading of qualified privilege under s 30 does not invoke an interest on the part of the media in receiving information so as to facilitate or encourage the provision of information by the public to police to assist the investigation, although that is said to be an interest of the recipients for the purpose of qualified privilege at common law.[76]

146 Notwithstanding the potentially privileged nature of the occasion, for the reasons explained below, I do not consider that the publication of the defamatory matter can be said to have occurred in the course of giving the information which the media have a relevant interest in receiving, nor do I think that conveying the guilt imputation was reasonable.

Publication of defamatory matter in the course of giving information on the subject

147 The information on the subject in respect of which the media had the pleaded interest was information as to the progress of the investigation and an explanation, or clarification, of the basis on which the police were conducting a search of the Rayney residence, and on which Mr Rayney left his home that morning in the company of police.

148 The information given by DSS Lee went well beyond those matters. The interest of the media and the public would have been met by simply announcing that Mr Rayney was to be interviewed about and charged with an offence under the *Surveillance Devices Act*, that as a result of ongoing investigations the police were carrying out a search of his home in relation to both the proposed charge under the *Surveillance Devices Act* and in furtherance of the murder investigation, and that Mr Rayney was being (or, more accurately, had been) interviewed in relation to both matters. It was

unnecessary to embark upon a disclosure of the evidentiary basis upon which the police were basing their actions, and certainly not part of the media's interest to hear information suggesting guilt. The position is analogous to that considered in ***Wright v Australian Broadcasting Commission***,[77] a case concerned with a report as to a vote taken in the Senate which attributed disloyalty by a senator in voting against his party. Reynolds JA, with whom Glass JA agreed, concluded that the general public undoubtedly had an interest in having information on the subject of public affairs and, in particular, the subject of the election of a President of the Senate; but, in the case in question, the defamatory matter was not published in the course of giving the public information on that subject. Rather, the subject of the publication was no more than a speculation in the nature of titillating gossip as to how Senator Wright had cast his vote in a secret ballot. This was a subject in which the general public had no legitimate interest. Reynolds JA went on to find that that conclusion meant that the publication complained of was not, and could not be, reasonable within the New South Wales equivalent of s 30(1)(b). I turn now to that question.

Reasonableness

149 The considerations that bear upon the reasonableness of the publication of information for the purposes of s 30(3) of the *Defamation Act* will vary with the circumstances of individual cases.[78]

150 In ***Morgan v John Fairfax & Sons Ltd***[79] Hunt AJA, with whom Samuels JA agreed, after examining the authorities, concluded that four nonexhaustive propositions could be stated in relation to the requirement of s 22(1)(c) of the *Defamation Act 1974* (NSW) that the conduct of a defendant in publishing defamatory matter was reasonable. Those propositions were:

> (1) The conduct must have been reasonable in the circumstances to publish each imputation found to have been in fact conveyed by the matter complained of. The more serious the imputation conveyed, the greater the obligation upon the defendant to ensure that his conduct in relation to it was reasonable. Of course, if any other defence (such as truth or comment) has already been established in relation to any particular imputation found to have been so conveyed, it is unnecessary to consider the reasonableness of the defendant's conduct in relation to the publication of that particular imputation.
>
> (2) If the defendant intended to convey any imputation in fact conveyed, he must (subject to the exceptional case discussed in ***Barbaro's*** case, and perhaps also that discussed in ***Collins v Ryan***) have believed in the truth of that imputation.
>
> (3) If the defendant did not intend to convey any particular imputation in fact conveyed, he must establish:
>
> > (a) that (subject to the same exceptions) he believed in the truth of each imputation which he did intend to convey; and

(b) that his conduct was nevertheless reasonable in the circumstances in relation to each imputation which he did not intend to convey but which was in fact conveyed.

If, for example, it were reasonably foreseeable that the matter complained of might convey the imputation which the jury finds was in fact conveyed, it will be relevant to the decision concerning s 22(1)(c) as to whether the defendant gave any consideration to the possibility that the matter complained of would be understood as conveying such an imputation, as will be his belief in the truth of that particular imputation and what steps he took to prevent the matter complained of being so understood: ***Evatt v John Fairfax & Sons Ltd*** at 13 14; ***Makim v John Fairfax & Sons Ltd*** (1990) 5 BR 196 at 209; see also ***Wright v Australian Broadcasting Commission*** at 712 (whether the defendant 'knew whether he was likely to convey a misleading impression'; ***Austin v Mirror Newspapers Ltd*** (at 362) (Privy Council).

(4) The defendant must also establish:

(a) that, before publishing the matter complained of, he exercised reasonable care to ensure that he got his conclusions right, (where appropriate) by making proper inquiries and checking on the accuracy of his sources;

(b) that his conclusion (whether statements of fact or expressions of opinion) followed logically, fairly and reasonably from the information which he had obtained;

(c) that the manner and extent of the publication did not exceed what was reasonably required in the circumstances; and

(d) that each imputation intended to be conveyed was relevant to the subject about which he is giving information to his readers.[80]

151 DSS Lee explained that the Western Australian Police had policies, guidelines, a media guide and a code of conduct which applied to interacting with the media. The Police Media Policy[81] specifies that it is the policy of the Western Australian Police to assist the media whenever possible to understand how the police performs its work and the service it provides to the community. It specifies:

The media should be assisted in their efforts to obtain information from the WA Police if it can be identified that:

(a) the information requested is in the public interest, eg, general right to know, dangerous situations, public advice or warnings, and would also foster increased awareness of personal safety and property security,

(b) the information requested is in the WA Police's interest, eg, proactive information, crime prevention, public relation material, police warnings, which also demonstrates a commitment to public safety and security,

(c) to demonstrate the police services openness and accountability.

152 The Western Australian Police Service Ethical Guideline identifies six principles of conduct which are said to enhance the credibility of the police service, being honesty, respect, fairness, empathy, openness and accountability.[82] The Western Australian Police Media Guide urges police officers to adopt various principles, including to tell the truth. In relation to doing television interviews, the media guide makes the obvious point that:

> Because television news scripts are often little more than a minute long, it is absolutely essential that you package your comments correctly. You will only have one or two comments aired in a story, so it is important you are clear and concise.

153 In relation to the 'arrest phase' the media guide provides:

> When a person is taken into custody, but not yet charged, they should be referred to as someone 'helping us with our enquiries' or 'a person of interest'. In normal circumstances police should not identify such people. Where such people are already known to the media or public (eg celebrities), careful judgment needs to be exercised about identifying them.

154 There is no doubt that the events surrounding the disappearance and murder of Mrs Rayney attracted enormous media interest. As noted earlier, DSS Lee said that he had never worked on any enquiry before or since with that level of media interest, some of which he described as unhelpful and getting 'in the way of the investigation'. When that occurred he said that they 'tried to dampen it down'.

155 At the time of DSS Lee's media conference on 20 September 2007, the status of the plaintiff under the CI Act was that he had been arrested pursuant to s 128(2) in relation to the murder of Mrs Rayney, on the basis that the arresting officer reasonably suspected that he had committed an offence. He was, thus, what is defined as an 'arrested suspect' for the purposes of s 138 of the CI Act. He therefore enjoyed the rights of an arrested suspect under that section, namely to be informed of the offence for which he had been arrested, and any other offences that he was suspected of having committed, to be cautioned before being interviewed as a suspect, to have a reasonable opportunity to communicate with a legal practitioner, and to be informed of those rights as soon as practicable after arrest.

156 DSS Lee said that it was not his intention prior to the execution of the search warrant on 20 September 2007 to hold a media conference, but rather to explain the police's actions by way of a media statement if that became necessary. It was initially intended, so DSS Lee said, that Mr Rayney would be taken into custody and taken away from the Rayney residence before media representatives arrived. That intention did not come to pass and the media were present when Mr Rayney was escorted from the home by police, and that event was filmed by television cameras. DSS Lee said that he decided, in consultation with his immediate superior, Assistant Commissioner Byleveld, Superintendent Annetts, and the Police Media Unit Officer, Mr Stanbury, sometime after noon on 20 September 2007, and probably between 1.00 pm and 1.30 pm, that the issue of the plaintiff's arrest had to be dealt with by way of media conference. It is apparent that the media were exerting considerable pressure by way of constant enquiries of the Police Media Office and the detectives involved, seeking information. DSS Lee said that he was instructed by Superintendent Annetts to 'type something up', and he typed a draft statement to be read to the media. Before the press conference - DSS Lee estimated approximately 30 minutes before - he attended at police headquarters for a further briefing with Inspector Hatch of the Police Media Liaison Unit. He said he was shown a list of questions and rehearsed answers, but only got half way through the list before the start time for the media conference.

157 DSS Lee said that he was not entirely happy with his draft statement because he was reluctant to contradict a statement by the Commissioner of Police which he had heard on the radio at 10.00 am that day in which Mr Rayney was described only as a person of interest, rather than a suspect. It can be noted in passing that, in the course of that media interview by the Commissioner on Radio 6PR that morning, the Commissioner had said that DSS Lee would be conducting a media conference later that day to provide more detail.

158 DSS Lee said that he felt that it 'needed to be said that Mr Rayney was an arrested suspect' because the police intended to detain him while conducting investigations. He said he was very concerned to correct the statement by the Commissioner because it was his belief that the police had obligations under the CI Act to ensure that Mr Rayney was informed that he was an arrested suspect, and he wished to ensure that he protected the admissibility of any admissions obtained during his interview should Mr Rayney make any. DSS Lee said that he considered that there needed to be a public correction of what he said was an incorrect description made publicly by the Commissioner earlier that day.

159 That rationale for the conference is difficult to understand. Section 138 of the CI Act grants rights to an arrested suspect. As noted above, they are rights as to information concerning the suspected offences, the provision of a caution, and the provision of an opportunity to communicate with a legal practitioner. A person is an arrested suspect if they are arrested pursuant to s 128(2) of the CI Act. DSS Lee knew that Mr Rayney had been arrested on that basis. The statement by the Police Commissioner, consistent with police guidelines, which publicly described Mr Rayney as a person of interest, rather than a suspect, had no capacity to change Mr Rayney's status under the CI Act or the admissibility of any admissions made by Mr Rayney. Even if it did, it is difficult to see how it could possibly be thought that publicly correcting the statements five hours later would retrospectively alter that outcome in relation to events which occurred prior to DSS Lee's press conference. When asked how any problem occasioned by the Commissioner's public statement could be retrospectively cured, DSS Lee said:

> I - I think I've covered that. I said his legal status was an arrested suspect. The Commissioner said at 11 am that he was a POI. That changes his status within the CIA and he has rights under the CIA to be advised of - of the fact he has been arrested and what he has been arrested for and if the general public believe that, my belief was that Mr Rayney would at some point in the future use that statement by the Commissioner to have evidence that was obtained on 20 September thrown out of court.[83]

160 If that was DSS Lee's motivation for what he said at the press conference, it was entirely misconceived. What is relevant to questions of admissibility of admissions are Mr Rayney's actual status, that he is told of his status, and his entitlement to certain rights. What the public may think about his status is irrelevant and could provide no basis for Mr Rayney to challenge the admissibility of any admissions. In any event, by the time DSS Lee held the press conference, the interview with Mr Rayney had been concluded for around an hour and, as was expected, Mr Rayney had exercised his right to silence and made no admissions. I do not consider that that reason for holding the press conference was a circumstance pointing to the reasonableness of what was said at the press conference.

161 Further, in that context, it can be noted that neither in the prepared statement read by DSS Lee to the media (being the brief statement made prior to taking questions), nor in the course of his answers to questions, did DSS Lee use the expression 'arrested suspect' or make any reference to the CI Act or the significance of the status under that Act. There is no apparent reason why DSS Lee needed to depart from the media guide relating to the arrest phase.

162 DSS Lee said a further reason for giving the media conference was that he was concerned that the media would have thought that the police were charging Mr Rayney with murder because he was taken away in a police vehicle and 'many lawyers, including the DPP lawyer, had been present at the Rayney home'. He said that the media were continuously calling him and asking whether or when Mr Rayney would be charged with murder.

163 Again, I do not consider that that reason justified going beyond merely advising the media that Mr Rayney was being charged with an offence under the *Surveillance Devices Act*, that enquiries in relation to Mrs Rayney's murder were ongoing, and otherwise abiding by the media guide in relation to the arrest phase. It will be recalled that the media guide called for careful judgment to be exercised where people are already known to the media, and I am satisfied that DSS Lee failed to exercise that judgment. I note that Inspector Hatch, who was involved in setting up the press conference on 20 September 2007, and who spent a short time with DSS Lee preparing him for questions that he may be asked, acknowledged that it was not a 'planned strategy' to say that Mr Rayney was the 'prime and only suspect' and that there was never any discussion before the conference about referring to Mr Rayney in that way.[84] DS Correia gave evidence before Brian Martin AJ in the murder trial, and confirmed in these proceedings, that what DSS Lee said at the press conference 'wasn't the position that we, as operationally myself, wanted out in the general public'.[85]

164 In his reasons for decision in relation to the murder trial,[86] Brian Martin AJ criticised DSS Lee's conduct at the press conference in the following way:

> To put the position at its lowest, Mr Lee was gravely in error in identifying the accused as a 'suspect' in the murder of the deceased and in conveying a police view that the accused was the prime and only suspect. Similarly, he should not have informed the media that police investigations and 'forensic evidence' had led the police to 'believe' that it was 'very likely' that the deceased was murdered at Como. Given the presence of the media, Mr Lee probably had no choice but to confirm that police had executed a search warrant at the premises, but he should not have said that police had executed a forced entry after 'access was denied' and there was no need to mention the execution of a search warrant at the accused's business premises. It would have been sufficient to explain to the media that police had executed a search warrant in furtherance of their investigations and that the accused had been charged with an offence under the *Surveillance Devices Act*.

> Mr Lee's lack of judgment was compounded by allowing the media to continue to ask questions and by giving a number of utterly inappropriate responses. In particular, notwithstanding his statement that police did not possess any evidence to suggest that the accused was 'in fact guilty of or is in fact responsible for' the murder of the deceased, naming the accused as a suspect and the prime or only suspect was a serious departure from the proper standards of conduct expected of investigating officers. What occurred on 20 September 2007 in the press conference highlights the dangers associated with such conferences and the undesirability of police giving such open-ended conferences or interviews concerning ongoing investigations.

165 During crossexamination, DSS Lee said that he accepted each of the criticisms contained in those two paragraphs. I agree with the criticisms made by Brian Martin AJ. DSS Lee was asked in reexamination whether, notwithstanding that he accepted the criticisms, he nevertheless maintained his evidence as to his reasons for holding the conference and for saying what he did. He said that he maintained his evidence. In what sense, therefore, he claimed to have 'accepted the criticism' is not clear. That lack of clarity is, however, of no significance, since DSS Lee's subjective opinion as to his conduct is not determinative of the question of reasonableness. In my view, DSS Lee went far beyond what was appropriate in the circumstances with which he was confronted, and, especially having regards to the seriousness of the offence being investigated and the obvious professional damage that loose language would inflict on Mr Rayney. The errors and misstatements that I have discussed above demonstrate that he did not exercise reasonable care in his responses to questions. His statements did not follow logically and fairly from the information that he had or could have had. His statements were not reasonable in the sense contemplated by s 30 of the *Defamation Act*.

Qualified privilege at common law

166 As a general proposition, the common law protects the publication of defamatory matter made on an occasion where one person has a duty or interest to make the publication and the recipient has a corresponding duty or interest to receive it; but the privilege depends upon the absence of malice.[87]

167 Unlike qualified privilege under s 30 of the *Defamation Act*, there must be reciprocity of the interest or duty of the publisher on the one hand and the interest or duty of the recipient on the other. The requirement of reciprocity of interest generally denies the common law privilege where the matter has been disseminated to the public at large.[88]

168 The question of the interest of media organisations as recipients of information as to police investigations was considered in the context of qualified privilege at common law by Kelly J in ***Sands v State of South Australia***.[89] In that case, the interest pleaded was 'a legitimate reciprocal interest in receiving this information because of the South Australian public's interest in the investigation of serious crime and the arrest of persons whom the police believe, on reasonable grounds, to have committed serious crimes'. Her Honour concluded that as a matter of general principle, it is undoubtedly in the public interest for police to communicate with the public in the course of an investigation into a serious crime through media briefings. She found, however, that on the facts before her, the relevant media release and press conference went beyond anything which might be required to discharge the duty of police to keep the public informed of the state of the ongoing investigation or to call for further information from the public. That conclusion was expressly approved by the Full Court in the appeal from her Honour's judgment when it said:

> The Media Release and Press Conference were occasions for the police to enlist the assistance of the public in terms of obtaining any information in public hands that may assist them with their intractable and long running murder investigation. It was this that underpinned the

> potentially privileged nature of the occasion. It was gratuitous for the police, in advancing that purpose, to inform members of the public that they had reasonable grounds to suspect Mr Sands and that he had conducted himself so as to warrant that suspicion. This information fell wholly outside the interest or duty of the police to provide information necessary to obtain such assistance from the public as may potentially be available and outside the interest of members of the public to receive such information. The wider information disclosed as identified by the judge served only to emphasise that the police had stepped outside the occasion of privilege.[90]

169 The defendant pleads that DSS Lee's words were spoken on an occasion of qualified privilege at common law in that DSS Lee had an interest or a duty in solving the murder of Mrs Rayney and providing sufficient information to members of the public as a result of which they:

were better able to provide information to assist the investigation;
were aware of the change in Mr Rayney's status in the investigation; and
would continue to provide information to assist the investigation.

170 It pleads that the media representatives present at the press conference and members of the public had a corresponding interest in receiving DSS Lee's communication.[91]

171 It can be noted in passing that, unlike other press statements by police earlier in the investigation of Operation Dargan, no request was made by DSS Lee at the 20 September 2007 press conference for the public to provide information. DSS Lee gave evidence as to why he held the press conference. The reasons he gave did not include any reference to encouraging or facilitating the provision of information by the public.[92] The proposition that the media conference was held in the performance of an interest or duty to facilitate information from the public is not supported by the evidence. In any event, it is not readily apparent how narrowing down the options as to where the offence may have occurred would assist in encouraging members of the public to come forward with information unless it related to the offence having occurred at the Rayney residence. For example, a member of the public who observed something unusual at some other location would be more likely to dismiss their observation as irrelevant. If, contrary to the fact, DSS Lee did hold the conference in order to encourage members of the public to come forward, what he said could only logically cause them to come forward to assist police to establish their case theory that the offence had occurred at the Rayney residence.

172 In dismissing statutory qualified privilege, I have dealt with the evidence as to the motive and rationale for holding the press conference. In ***Cush v Dillon***,[93] French CJ, Crennan and Kiefel JJ said in relation to the appellants' submission that the defamatory statement was extraneous to and made outside the 'umbrella of the applicable privilege':[94]

> The appellants' contention brings to mind the further requirement spoken of by Parke B in ***Toogood v Spyring*** for statements to attract the qualified privilege:
>
> > 'If *fairly warranted* by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits. (emphasis added)'

> ***Adam v Ward*** confirms that there may be limits to what may be said upon a subject on an occasion of qualified privilege and that those limits are to be tested by the connection of the statement to the subject. In that case Earl Loreburn observed that the fact that an occasion is privileged 'does not necessarily protect all that is said or written on that occasion' and that anything 'not relevant and pertinent' to the discharge of the duty or the safeguarding of the interest which creates the privilege will not be protected. Where such a question is raised it will be necessary for the trial judge to consider the matter of the duty or interest and rule whether the defendant has published something 'beyond what was germane and reasonably appropriate to the occasion'. Lord Dunedin spoke of a statement 'quite unconnected with and irrelevant to the main statement'; Lord Atkinson to 'foreign and irrelevant' matter and Lord Shaw of Dunfermline to matter which was 'not in any reasonable sense germane' to what was being conveyed in the discharge of duty or the protection of an interest.[95] (footnotes omitted)

173 DSS Lee's statements were made to the public at large. The dominant operative purpose for holding the press conference appears to have been a desire to appease the demands of the media rather than to assist in solving the murder of Mrs Rayney. In my view, this case is analogous to that confronting Kelly J in ***Sands v State of South Australia***,[96] and DSS Lee's statements at the media conference on 20 September 2007 went beyond anything required to discharge any duty of the police to keep the public informed, and fell outside the 'umbrella of the privilege' at common law.

Conduct imputation and suspicion imputation

174 Given the conclusion that I have reached as to the meaning of the words used by DSS Lee on 20 September 2007, the issue of justification falls away, since the defendant does not assert that the imputation that the plaintiff killed his wife was, or is, true. It is appropriate, however, given that the vast bulk of the trial was concerned with the defendant's case as to truth of the conduct imputation and the suspicion imputation, that I deal with those issues.

Particulars of the truth of the conduct and suspicion imputations

175 In particularising its plea of the truth of the conduct imputation, the defendant identified 33 circumstances against which it suggests that conduct referred to in a further 29 particulars gives rise to a reasonable suspicion that the plaintiff murdered his wife. It is necessary to consider which of those contextual circumstances are established, either by admission or by the evidence, before moving to examine whether the defendant has established the conduct alleged, and then to consider whether the established conduct, viewed in the context of the established circumstances, gives rise to a reasonable suspicion that the plaintiff had murdered his wife. A number of the particulars of circumstances overlap, and can be dealt with together. The same particulars are relied upon, with the exception of two matters,[97] as matters establishing the truth of the suspicion imputation; being matters that had come to the attention of police prior to the holding of the press conference on 20 September 2007.

176 Before turning to those matters and the evidence in relation to them it is necessary to consider a pleading issue and to make some observations about the credibility of certain witnesses including the plaintiff.

The 'conduct rule'

177 It has been suggested in some cases that to say a person is suspected of something necessarily implies that he has so conducted himself as to have warranted that suspicion.[98] In ***Shah v Standard Chartered Bank***,[99] Hirst LJ said that it is an essential requisite of the defence of justification of reasonable suspicion that it should focus on some conduct on the plaintiff's part giving rise to reasonable suspicion. This is sometimes referred to as 'the conduct rule'.

178 In ***Channel Seven Adelaide Pty Ltd v S, DJ***,[100] Perry J (with whom Duggan & David JJ agreed) said:

> Channel Seven, through its counsel, contends that the so-called conduct rule is not a rule at all, but only a 'general guideline'. I would agree with that proposition to the extent that regard may be had in some cases to circumstantial evidence and background facts which may not flow directly from conduct on the part of the plaintiff.

179 That passage reflects an acceptance in the English cases that the conduct rule is not an absolute rule and that strong circumstantial evidence can contribute to reasonable grounds for suspicion.[101]

180 The defendant's pleading deals with justification of each of the conduct imputation and the suspicion imputation in a rolledup manner. That gives rise to a pleading issue which needs to be considered to clarify the nature of the analysis to be undertaken.

The pleading issue

181 As noted above, the defendant identified in the particulars to [36] of the Defence 29 particulars of conduct and 33 circumstances against which it contended that conduct should be viewed. No effort was made to correlate the conduct with any particular circumstances. To take a simple example, the circumstance pleaded in particular 36(xii) provides:

> shortly before 7 August 2007, the plaintiff indicated to Corryn Rayney a willingness to provide financial documents and move out of the Rayney premises.

While particular 36(xxxiii) provides a particular of conduct as follows:

> Using a dictaphone, the plaintiff recorded conversations between him and Corryn Rayney without her consent.

No logical or probative connection appears to exist between that particular of conduct, and the circumstance particularised in particular 36(xii). That disconnect between the particulars infects the whole pleading of truth.

182 After setting out the 33 circumstances, the particulars to [36] continue:

> The following conduct of the plaintiff up until the holding of the media conference [on 20 September 2007], in its totality, gave rise to a reasonable suspicion that he had murdered his wife. (emphasis added)

183 There then follows the 29 particulars of conduct relied upon.

184 Particulars of truth of the suspicion imputation are also provided in [36] of the Defence. Those particulars plead that:

> The police officers involved in Operation Dargan, including DSS Lee, suspected the plaintiff of having murdered or unlawfully killed his wife and had reasonable cause for doing so on the basis of evidence of the matters particularised [in all but two of the particulars of circumstances and conduct relating to the conduct imputation], having come to their attention prior to the holding of the media conference [on 20 September 2007]. The evidence is listed in paragraph 12A of the Schedule of this Defence.

185 Schedule 12A of the Defence enumerates 126 witness statements, including many of which postdate 20 September 2007, seven items of physical evidence, 21 items of 'other documentary evidence' comprising bundles of correspondence, videos taken during the investigation, exhibit logs, photographs, bank statements, passports, diaries, a forensic matrix and a statements matrix, and a vast number of police records including 44 diaries or red books of a large number of police officers, a good number of which did not give evidence at the trial, a large number of 'VIPER actions', the Dargan briefing book, a critical decisions log book, a bundle of WA police service forensic division crime scene unit case management face sheets, five applications for search warrants, and two search warrants.

186 The plaintiff submits that the defendant's pleading of justification attracts the criticism inherent in the observations of four members of the High Court in ***Forrest v Australian Securities and Investments Commission***,[102] where their Honours stated:

> The task of the pleader is to allege the facts said to constitute a cause of action or causes of action supporting the claims for relief. Sometimes that task may require facts or characterisations of facts to be pleaded in the alternative. It does not extend to planting a forest of forensic contingencies and awaiting until final address or perhaps even an appeal hearing to map a path through it. In this case, there were hundreds, if not thousands, of alternative and cumulative combinations of allegations.

187 There is merit in the plaintiff's criticism of the pleading on that basis. It was, however, the pleading upon which the trial proceeded and it is necessary to deal with the defendant's case as best as can be done.

188 While the pleading of the Defence is cumbersome and unwieldy, and can fairly be criticised as inadequately identifying the connection between conduct and circumstances and, in relation to the suspicion imputation, between the vast number of documents identified and the conduct or circumstance to which they relate, I do not accept that the pleas of justification stand or fall on proof of every particular. That is so, notwithstanding the use of the words 'in their totality' in the connecting clause between the particulars of circumstances and the particulars of conduct. Common sense requires those words to be construed as making clear that the defendant's case is not that any single particular of conduct gives rise to a reasonable suspicion that Mr Rayney murdered his wife, but rather that suspicion arises from the totality of the conduct in which Mr Rayney is said to have engaged. In other words, the suspicion arises in the same way that an inference is drawn, not from any particular fact, but from a combination of facts in their totality. It does not follow from that construction that if a particular act of the plaintiff is not proved, then the justification case falls away. To hold the defendant to that construction would be to create a real risk that the substantive question, namely whether the plaintiff had conducted himself so as to give rise to a reasonable suspicion, or that the police held a suspicion on reasonable grounds, would be answered by reference to a technical pleading point rather than the proper conclusion to be drawn from the established facts. The defendant is to be held to its pleading insofar as the facts from which the court should draw its conclusion must be within those identified in the particulars. That does not, however, require that the defendant establish every fact which it pleads before grounds for suspicion can be found to have existed.

189 As to the reasonable suspicion plea, the imputation pleaded in [36(b)] of the Defence is:

> That the police suspected the plaintiff of having murdered or unlawfully killed his wife and had reasonable cause for doing so, and that imputation was true.

190 That plea involves both a subjective and an objective component. The defendant in this trial led evidence from a number of police officers who said that they suspected the plaintiff of being involved in the death of his wife. They each outlined their reasons for that suspicion. The reasons of the different officers were not the same, although there was obviously an overlap of matters which the various officers said led to their suspicion. That evidence establishes that many of the police officers involved in Operation Dargan in fact suspected Mr Rayney. The question which then arises is an objective one, namely whether there existed reasonable cause for a suspicion to arise. It is not necessary to examine the particular reasons of each officer to ascertain whether the factors which influenced the officers' personal conclusion was reasonable. The plea as to the suspicion imputation is a plea that 'the police' suspected the plaintiff. DSS Lee was acting as the police spokesman in giving the press conference on 20 September 2007. In his prepared opening remarks, he spoke of the activities of 'Operation Dargan detectives' and throughout the press conference spoke mostly using the pronouns 'we', 'us' and 'our'. The issue raised by [36(b)] is whether the police collectively had reasonable cause for doing so. That is an objective question.

191 Despite the criticisms that can be made of the Defence, the case which the plaintiff had to meet was identifiable. The question for determination is whether such of the circumstances or particulars of conduct that are identified by the particulars and are proved, give rise to either the conduct imputation or the suspicion imputation. The basis of the defence of truth is identified. The range of possible facts said to give rise to the suspicion is circumscribed by the particulars to [36] of the Defence.

Evidentiary issues Reliability of witness statements

192 In accordance with usual practice, the evidenceinchief of most witnesses was given by the tender of a written witness statement. Pretrial directions required that witness statements be prepared in accordance with the Western Australian Bar Association Best Practice Guide 01/20092011 (Best Practice Guide).[103] The only exceptions were the witnesses who attended on subpoena being the three journalists called by the plaintiff, Mr Taylor, Mr Cooper and Mr Cowan, and two witnesses called by the defendant, being Mr Rayney's former solicitor, Mr Carr, and Mr Pearson. In all, the plaintiff called 14 witnesses, and a further 13 witness statements were tendered by consent. The defendant called 47 witnesses, 24 of whom were police officers or former police officers. In addition, 13 witness statements were tendered by the defendant with the plaintiff's consent.

193 A large number of the witnesses called on both sides had previously made statements to the police during the course of the investigation by Operation Dargan. In the defendant's case, a large number of the witness statements tendered as evidenceinchief referred to previous statements having been made to police by the witness and of the fact that the witness had had regard to those statements in the preparation of the evidence for this trial. In the course of crossexamination of witnesses, it was demonstrated in many cases that the evidence in their witness statements was copied word for word from original police statements. In closing submissions, the plaintiff submitted that the defendant's witness statements suffered 'a fundamental flaw' by reason of having been copied from previous witness statements or compiled from portions of previous witness statements.[104] This was said to be contrary to the Best Practice Guide, and in particular [19.34] [19.35].

194 Those paragraphs are concerned with the use of direct speech in a witness statement. They do not address the more general proposition as to the extent to which witnesses might rely on earlier statements to refresh their memory. Paragraph 11.1 of the Best Practice Guide provides that a witness can be assisted in recalling matters known to the witness by being taken to contemporaneous documents or by working through the witness's recollection of the sequence of events. While previous statements made to police could not, in many cases, be described as contemporaneous, they were obviously made many years closer to the events in respect of which the evidence was given. They generally bore the standard concluding statement to the effect that the maker understood that he or she would be liable to penalties if the statement contained any falsehood. I do not consider the fact that the

witnesses had recourse to previous statements to be inconsistent with the Best Practice Guideline. It is entirely reasonable. The fact that a witness expressed himself or herself in precisely the same words does not, of itself, diminish the credibility of what is stated. What is necessary is that the witness addresses his or her mind to their actual recollection of events, as most witnesses said they did. Whether that in fact occurred, and whether present recollections differ from what is contained in earlier statements, are all matters that can be dealt with, and were dealt with, in crossexamination.[105] It is clear that some of the witnesses called by the plaintiff also had recourse to earlier police statements in the preparation of their evidence for this trial.[106]

195 I do not consider the fact that the evidenceinchief given by many witnesses in this trial drew upon previous statements is, of itself, a basis to diminish the reliability of the witnesses' evidence.

Passage of time

196 There is, however, a challenge in assessing the reliability of evidence generally in this trial. The events the subject of the evidence occurred more than nine years before the trial commenced. Mrs Rayney's disappearance and murder, the police investigation which followed, the very lengthy murder trial accompanied by extraordinary media coverage, the publication of Brian Martin AJ's decision, and the subsequent appeal and decision of the Court of Appeal, were all matters capable of influencing and affecting the recollections as to events by the witnesses. In the case of friends and family of Mr and Mrs Rayney, I have no doubt that discussion and speculation amongst themselves was likely to influence their recollection and interpretation of events. That is a matter I deal with more specifically below.

Temporal limitations on evidence

197 In the context of determination of the existence of reasonable grounds for the conduct imputation and the suspicion imputation, the question arises as to the admissibility of evidence as to facts and events arising after the date of the publication on 20 September 2007. The parties were largely in agreement as to the principles which apply, but differed as to the application of those principles to their respective pleaded cases.

198 The first proposition which was not in issue was that, in relation to the suspicion imputation, only evidence of what the police knew or suspected prior to the 20 September 2007 media conference is admissible. That follows from the observation of Brooke LJ in ***Chase v News Group Newspapers Ltd***[107] that, where the meaning sought to be justified is that there were reasonable grounds at the date of publication to suspect the claimant was guilty, the viability of that plea cannot be weakened if subsequent events reveal that it is no longer reasonable to hold that suspicion. The converse is that the viability of the plea cannot be strengthened if subsequent events reinforce the suspicion.

199 The second principle is that evidence of conduct that occurred prior to 20 September 2007 is admissible in relation to the conduct imputation notwithstanding that the conduct was not known to the police as at 20 September 2007. That principle was identified by Kelly J in ***Sands v State of South Australia***[108] and was also stated by Eady J in ***Musa King v Telegraph Group Ltd***.[109]

200 Thirdly, in relation to the conduct imputation, the defendant is not precluded from relying on evidence of facts and circumstances other than the plaintiff's conduct to establish a defence of truth, provided the evidence of the conduct is the focus of the defence.[110] As Hirst LJ observed in ***Shah***, in a complicated case, it is necessary for the defendant to portray in some detail the relevant background and set out material which connects together the main facts as to conduct which are relied upon.

201 A further principle identified by Eady J in ***Musa King v Telegraph Group Ltd*** is that, in relation to a conduct imputation, a defendant may not confine the issue of reasonable grounds to particular facts of its own choosing since the issue requires it to be determined against the overall factual position as it stood at the material time.[111] In this case, the plaintiff in the Reply has pleaded a number of facts which, as I apprehend the plaintiff's case, are said to be facts against which his conduct is to be viewed. Evidence of a number of those facts only came to light well after September 2007. Some, by their nature, are entirely unrelated to the plaintiff's conduct, but rather are matters which the plaintiff contends point to the unlikelihood of his being involved in the murder of Mrs Rayney. The focus of evidence in relation to the conduct imputation must be the plaintiff's conduct. The evidence of matters generally concerned with the investigation is irrelevant and inadmissible in relation to the conduct imputation unless it goes to matters relating to the plaintiff's conduct.

202 These principles fall to be applied in the assessment of the justification of each of the conduct imputation and the suspicion imputation in the light of my findings as to each of the particulars pleaded in [36] of the Defence and [47A] and [47B] of the Reply.

Section 79C

203 Towards the end of the trial, the defendant applied to tender a large number of documents pursuant to s 79C(2a) of the *Evidence Act 1906* (WA) as business records. The documents were enumerated in ten schedules to the application, being schedules A to J. Each schedule contained different categories of documents. In addition, the defendant sought to tender documents contained in three further schedules K to M, pursuant to s 79C(1) and 79C(2a). Schedule J contained 59 documents which were agreed for tender as business records. The plaintiff did not oppose the tender of schedules K to M.

204 Schedule A of the application consisted of witness statements taken by police in the course of their investigation of Mrs Rayney's disappearance. Schedule B consisted of documents referred to as VIPER documents which contained records of information obtained by police in the course of their investigation. The VIPER documents contained in schedule B of the application were tendered as proof of their contents, and contained accounts of statements made by different people to investigating officers. The tender was thus directed to providing evidence as to the truth of statements said by the person creating the VIPER entry to have been made by persons interviewed by police.

205 Schedule C consisted of 39 Operation Dargan running sheet entries. Schedule D consisted of 12 red books of police officers, all but one of whom were not called to give evidence. Schedule E initially consisted of 32 police handwritten running sheets, forensic face sheets, critical decisions work sheets, incident reports and exhibit logs, but that list was reduced to seven documents of that character by an amendment to the application. Schedule F consisted of police working materials authored by Operation Dargan investigators or commissioned by WA police. Schedule G comprised photographs, audio visual recordings, and audio recordings of police work. Schedule H consisted of material received by Operation Dargan and uploaded to VIPER and schedule I consisted of one phone intercept recording.

206 As distinct from the purpose of tender of the documents in schedules A and B, the balance of the schedules were not tendered as to the truth of any statement or information provided to police by third parties, but simply as to evidence of things done and steps taken by police in the course of their investigations up until 20 September 2007.

207 In relation to the documents in schedules A and B, it was necessary for the defendant to identify the particular statements within those documents upon which it sought to rely as to their truth. The defendant's amended application identified those statements with particularity. After hearing argument, I

indicated that I would advise the parties as to my decision on the application in advance of closing submissions (which were to commence shortly after the application for admission was made), but provide reasons for that decision in these substantive reasons.

208 The orders which I made were as follows:

(1) the application to admit into evidence under s 79C(2a) of the *Evidence Act* the documents enumerated in schedule A to the application is refused;

(2) the application to admit into evidence under s 79C(2a) of the *Evidence Act* the documents enumerated in schedule B of the application as truth of statements made by persons other than the person entering the VIPER record is refused;

(3) the application to admit into evidence under s 79C(2a) of the *Evidence Act* the documents enumerated in schedules C, D, E and F of the application is allowed on the basis that documents are evidence of things done by or reported to police and not as evidence of the truth of the things said or reported to police;

(4) the application to admit into evidence under s 79C(2a) of the *Evidence Act* the documents enumerated in schedules G, H, I and J of the application is allowed; and

(5) the application to admit into evidence under s 79C(1) and s 79C(2a) of the *Evidence Act* the documents enumerated in schedules K to M of the application is allowed.

209 I accept that the records identified in each of schedules A to J comprise business records. A business record is relevantly defined by s 79B of the *Evidence Act* as a 'document prepared or used in the ordinary course of a business for the purpose of recording any matter relating to the business'. Various enumerated documents are clearly documents within the meaning of that expression as defined in s 79B.

210 In ***Beamish v The Queen***,[112] the Court of Appeal confirmed that the Western Australian Police Force was relevantly a business and that the departmental documents in its files are business records. Section 79C(2a) renders admissible a statement in a business record tending to establish a fact. That section makes a statement admissible notwithstanding the rules against hearsay or the rules against secondary evidence of the contents of a document, whether or not the person who made the statement is called to give evidence, and whether or not he or she gives evidence consistent or inconsistent with the statement: s 79C(3). Section 79C(6) provides:

> For the purposes of this section a court may, in its discretion, reject a statement notwithstanding that the requirements of this section are satisfied with respect thereto, if the court is of the opinion that the probative value of the statement is outweighed by the consideration that its admission or the determination of its admissibility -
>
> (a) may necessitate undue consumption of time; or

(b) may create undue prejudice, confuse the issues, or in proceedings with a jury mislead the jury.

211 In this case, the defendant called 60 witnesses. Nearly all of those were persons who had previously made statements to police in the course of their investigations. Without going through each one separately, a significant number of the statements sought to be relied upon in the witness statements in sch A, and the statements recorded in VIPER records in sch B, relate to matters about which evidence was given by other witnesses who were the subject of crossexamination. To some extent, the matters referred to in the statements sought to be tendered are uncontroversial, but in some respects they are controversial. To the extent that the statements are uncontroversial, their forensic importance is minimal. In the course of submissions in relation to this application, junior counsel for the defendant, Ms Young, said:[113]

> [A]lthough your Honour has heard numerous witnesses give varying accounts on how they might have described the situation, this is yet another example of that same character of the evidence.
>
> Equally, we think it's not prejudicial to put in that evidence, given it treads over the same themes and topics that your Honour has heard from the witnesses that have appeared in person.

212 Where witnesses were called to address issues of the type covered in the statements sought to be tendered, the plaintiff not only had the opportunity to test their evidence where it was in contest, but also to ask questions which give context to the statements made or to extract other evidence which the plaintiff might seek to adduce in support of his case. The tendering of police statements without calling the witnesses concerned deprives the plaintiff of that opportunity. There is no evidence that the makers of the statements were unavailable to be called as witnesses.

213 Many of the statements refer to conversations which the maker of the statement had had with Mrs Rayney, and about things that she had said. A deal of evidence of that character was admitted at trial as evidence of Mrs Rayney's state of mind, rather than as to the truth of things which she is said to have said. Other statements contained obvious hearsay on the part of the statement maker, being evidence which they would not have been able to give at trial.

214 Having reviewed all of the identified statements sought to be tendered as their truth in each of the statements in schedules A and B, I concluded that, especially having regard to the enormous volume of evidence which had already been adduced at trial, and the large number of witnesses called, the probative value of the statements was outweighed by the prejudice to the plaintiff in not having the opportunity to crossexamine the witnesses concerned. The defendant made a forensic decision as to which witnesses it proposed to call, and I did not accept that it could reasonably simply pick and choose those who it called to give evidence and have subjected to crossexamination, and those whose evidence it sought to adduce by the tender of police statements or VIPER records.

215 The potential prejudice was most glaringly demonstrated in relation to the proposed tender of a statement of former DC Kevin Tan. In the course of the application for tender, the defendant produced an affidavit of Joshua David Berson dated 18 July 2017.[114] Mr Berson's affidavit attached a series of emails between Mr Tan and the State Solicitor's Office, acting on behalf of the defendant, at a time when Mr Tan was on long service leave from the Western Australian Police in November 2016. Apparently, Mr Tan did not return to the Police Service after his long service leave. The emails concerned

obtaining a witness statement from Mr Tan based upon his earlier police statements. It is apparent that Mr Tan was reluctant to give evidence in these proceedings, although ultimately was prepared to do so if required. In the course of the communications between the State Solicitor's Office and Mr Tan, Mr Tan advised that he had received a draft witness statement from the plaintiff's solicitors. On 23 January 2017, Mr Tan wrote by email to the State Solicitor's Office saying that he would 'provide a statement at your insistence, knowing that my evidence will not benefit the State nor will it have any evidentiary value in this civil matter'. He attached a copy of the statement that Mr Rayney's lawyers had sent to him for signing, saying it was his wish to include the contents of that statement in his statement for the purpose of these proceedings. The solicitor handling the matter at the State Solicitor's Office quite properly declined to read the draft statement on the basis that it was likely to be protected by legal professional privilege. Clearly, after that exchange, the decision was taken by the defendant not to call Mr Tan as a witness, but his police statement was included for tender under s 79C.

216 That exchange demonstrates the potential unreliability of any reliance on Mr Tan's original witness statement. It also demonstrates the prejudice which would result for the plaintiff in not having the opportunity to crossexamine Mr Tan.

217 I took the view that, whilst the circumstances in respect of Mr Tan might be thought to be at one extreme end of the range of possibilities, the experience of crossexamination of witnesses who had made previous statements to the police and did give evidence led me to conclude that the probative value of any of the witness statements was outweighed by the prejudice to the plaintiff in allowing the statements in without providing any opportunity to the plaintiff to crossexamine these witnesses. That is particularly so where there was no evidence that any of the witnesses were unavailable.

218 It was for that reason that I declined to allow the application in relation to sch A and sch B.

219 In respect of the other schedules which were not the subject of consent, the purpose of the tender was simply to demonstrate that the police undertook various enquiries and took various steps in the course of their investigation. The relevance of that evidence was said to be to meet the suggestion which had emerged in crossexamination that, from very early in the investigation, the police essentially focused on Mr Rayney and did not adequately explore or follow up alternative possibilities. The use of business records to record such matters is a more conventional use of s 79C. Many other documents of that character had been referred to in the course of examinationinchief or crossexamination, on the basis that they recorded the course of the investigation. Given the limited purpose for which the documents were tendered, I considered that the probative value was not outweighed by any prejudice to the plaintiff in their admission.

220 It was for those reasons that I made the orders referred to above.

The plaintiff's credibility

221 The plaintiff's evidenceinchief was contained in two witness statements which together comprised 587 pages. He was crossexamined for approximately six days. He has previously given evidence in relation to matters concerning issues in these proceedings on two occasions, one in the Magistrates Court and one in the State Administrative Tribunal (SAT). He sat through the evidence advanced at his murder trial which commenced on 16 July 2012 and was concluded on 19 October 2012. The events about which he was giving evidence occurred in excess of nine years ago. In his witness statement, Mr Rayney said that his recollection of events that occurred more than nine years ago is 'far from perfect'. He said, and I accept, that the events of the past nine years have resulted in considerable trauma to him and to his children. The trauma to his children, he said, exacerbated his own trauma. He acknowledged that his recollection of specific events may probably have been influenced or displaced by having read so many statements and documents and from others talking about the same or related events.

222 I accept that those factors are likely to have affected the accuracy of Mr Rayney's recollection of events. At least some of those factors are likely to affect the accuracy or reliability of other witnesses, including in particular family members of either the plaintiff or Mrs Rayney, and probably of police officers. It is naïve to think that there would not be some inconsistencies in Mr Rayney's evidence of events in those circumstances. His evidence in particular, and the evidence of others closely and emotionally involved in the events of 2007 must be viewed through that prism.

223 I also reached the conclusion that the plaintiff's personality is that of an intensely private man who does not publicly show his emotions, although I accept that in the few months before Mrs Rayney's untimely death, he did discuss his marital difficulties with some who were close to him. Care is required to avoid misconstruing that personality as indicating a lack of credit.

224 In this case I am satisfied that many of the police involved in Operation Dargan in August and September 2007 took the approach of assessing Mr Rayney's actions and words against an assumption of guilt, and that approach is reflected in the defendant's presentation of this case. The objective circumstances were that very shortly after Mrs Rayney disappeared, her friends, her family and the police developed, and I am satisfied exhibited, suspicion of Mr Rayney. That must, and I am confident did, serve to isolate him from a very early stage and to progressively make him feel increasingly isolated. He was suddenly confronted with the reality that he had to become the sole provider and protector of his children. His personality is such that it is likely to have affected his demeanour with those with whom he was dealing, particularly where he sensed they were suspicious of him. The police investigating, and the defendant in presenting its case in these proceedings, gave no weight to factors as to that nature. A more objective approach to the assessment of Mr Rayney's conduct and of his evidence is called for.

225 The defendant argued that Mr Rayney's evidence should not be accepted unless corroborated by documentary evidence or by the evidence of the defendant's witnesses. It contends that his evidence is unreliable because:

it was demonstrably untrue having regard to documentary evidence;
it was internally inconsistent;
it was unconvincing or unbelievable;
it showed a willingness on his part to attempt to denigrate police and Mrs Rayney's family, Ms Julie Porter, Ms Janine Taylor and Mr Ervin Vukelic; and
he lacked candour in the giving of his evidence.

The pretext calls on 20 September 2007

226 The first of the aspects of Mr Rayney's evidence said by the defendant to be demonstrably untrue related to the pretext calls on 20 September 2007. Before police executed the search warrant at the Rayney residence on 20 September 2007, a number of what are referred to as 'pretext calls' were made under police supervision to Mr Rayney early that morning. Two of those calls were made by Timothy Pearson. They were recorded by the police who were present with Mr Pearson when he made the calls. The transcript of the two calls reads as follows:

Call 1.

20 September 2007, at 8.38am.

Rayney: Hello

Pearson: G'day Lloyd its Tim here

Rayney: Hi Tim

Pearson: Hi, I just wanted to give you a call. Major Crime Squad left a card in my letterbox last night and they want me to call them?

Rayney: OK

Pearson: Um I was just wanting to get your advice on something, um what should I say to them?

Rayney: I'm just, I'm just ah driving, coming back coming back. Can I give you a call back?

Pearson: Yeh sure no worries.

Rayney: *Indistinct*

Call ends.

Call 2.

20 September 2007, at 8.52am.

Rayney: Hello

Pearson: Oh, Hi Lloyd, they just rang me again, um, they want me to come down to the station and speak to them. I was just wanting to ask you what shall I do.

Rayney: I can't really talk to you Tim but I, um, um, you know what I said about com computers, I I've got to get into work now.

Pearson: Yep. Yep.

Rayney: See you then.

Pearson: OK

Call ends.[115]

227 This issue arises in the context of the defendant's allegation that Mr Rayney instructed Mr Pearson to lie about his role in installing a listening device at the Rayney residence,[116] a matter I deal with below.[117] As will be seen, I do not accept Mr Rayney's explanation of his statement 'you know what I said about computers'.

Explanation for seeking Mr Pearson's assistance

228 Mr Rayney gave evidence that in his discussions with Mr Pearson, he requested Mr Pearson to make recordings and that his only instructions were the recordings were to be made 'lawfully and legally'. He said that Mr Pearson confirmed that the recordings would be done in that manner.[118] He maintained that evidence in crossexamination.[119]

229 The defendant contends that evidence is inherently unbelievable given Mr Rayney's experience as a criminal prosecutor. It also submits that that evidence is inconsistent with other evidence given by Mr Rayney that on one occasion when he spoke to Mr Pearson he thought that Mr Pearson 'sounded like he was stoned'.[120]

230 Mr Pearson agreed that when he first met Mr Rayney, Mr Rayney told him that he wanted him to act in a manner that was legal and lawful. He said that he understood there to be lawful means of recording phone conversations, where the recording takes place within the point where the external communications system is connected to the home.[121]

231 I see nothing inconsistent between Mr Rayney's evidence that on one occasion when he spoke to Mr Pearson by phone he thought that Mr Pearson may have been affected by drugs and his evidence that he instructed Mr Pearson not to do anything unlawful. The two are simply unrelated. The fact that a person might engage in the use of recreational drugs does not logically lead to an assumption that they could not be expected to act lawfully in the conduct of their technical expertise.

232 Nor do I consider that Mr Rayney's experience as a prosecutor necessarily makes his asserted understanding that recordings would be done in a lawful manner inherently unbelievable. There is no reason to suppose that Mr Rayney would have encountered a situation where a person recorded their own home phone calls, something that routinely happens to a degree with answering machines, as distinct from investigating authorities recording conversations by suspects under warrant.

Placing of bets at Centrebet

233 The defendant contends that the plaintiff's evidence in relation to his gambling demonstrated, through a reluctance to acknowledge the extent of his betting, that his evidence should not be relied upon generally. I will deal with the evidence in relation to the plaintiff's gambling later in these reasons since it constitutes one of the particulars of circumstances relied upon by the defendant.[122] The defendant's attack on the plaintiff's credibility is based on the suggestion that he sought to avoid the conclusion that he was a 'compulsive' gambler. Reliance was placed on Mr Rayney's crossexamination in relation

to a document which was analysed by Mr Neil Barlow, now a senior forensic accountant with Victoria Police, but formerly the manager of financial investigations with Western Australian Police, which he identified as a Centrebet customer statement for Mr Rayney containing betting transactions between 8 May 2007 and 21 June 2007.[123] That document showed a bet of $4,000 on 8 June 2007, a bet of $5,000 on 9 June 2007, $5,000 on 13 June 2007 and $7,900 on 15 June 2007 as well as a number of smaller bets during that period. In essence, the defendant's position is that the amount and frequency of bets depicted in those records showed Mr Rayney to be a compulsive gambler.

234 Mr Rayney said he was not familiar with the document put before him, and that statements of that nature were never provided to him by Centrebet. He said that he did not accept the accuracy of the document because he was not betting in amounts of $5,000 and $7,000.[124] He said that although he sometimes used the account to place bets for other people, no one he knew placed bets of those amounts.

235 As will be seen in my discussion of Mr Barlow's evidence later in these reasons, I accept Mr Rayney's evidence to the effect that he did not bet more than he could afford to lose. The records analysed by Mr Barlow comprised close to 200 pages of line items. The large bets upon which Mr Rayney was crossexamined were generally far in excess of the many much smaller wagers which the betting records reflect. Mr Rayney's statement that he did not bet in amounts of $5,000 and $7,000 was, as a generalisation, true. The fact that he was unable, when presented with the document with which he was not familiar, to recall five or six wagers made 10 years before is not a basis to generally reject his evidence.

Evidence in the Magistrates Court

236 The defendant contends that the fact that Mr Rayney acknowledged that he gave evidence under oath that 'was wrong' in relation to the dates that dictaphone recordings were made and then gave inconsistent evidence in both these proceedings and in proceedings before SAT, suggests that his evidence is generally unreliable. I do not accept that submission.

237 Mr Rayney accepted, in crossexamination, that in the proceedings before Magistrate Flynn concerning legal professional privilege, he gave evidence that he purchased the dictaphone upon which recordings were made in May 2007. He said that at a later time he realised that the date that he had told the magistrate was wrong in that he had said the recordings were made about May, June or July 2007 but it was brought to his attention that a particular call related to when he 'went away' and that was at an earlier time in April 2007. He said he corrected that in his evidence to SAT.[125]

238 It is not apparent to me that in the proceedings before Magistrate Flynn there was anything critical about whether the dictaphone was purchased in May 2007, or earlier in April 2007. The fact that Mr Rayney acknowledged that he had been in error, and corrected that error in both these proceedings and the proceedings before SAT is not a matter which affects his credibility adversely.

Evidence about recording played to Mr Carr

239 The defendant made extensive submissions as to the reliability of Mr Rayney's evidence regarding the playing of a recording on a dictaphone to Mr Carr on 6 August 2007. There was no issue that a recording was played to Mr Carr, who made a file note later that day in which he recorded that Mr Rayney attended his office that morning 'armed with some tapes of recordings with his wife in which she made certain threats about doing physical harm to him'. The note recorded that Mr Carr suggested that Mrs Rayney was 'simply venting her anger' and that there was nothing much in them.[126]

240 Mr Rayney was crossexamined about which recording he played to Mr Carr. He responded that he did not know which one he played because they were on the dictaphone and were not separated by any means. He said that he had a recollection of playing something which had the voice of Mrs Rayney

and the voice of one of the children. He said it may perhaps have been the call referred to in the trial as ID 9, or perhaps one earlier, and that he thought ID 9 'because trying to reconstruct it that would make sense'.[127]

241 The defendant made extensive submissions as to what it contends were implausible aspects of the plaintiff's evidence, not only in these proceedings, but in relation to evidence given before Magistrate Flynn and in the proceedings before SAT. Later in these reasons I deal with the general topic of the recording of conversations by dictaphone which comprises one of the particulars of conduct relied upon in the Defence. As will be seen, there are aspects of Mr Rayney's evidence in relation to that particular which I do not accept. A number of the criticisms of Mr Rayney's evidence are based upon the type of inconsistencies which are inevitable given the passage of time and the history of these proceedings as I discussed above. Many of the detailed criticisms made relate to matters which do not appear to me to be of any particular significance to the question of grounds for suspicion, but presumably are directed to Mr Rayney's general credibility. Other than the matters dealt with below in respect of which I expressly reject Mr Rayney's evidence, the balance of the matters seem to me to be as much attributable to the factors I have referred to above as to any question of Mr Rayney's general credibility.

Internal inconsistencies

242 The defendant identified what it contended were certain internal inconsistencies with respect to the plaintiff's evidence concerning particular matters. They were all matters dealt with arising under the various particulars of circumstances or conduct which are dealt with in detail below, and it is not necessary to deal with them separately at this point.

The plaintiff's conduct of the case to denigrate others

243 During the course of crossexamination by counsel for the plaintiff of a number of police witnesses, a number of suggestions were made either explicitly or implicitly of inappropriate, and on occasions illegal, conduct on the part of police officers. The more serious of those allegations are dealt with below in the context of the particular allegations to which they relate. In summary, none of the allegations of improper or illegal conduct is established. The defendant contends that Mr Rayney's attack on police through his counsel affects the credibility of his evidence.

244 Denigration by witnesses in this trial was not all one way. It was clear that some of the police officers, in particular DS Correia and DSS Lee, appeared anxious to take the opportunity to, in effect, publicly reinforce the suggestion that Mr Rayney was involved in the murder of his wife, notwithstanding his acquittal at trial being upheld on appeal, and notwithstanding that it formed no part of the defendant's case that the guilt imputation was true. The evidence, both of Mr Rayney, and of the police officers with whom he had the most contact during the investigation of Mrs Rayney's murder, demonstrated the animosity which existed between them. I have no doubt that that animosity influenced the perspective which those witnesses had, at the time they gave their evidence in this trial, of events during the course of the investigations.

245 As will be seen, many of the aspersions cast on Mr Rayney by the witnesses called by the defendant, and in particular police witnesses, I have found to be unsubstantiated or wrongly construed as indicative of Mr Rayney's guilt. That he responded in ways critical of police, or in ways suggesting impropriety, is explicable as a reaction to his perception of the way he has been treated. While that calls for care to be taken in assessing his evidence, I do not accept that it is a basis to conclude that his evidence is not generally credible.

Conclusion on Mr Rayney's credibility

246 As will be seen, there are certain aspects of Mr Rayney's evidence which I do not accept. I did not, however, consider that Mr Rayney's evidence was generally unreliable so that it could only be accepted where it is independently corroborated by documents or other evidence. Rather, his evidence in

relation to each issue was to be considered in the context of the overall evidence relating to that issue. The relevant issues are all discussed in the context of the particulars of circumstances and conduct dealt with below.

Evidence of friends and family of Corryn Rayney

247 As noted above, the passage of time, the emotional consequences of Mrs Rayney's death, and the inevitable effect of years of discussion and public attention on, and publicity about, events surrounding her death, are all likely to have affected the recollection of events by Mrs Rayney's friends and family.

248 Mrs Rayney's father, Mr Ernest Da Silva accepted that he could not honestly separate what he remembered of events from what he had been told about events by his daughter Sharon Coutinho and soninlaw Rohan Coutinho.[128] Mr Coutinho acknowledged that he and his wife discussed each of their observations, suspicions and recollections concerning the disappearance of Mrs Rayney on an almost daily basis in August and September 2007.[129] No doubt they have continued to do so frequently since that time.

249 That proposition was also readily acknowledged by Ms Janine Taylor, one of Mrs Rayney's friends who, when asked about her present recollection of events said that she had some recollection 'but it's very difficult with the period of time and the amount of coverage and things like that. You get confused between perhaps what is now actual recollection and then what might have been conversations'.[130]

250 There is another factor, which, in my view, is likely to have affected the recollection of events by some witnesses and the way they have interpreted events and observations. The factor is a belief, formed very early after Mrs Rayney's disappearance, that Mr Rayney was involved in foul play and was responsible for her disappearance and, at least after 16 August 2007, her murder.

251 I have no doubt that that view was formed by Mrs Rayney's father Mr Da Silva, her sister Ms Coutinho, her brotherinlaw Mr Coutinho, and her friends, particularly Ms Julie Porter. Mr Da Silva readily accepted that his memory of events was affected by biases that he had developed over the past nine and a half years.[131] When each of those witnesses spoke of wanting to assist police to identify Mrs Rayney's killer, I am satisfied that, given their firm beliefs, they were actually intent on assisting police to prosecute and obtain a conviction of Mr Rayney. DS McKenzie described Ms Porter as being 'stridently antiRayney'.[132] Ms Porter said that she told DS McKenzie when he interviewed her on 8 August 2007, the evening after Mrs Rayney went missing 'don't leave a staple out or he will get off'.[133] That conclusion is also supported by evidence given by DSS Lee about his interactions with a journalist, Ms Dixie Marshall, following Mrs Rayney's disappearance. DSS Lee said that Ms Marshall told him that, apparently as a result of Ms Marshall being part of an 'email group of friends' of which Mrs Rayney was a member, she and her employer, Channel 9, had possession of emails showing an acrimonious relationship between Mr and Mrs Rayney, and that police 'should concentrate on Mr Rayney'. He said that Ms Marshall continued to constantly ring him, including ringing him on 18 August 2007, and threatening to take him to the CCC for not pursuing Mr Rayney because he was a former DPP prosecutor. DSS Lee said that he did not have a lot of concern about the emails which merely showed that the relationship had broken down, but were not threatening.[134]

252 That several witnesses formed a belief in Mr Rayney's guilt in late 2007 is clear from their evidence. Mr Da Silva said that he had formed the belief that Mr Rayney had killed his daughter the day her body was found.[135] Ms Coutinho said that from very early on, indeed in the first week after her sister went missing she, her husband and her father discussed their suspicion with police that Mr Rayney was involved in her disappearance and murder.[136]

She said she heard her father tell police that he thought Mr Rayney 'had done it' soon after the police found Mrs Rayney's body. That suspicion arose, Ms Coutinho said, because Mr Rayney would not look her in the eyes, would not leave her alone with his daughters and because he did not allow her to help the girls cope after they knew Mrs Rayney had been murdered.[137] The evidence in relation to the contact between Mr Rayney's daughters and the members of Mrs Rayney's family is discussed later in these reasons.

253 Mr Coutinho said that he held suspicions that Mr Rayney had murdered his sisterinlaw since August 2007.[138]

254 The evidence of Mr Da Silva, Mr and Ms Coutinho and Ms Porter must be treated with caution. That is not to say that their evidence was in all respects unreliable. As with all controversial witnesses, including Mr Rayney, it is necessary to consider their evidence in the context of the issue to which the evidence relates, and all other evidence on that issue.

255 Conversely, Mr Rayney's daughters demonstrated loyalty to their father. It can be inferred that they firmly believe in his innocence. Their evidence must be assessed with that in mind and appropriate caution applied. Having acknowledged that, however, very little of their evidence was challenged in crossexamination much of which consisted of them simply confirming their evidenceinchief. The defendant's closing submissions contained a number of assertions that the evidence of either Caitlyn Rayney or Sarah Rayney should be rejected. Those challenges offend the rule in ***Browne v Dunn***[139] and I do not accept them.

Evidence of police witnesses

256 I am satisfied that at least some of the principal members of Operation Dargan formed a prejudicial view of Mr Rayney very early in the investigation or in DSS Lee's case, by the end of August 2007. While it was obviously appropriate for police to thoroughly investigate whether Mr Rayney had any involvement in Mrs Rayney's death, I am satisfied that by the end of August the police involved in the investigation construed events and information that they learned with a suspicious bias rather than objectively. That conclusion most clearly emerged from the evidence of DSC Williams, DSS Lee, and DS Correia. Each of those witnesses was at pains to construe every snippet of information they had as pointing to Mr Rayney's involvement with his wife's murder. Many of the matters that they relied upon as pointing to Mr Rayney's guilt were at best equivocal, simply not probative of anything or inconsistent with any cogent case theory. To understand that conclusion, it is necessary to examine the matters which they contended supported their suspicion of Mr Rayney's guilt. It is convenient to look first at the evidence of DSS Lee.

257 In the course of crossexamination, DSS Lee said, on a number of occasions, that he had 'over 50 different pieces of information including physical evidence observation and inferences that he used to form his belief that Mr Rayney was a suspect'.[140] Those pieces of information were said to be described in DSS Lee's witness statement.[141] DSS Lee was taken through each of those items in the course of lengthy crossexamination.

258 The first piece of information was that DSS Lee was 'aware from reviewing the evidence of the boot scooters' that two witnesses had stated that Mrs Rayney wore a coat when she arrived, and one had described the coat as a black coat. The significance of this information is that it relates to the fact that a coat was observed lying on Mrs Rayney's bed on the morning of 8 August 2007 suggesting, if she was wearing the same coat when she went to boot scooting, that she had returned home on the night of 7 August 2007.

259 There were 33 people other than Mrs Rayney present at boot scooting on 7 August 2007 from most of whom police took statements. Two of those reported a coat being worn by Mrs Rayney. One was Ms Jill Kellock who said that Mrs Rayney arrived 15 minutes into the class. Ms Kellock was dancing

behind two others. She said that she recalled seeing Mrs Rayney put her coat on a chair near the kitchen alcove when she arrived. The coat was dark coloured and she thought it was made of wool. She said she had seen her wear the coat before in the past. She said that Mrs Rayney was also wearing a caramel or tanned coloured shirt with tassels and dark pants.[142]

260 Ms Hildegard Kennedy told police that she did not speak to Mrs Rayney on the night of 7 August, but her friend Adele, who she said knew Mrs Rayney better, did speak to her. She said that she remembered Mrs Rayney wearing a 'black jacket' on that night but was not sure at what time she saw her wearing it. She described the jacket as tight fitting, cotton fabric coming down to waist level, and said that 'Adele would remember her jacket better than I would'.[143] The reference to Adele appears to be a reference to Ms Adele Rovall. Reference was made in crossexamination of both DSC Williams and DSS Lee to Ms Rovall having no recollection of Mrs Rayney wearing a coat. I have not been able to locate the questionnaire apparently completed by Ms Rovall on 14 August 2007 in the trial bundle. However, neither DSC Williams nor DSS Lee rejected the proposition put to them that Ms Rovall made no mention of a coat when describing what Mrs Rayney was wearing at boot scooting on 7 August 2007.[144]

261 No other dancers identified that Mrs Rayney was wearing a coat when she arrived at the Bentley Community Centre. Ms Eva Bosnyak, a boot scooter who had socialised on a number of occasions with Mrs Rayney, said that after the class had done about two or three dances she noticed Mrs Rayney walking in through the entry. She described her as wearing a tan shirt with fringing, black belt with silver arrows that go all around the edging of the belt, blue denim jeans, and black Cubin heel dancing boots. She made no mention of a coat.[145]

262 DSS Lee was crossexamined as to why he placed so much significance on those identifications, given that only two out of 33 said that Mrs Rayney was wearing a coat, and one of those described a coat dissimilar to that which was subsequently found on her bed. In relation to the dissimilar description, DSS Lee said 'it was still a coat'. When a photograph of the coat found on Mrs Rayney showed a dark grey, not black, coat, DSS Lee said 'so the witness may have got it wrong or depending on the lighting at boot scooting'.[146] Those responses can be contrasted with DSS Lee's evidence as to why he rejected a statement made to investigators by a police officer, Darryl McLeod. Constable McLeod described a woman who he saw in Victoria Park on the night of 7 August 2007. DSS Lee said that Constable McLeod's statement was wrong, and that he identified the wrong person by identifying the wrong clothing. The following exchange took place with counsel:[147]

> Have you got McLeod's statement in front of you nowYes. He says he is a senior police - Senior Constable stationed at Kensington and in paragraph 10, he observes a woman - a female, who he now thinks may have been Ms Rayney. She was darkskinned IndianPakistanilooking, black kneehigh boots with a three to four-inch heel, tight jeans or dark pants, a brown long-sleeved cowboy shirt with tassels, quite attractiveYes.
>
> The missing person Major Crime Squad notification published on 10 August 2007, which your Honour will find in volume 7, document 151, page 1837, describes Ms Rayney as hair black, ethnic Indian, clothing dark caramel longsleeved silky shirt with tassel bib design around chest and around back, black pointed bootscooting boots, blue jeans. McLeod goes on to say: The lady appeared to be of short stature with dark long shoulderlength flowing hair. Ms Rayney is described as 164 centimetres, black hair, etcetera. The photograph shows shoulder-

length hair. What part of her clothing was misdescribed by McLeodThe boots.

What part of the bootsThey were kneehigh boots.

263 When questioned further about the boots being worn by Mrs Rayney, DSS Lee said that they were calf high boots, not knee high boots. A photograph of Mrs Rayney's boots shows that they were quite high and would have covered much of the calf area. The description of them as knee high would not appear to be far from the mark.

264 DSS Lee was willing to give significant weight to a description by one of 33 boot scooters of a dissimilar coat being worn by Mrs Rayney from that which was found on her bed the next day, but to dismiss as 'not evidence'[148] the statement of Constable McLeod simply because his description, which otherwise appears to have closely matched a description of what Mrs Rayney was wearing on the night in question with the exception of whether the boots were calf height or knee height. That demonstrates, in my view, an approach by DSS Lee which is to selectively rely on any evidence which is consistent with his theory as to Mr Rayney's involvement in his wife's death, and to put aside or reject evidence, information or inferences which are inconsistent with that theory.

265 The second piece of information relied upon by DSS Lee was that Mrs Rayney had been observed leaving the location of the boot scooting alive and well 'and was on her way home'. That she left alive and well is of course completely equivocal to any question of Mr Rayney's involvement in her death. So too the fact, if it were the fact, that she was on her way home. In any event, she was not in fact observed leaving the location of the car park, although some witnesses described seeing her leaving the hall. Nobody said that they saw her get into her car, or saw her car leave the car park, save for one witness who was later shown to have mistaken a different vehicle for Mrs Rayney's vehicle.

266 The third piece of information relied upon by DSS Lee was that there was no evidence to suggest that Mrs Rayney did not intend to head directly home after boot scooting. There is no doubt that she had earlier indicated to several people that that was her intention. The issue, of course, is whether anything occurred which might have interfered with or altered, that intention.

267 The fourth piece of information was that vegetation was located on the back seat of Mrs Rayney's vehicle which DSS Lee said was 'identical to that from a bush in the garden at her home'. I accept that that was a piece of information which was of significance to the enquiry, and is a matter dealt with later in these reasons. The same is true of the fifth item, namely the location of Liquidambar seeds found in Mrs Rayney's hair which were consistent with seeds from a tree in the garden at her home.

268 The sixth matter relied upon by DSS Lee was that Mr Rayney was at home on the night Mrs Rayney disappeared. That is not a matter in dispute and, of itself, is entirely equivocal.

269 The seventh matter described by DSS Lee was that the statements of Julie Porter and Michael Halls established that Mrs Rayney 'was due to have a confrontation with Mr Rayney in which she intended to tell him to leave the Rayney home'. All of the evidence, including that of Mr Rayney, points to the fact that Mr and Mrs Rayney had agreed to meet at the Rayney residence when she returned from boot scooting in order to discuss arrangements in relation to their separation. The characterisation of that meeting as a 'confrontation' and the suggestion that the statements of Ms Porter and Mr Halls

suggested that Mrs Rayney 'intended to tell him to leave the Rayney home' is again indicative of the bias with which DSS Lee viewed the evidence and information available. The expression 'confrontation' is inconsistent with the defendant's pleading that Mr and Mrs Rayney were scheduled to meet and that Mrs Rayney was looking forward to the meeting.[149]

270 Mr Halls' statement recounted what he said he had overheard in a conversation between his wife, Ms Porter, and Mrs Rayney on 6 August 2007. He said that the following day his wife told him that Mrs Rayney had set up a meeting at 9.30 pm on 7 August 2007 and that Mrs Rayney was looking forward to the meeting.[150] Mr Halls made no mention of Mrs Rayney intending to tell Mr Rayney to leave the home. That Mr Halls was told that Mrs Rayney was looking forward to the meeting is consistent with the evidence of a number of other witnesses whose evidence suggested that both Mr and Mrs Rayney were looking forward to that meeting on the expectation that questions arising from their separation would be resolved. That evidence is dealt with more fully below in relation to the issue raised in [36(xiii)] of the Defence.

271 DSS Lee sought to justify his assertion that there was to be a 'confrontation' with Mrs Rayney telling Mr Rayney to leave the matrimonial home by reference to earlier parts of Mr Halls' statement where he spoke of information he was told by his wife, or which he gleaned from overhearing conversations between his wife and Mrs Rayney on the phone. That construction of Mr Halls' statement ignores the evidence contained in other statements which suggest that both Mr and Mrs Rayney saw the meeting as an opportunity to resolve separation issues without the necessity of involving lawyers. The fact that there had been tensions between Mr and Mrs Rayney over earlier months, as undoubtedly there were, does not necessarily lead to the conclusion that the meeting on 7 August 2007 was to be confrontational. To reach that conclusion, it is necessary to have regard to the evidence as to the parties' attitudes and expectations in relation to that meeting. DSS Lee's slant on the meeting illustrates his tendency to construe evidence in a way most prejudicial to Mr Rayney.

272 Ms Porter made statements on 8 August 2007 and 10 August 2007. In the first of those statements[151] Ms Porter said that between 9.00 am and 11.00 am on 7 August 2007 she received a phone call from Mrs Rayney who told her that she was having a discussion with Mr Rayney at 9.30 pm in which they would discuss how to solve the problems with divorce, mainly custody of the two daughters, and the financial situation. She said that 'she was so looking forward to the discussion'. In the second statement, made on 10 August 2007, Ms Porter said that she received a phone call from Mrs Rayney between 9.00 am and 11.00 am on 7 August, and they talked for about 10 15 minutes or possibly longer. She said that Mrs Rayney told her that 'she was making progress' and that Mr Rayney wanted to discuss things at 9.30 pm. She said that Mrs Rayney said that 'her agenda was about custody only, not financial' but that she believed that Mr Rayney's agenda would be financial. She said that Mrs Rayney told her that Mrs Rayney believed that Mr Rayney would be out of the house very soon.[152] Ms Porter continued:

> I repeated that she should be willing to help Lloyd get an apartment, assist in the purchase of bedroom furniture for the kids and talk openly about access to the children, and assure Lloyd that he would see plenty of the children.

273 Ms Porter said that Mrs Rayney believed that using lawyers to sort out their affairs was a waste of money and believed that they should be able to sort the problems out themselves.

274 In her evidence in this trial, Ms Porter described Mrs Rayney as being 'very excited and positive and thought the necessary steps to facilitate separation were moving ahead'.[153]

275 Ms Porter's statements do not support the categorisation of the proposed meeting as one of 'confrontation', and do not suggest that at the meeting Mrs Rayney proposed to tell Mr Rayney to leave the Rayney residence, even if she may have had an expectation that he would in fact leave the home in the near future as part of an agreed resolution of the issues between them.

276 The eighth piece of information relied upon by DSS Lee was that he became aware, on reviewing the witness statement of Timothy Pearson, that Mr Rayney had used a phone intercept device on his home phone line 'which meant that he could have listened to Corryn's telephone conversations on that line and learned of her plans against him'. There was no evidence available to DSS Lee as at 20 September 2007 (and indeed there was no evidence produced in the hearing of this matter) that Mr Rayney heard any conversations in which Mrs Rayney discussed 'her plans against him', nor is there any suggestion in the evidence that Mrs Rayney had any 'plans against him' beyond the things that she had said quite openly in her email exchanges with Mr Rayney. This was said by DSS Lee to be key for him in changing his opinion of Mr Rayney in that it suggested that he was prepared to break the law. Undoubtedly, phone interception was an issue of significance. Its significance to suspicion is dealt with later in these reasons.

277 DSS Lee's ninth point was that he had become aware from briefings that there was physical evidence to support Mr Pearson's statements, such as the 'order for the recording device and the cabling from the device recovered from the Rayney home'. Whilst, as I have acknowledged, the use of a listening device was a matter of significance, it seems to me that what DSS Lee refers to as two separate pieces of information are, in effect, matters going to one point.

278 In the course of crossexamination on these issues, DSS Lee referred to the fact that Mr Rayney paid sums of cash to Mr Pearson and received no receipts and continued:

> That doesn't smack of a legitimate enterprise and certainly as soon as - well, as soon as Mr Pearson indicated something may be up, all of a sudden the telephone intercept device went missing.[154]

279 There is no evidence which links the removal of the intercept device with any indication from Mr Pearson to Mr Rayney that 'something may be up'. When pressed on the basis for that assertion, DSS Lee eventually conceded that he may have been 'incorrect as to whether it occurred before or after Pearson spoke to police'.[155] That significant assertion, without any foundation on the evidence that was available to DSS Lee at the relevant time, is a further illustration of DSS Lee's tendency to couch his evidence in the way most damaging to Mr Rayney.

280 DSS Lee's tenth piece of information was that, in his opinion, there was evidence to suggest that Mrs Rayney made it inside the Rayney residence before she was assaulted or murdered. He later identified the evidence which he says led to that conclusion, and counted each piece of evidence as a separate piece of the 50 pieces of information upon which he said Mr Rayney was implicated. This tenth point is, therefore, not a separate point.

281 The eleventh point was said to be that some witnesses at boot scooting stated that Mrs Rayney wore a black coat when she arrived and that the coat was identical to the one seen on the bed on 8 August 2007. That is a repetition of the first point.

282 The twelfth point was that it was a cold night on 7 August and was raining so DSS Lee would expect that Mrs Rayney would wear a coat. This is, of course, no more than speculation to support DSS Lee's acceptance of the evidence of the two boot scooter witnesses who said that Mrs Rayney was wearing a coat. To say that it is a separate piece of information or inference pointing to the involvement of Mr Rayney in Mrs Rayney's death illustrates DSS Lee's tendency to strain to find matters prejudicial to Mr Rayney. It is noteworthy that, when seeking to enumerate DSS Lee's 50 pieces of

information, counsel for the plaintiff passed over the reference to the weather in DSS Lee's statement of evidence, but DSS Lee was quick to include the point as one of his 50.[156]

283 DSS Lee's thirteenth point was that Mrs Rayney wore tight denim jeans to boot scooting, and he was aware from a briefing by DSC Casilli that when Mrs Rayney's body was located the jeans were unzipped and the zip was broken. DSS Lee agreed that when Mrs Rayney's body was exhumed, her belt buckle was undone, the two buttons at the top of the jeans were undone, the jeans were unzipped in a manner indicating the zip had broken and teeth were missing from the zip. This was said by DSS Lee to comprise evidence that Mrs Rayney made it inside the home before she was assaulted because the missing teeth from the zip were not located in the driveway.[157]

284 DSS Lee explained the logic of that approach as follows:

> My belief from the evidence I've already given was that she died at the house, that she ended up on the driveway and those zipper teeth were not in the driveway. Therefore, I believed, along with other evidence, that she actually went inside the house.[158]

285 His theory was later explained as being that Mrs Rayney returned from boot scooting, went inside the Rayney residence, and began to undress to the extent of removing her boots and undoing her belt and the zipper of her jeans, and at that time she was assaulted. That is, of course, entirely conjecture, and how the theory fits with the zipper being opened with sufficient force to dislodge teeth, which were never located in the house, is unclear. The only evidence to support the theory that she returned to the house was the presence of the coat which, for reasons which will be discussed later, is far from compelling, and the fact that she intended to have a meeting with Mr Rayney on her return from boot scooting. DSS Lee's conclusion that, because no zipper teeth were found on the driveway, Mrs Rayney must have made it inside the house simply defies logic. No zipper teeth were found in the house either (or indeed were ever found anywhere). One possibility that would explain why the zipper teeth were never located inside or outside the house is that Mrs Rayney did not return at all to 6 Monash Avenue after boot scooting on 7 August 2007. DSS Lee did not appear to give any consideration to that possibility.

286 DSS Lee's fourteenth point was that he was aware from information provided during a briefing by DSC Williams that boots were found in the rear of her car, and he was aware from reviewing the evidence of the boot scooters that Mrs Rayney wore boots to boot scooting. He said that his fifteenth point was that he formed the view that 'because it was raining that night - why would Corryn take her boots off unless she made it home?' How those two points are said to be separate matters implicating Mr Rayney is by no means clear. The single point would appear to overlap with DSS Lee's theory that Mrs Rayney began to undress upon her arrival home. It is difficult to reconcile that theory with the presence of scratch marks on the boots which other witnesses described as supporting the theory that she had been dragged across the driveway bricks in her boots. On DSS Lee's speculative theory Mrs Rayney would have to have removed her boots in order to undress, been subjected to an assault after which her boots were put back on before she was dragged across the brick driveway, and then had the boots removed again once she was placed in the car. To describe that scenario as unlikely would be an understatement.

287 At [174.6] of his witness statement, DSS Lee said:

> There was conjecture these changes were consistent with an attempted sexual assault, but I didn't (and still don't) accept that. In my opinion, if the motive was sexual assault why wasn't the offence completed given that Corryn had been rendered incapable of resistance?

Further, I formed the view that the offender was not scared off as there were clearly some hours spent disposing of the body.

288 In crossexamination, DSS Lee said that that paragraph covered motives for the attack in that it was not a sexual assault, it was not a robbery, it was not consistent with a revenge attack and it was not consistent with a random opportunistic attack. He said that that counted as four of his 50 points rather than one.

289 In relation to an attempted sexual assault, DSS Lee agreed that he was aware of cases where homicide is not the intended purpose of an assault, but the assailant in the course of an attack kills a victim, and then does not proceed to complete the sexual offence.[159] DSS Lee expressed the view that this was not such a case, although his reasons for that conclusion were not entirely clear. He rejected the proposition that the presence of Mrs Rayney's purse, with the contents strewn over the foot well of the backseat of her car, was suggestive of robbery as a potential motive. In short, the substance of DSS Lee's contention is that his opinion that no motive could be identified for someone to have assaulted Mrs Rayney outside of the Rayney residence supported his conclusion that she had made it inside the home on her return from boot scooting.

290 DSS Lee identified as his twentieth point an observation that, in his opinion, the changes to Mrs Rayney's clothing were more consistent with her arriving home and commencing to change into more comfortable clothes, although he acknowledged that the marks on her boots indicating that she may have been dragged along the ground were not consistent with that theory. It is not, therefore, a separate point, but rather a repetition of points thirteen, fourteen and fifteen and an acknowledgement of the inconsistency of different points upon which he relied. DSS Lee's willingness to suggest that, notwithstanding its apparent inconsistency with other points, that part of his evidence comprised a separate piece of information implicating Mr Rayney demonstrates his eagerness to grasp at any point to endeavour to show that his reference to the 50 points of information was not an exaggeration.

291 DSS Lee's twentyfirst point was that there were no obvious assault injuries, and no defensive injuries suggestive of either an opportunistic street attack or a sexual assault or robbery. Whether that might point to some involvement by Mr Rayney requires consideration of several pieces of information.

292 DSS Lee said that the evidence did not support Mrs Rayney having been the subject of a planned attack and that he had never suggested that this was a premeditated murder.[160] The absence of obvious assault injuries, or defensive injuries on Mrs Rayney seems to me to be as difficult to explain in the context of a sudden unpremeditated altercation with Mrs Rayney which led to her death, as they would be to other theories as to how her death may have come about.

293 DSS Lee's twentysecond and twentythird points were that Mrs Rayney's purse was located in the rear of her car (twenty second point) and that money and credit cards were found in the car (twenty third point), thereby minimising robbery as a motive. The money referred to by DSS Lee was two $50 notes which were in a Project Compassion (a charity) envelope in the glove box. DSS Lee acknowledged that in those circumstances he could understand that an envelope could be overlooked by Mrs Rayney's killers even if the motive was robbery. He suggested that it was more likely that, if robbery were a motive, the purse would have been removed from Mrs Rayney's car and disposed of elsewhere.

294 DSS Lee identified points twenty four, twenty five and twenty six as being that there was no suspicious behaviour observed in Monash Avenue on the night in question, there were no other crimes in that area on that evening, and the neighbours observed nothing. DSS Lee acknowledged that, on the theory that Mrs Rayney had returned home, there would have been opportunities for people to observe her vehicle returning home, then to observe it being driven away to be hidden pending Caitlyn Rayney's return home from the Gwen Stefani concert she was attending that evening, and then possibly

being brought back to Monash Avenue so that Mrs Rayney's body could be placed in the vehicle before it was driven to Kings Park. The absence of anybody seeing the car, or being aware of any other unusual occurrences in Monash Avenue that evening would appear at best equivocal.

295 DSS Lee's twentyseventh point was the manner in which Mrs Rayney's body had been disposed of, indicating that the killer went to great lengths to ensure that it was not discovered, suggested that the killing was not opportunistic. DSS Lee identified a number of issues arising in that context. One was taking the body to the front driveway where, DSS Lee said, the vegetation and the Liquidambar seeds were picked up, the second was placing the body in the car twice, once in the boot, and once on the back seat, driving the body from Como to Kings Park, obtaining a shovel to dig the hole, and actually digging the hole and spending a length of time in Kings Park. All of those things, DSS Lee said, exposed the killer to discovery. Those points were counted by DSS Lee as six pieces of information. Why, on DSS Lee's theory that Mrs Rayney's death was unpremeditated, Mr Rayney, as distinct from any other killer, would expose himself to those risks, was not made clear by DSS Lee.

296 DSS Lee's thirtythird point was that he was aware from a briefing that the person who disposed of Mrs Rayney's vehicle locked the car doors and retained the keys. He considered that 'unusual for an opportunistic assailant'. The basis for that opinion is not readily apparent given the circumstances in which the car was abandoned after being damaged making the circumstances in which it was left unusual in themselves. Whoever killed Mrs Rayney went to considerable trouble to cover their crime. The fact that the killer or killers locked the car when they abandoned it is simply consistent with those attempts. It is entirely equivocal as to any involvement by Mr Rayney.

297 The thirtyfourth point was that DSS Lee was aware from information provided in a briefing that Mrs Rayney's wallet and credit cards were left in the car, a matter which he also considered unusual for an opportunistic assailant. Again, the foundation for that opinion is not readily apparent in the circumstances in which the car was abandoned.

298 DSS Lee's thirtyfifth point was that he was aware that a handkerchief had been located in the grave. He said 'it is very unusual for a street level offender to carry a handkerchief'. It is not known whether Mrs Rayney herself may have had the handkerchief on her, or whether it was in the car, or whether it was carried by the killer.

299 His thirtysixth point was that the evidence did not support Mrs Rayney having been the subject of a planned attack given that she had no wounds associated with a knife, firearms or a blunt instrument attack or any application of a ligature. This is a reaffirmation that DSS Lee did not believe that Mrs Rayney's murder was premeditated. Sarah Rayney's evidence was that she did not hear her mother return home, and thus did not hear any argument between her parents. DSS Lee's theory does not contain any explanation as to what may have happened to cause Mr Rayney to suddenly kill his wife with his bare hands in circumstances where neither she nor he showed any signs of a struggle.

300 DSS Lee said in his evidenceinchief that he was 'firmly of the belief that all other significant persons of interest besides Mr Rayney that had come to the attention of Dargan had been eliminated from the inquiry' by 20 September 2007. Thus, in his opinion, he said that 'the only line of inquiry that kept holding up and continuing related to Mr Rayney'. When asked whether that was his next piece of information implicating Mr Rayney, he said that that was in fact six pieces of information, since six people had been eliminated. The logic of that contention escapes me. If they had eliminated one hundred people from their enquiries, would that be one hundred pieces of information pointing to Mr Rayney's involvement? In any event, DSS Lee's evidence that all other persons of interest had been eliminated as at 20 September 2007 is not consistent with the evidence of other police officers, who said that there were still other persons of interest under investigation at and after 20 September 2007.

301 DSS Lee's fortythird point was that, based on his experience, in cases involving a homicide with a female victim, a large proportion of offenders in those cases will be the woman's partner or husband. While that factor may well justify investigation of the possibility that the victim's partner is the offender, that statistic is obviously of no probative value in the context of consideration of evidence against a partner in any particular case.

302 DSS Lee's final eight points concern elements of Mr Rayney's conduct during the course of the police investigation. Two of those points relate to allegations that Mr Rayney did not cooperate with police in that he failed to attend interviews. The other alleged conduct was that:

Mr Rayney was 'surveillance aware' in that he did not speak to his sister when both were travelling in his car in which the police had installed a listening device;
Mr Rayney refused access to police into his house on 20 September 2007 when police were in possession of a search warrant, and that he said that on that occasion he thought that he was the subject of a home invasion but rang his lawyer and not the police; and
he had refused to allow his children to be interviewed by police, or to permit Mrs Rayney's family to see the Rayney children and that he had intervened when his children were initially interviewed by police to change the time that his daughter, Sarah Rayney, said she went to bed, thereby effectively supporting his account of his movements and of Mrs Rayney's failure to return to the house.

303 I will deal with those matters in the context of the discussion of [36 (xliii)] of the Defence below.

304 Two observations can be made about this aspect of DSS Lee's evidence.

305 The first is that I am satisfied that, by repeatedly asserting that there were 50 pieces of information pointing to Mr Rayney's involvement in his wife's death, DSS Lee was exaggerating. When called upon to identify those 50 pieces of information, he identified the same point on several occasions but counted them as separate points. He counted as separate points his opinion as to various alternative motives in Mrs Rayney's murder, and counted as six points the (probably inaccurate) contention that six other people had been eliminated from the enquiry. Some of the points identified were inconsistent with each other and thus could not support a coherent theory of Mr Rayney's involvement. Many of the points were simply neutral or equivocal, and some were purely speculative.

306 The second thing that can be said is that, fairly construed, many of the points made simply reflect that the police were unable to identify an offender. DSS Lee construed that inability as pointing to Mr Rayney's involvement in the death of his wife. He was no doubt influenced by what he saw as a statistical fact in relation to female murder victims, but very probably also influenced by the very early belief expressed strongly by Mrs Rayney's family and some of her friends, and in my view adopted by at least some of the police officers, that Mr Rayney was involved in her death, notwithstanding that those views were expressed without any direct evidence whatsoever of his involvement, and premised on circumstantial evidence falling a long way short of being capable of sustaining any coherent theory as to the circumstances of Mrs Rayney's murder.

307 The conclusion that at least some of the Operation Dargan team formed that early belief is supported by an entry made by DS Correia in his red book on 28 August 2007. That entry recorded a meeting attended by DS Correia, DSS Lee, DS Rakich, DS McKenzie and DS Hart with a Dr Gregory Saatoff, a visiting doctor of psychiatry at the University of Virginia, USA. DS Correia recorded the purpose of the meeting as being 'to disclose and brief Dr Saatoff on the background of operation in order to gain further possible investigation strategies'. He then records 'meeting with Dr Saatoff cemented our thoughts and perceptions of POI Lloyd Rayney.[161] DSC Williams recalled that Dr Saatoff told them that he had read the front page of a paper on his flight from the eastern states to Western Australia that afternoon and had seen a photograph of Mr Rayney, in a suit, carrying milk and bread and that that was a 'ploy by

Mr Rayney to show people that he was looking after his kids'. DS McKenzie understood that Dr Saatoff was suggesting that Mr Rayney's behaviour was contrived.[162] He also confirmed that Mr Rayney was the only person of interest discussed with Dr Saatoff.[163]

308 DSC Williams exhibited the same propensity to construe information in the way most prejudicial to Mr Rayney. My view of DSC Williams' evidence is that he started from the assumption that Mr Rayney was guilty, and interpreted information which he either obtained himself or learnt from others as pointing to guilt, rather than making any objective assessment of it. That approach was illustrated many times in the course of his evidence. At [383] of his witness statement,[164] DSC Williams spoke of the information which he received from Superintendent Brandham as to Mr Rayney's state on 8 August 2007. He said:

> Mr Brandham reported to me Mr Rayney was very emotional and had tears rolling down his face at the Supreme Court on 8 August 2007. I found that that [sic] suspicious later because in the context of what we knew about their acrimonious relationship and Mr Rayney's initial comments to the effect that Corryn might have run away, I thought it was an overly emotional response and it suggested he had knowledge about what had happened to Corryn.

309 The first thing that can be said about that is that there is no evidence of Mr Rayney suggesting that his wife 'might have run away'. The evidence suggests that, unsurprisingly, various possibilities for Mrs Rayney's disappearance were discussed between Mr Rayney, his sister, Mrs Rayney's family members and the police at the time of her disappearance. The general tenor of the discussion was to the effect that it was most unlikely that she would have voluntarily left her children and her home. It is not accurate to say that Mr Rayney in any way positively asserted the likelihood that she had run away. Secondly, it is not objectively reasonable to view Mr Rayney's emotional response to his wife's disappearance as suspicious, notwithstanding the breakdown of his relationship with Mrs Rayney. Mrs Rayney was the mother of his children, and even if his own relationship with Mrs Rayney had deteriorated, it would be unreasonable not to expect deep concern on Mr Rayney's part for the disappearance of his wife, if not out of residual affection then for the sake of his children. One might reasonably think that, had Mr Rayney not shown any concern or emotion at his wife's disappearance, that would have been treated as at least equally suspicious by those investigating her disappearance. In the note of his discussions with Superintendent Brandham on 9 August 2007 contained in his red book, DSC Williams noted 'Lloyd almost in tears'.[165] When Superintendent Brandham subsequently provided a formal statement to the police on 26 November 2007, he said that when he attended the Supreme Court at Mr Rayney's request on 7 August 2007, he 'noticed that Lloyd appeared emotional and I thought he was almost in tears'. He said that at one stage when he was asking questions, 'tears welled up in Lloyd's eyes and ran down his cheek'. He continued:

> Given the circumstances under which I had seen Lloyd that morning I consider that his demeanour had changed greatly. He genuinely appeared upset and greatly concerned that his wife was missing.[166]

310 It is reasonable to conclude that Superintendent Brandham's account, given to DSC Williams on 9 August 2007, of Mr Rayney's emotions on the discovery that his wife was missing was provided in the sense later explained in his formal statement, rather than in a way that suggested some contrived emotion.

311 DSC Williams referred to the handwritten statement of Mr Rayney taken by police on 8 August 2007 in which he referred to a meeting which he and Mrs Rayney had arranged at 9.30 pm after her boot scooting class on 7 August 2007 and had said 'we were both optimistic of reaching a workable and fair

resolution which her lawyers would later confirm in writing'.[167] In crossexamination, DSC Williams expressed the view that 'Mr Rayney lied to police on day one in providing that statement'.[168] Contrary to DSC Williams' assertion, the evidence available to police, and which DSC Williams undoubtedly read, suggests that optimism on the part of both Mr and Mrs Rayney as to some resolution of issues being achieved at their meeting on the night of 7 August 2007 accurately described the situation. I have referred to the evidence of Ms Porter in relation to this proposed meeting above at [269] [275]. Although Ms Porter's description of Mrs Rayney as 'very excited and positive' about the meeting was contained in her witness statement in these proceedings, and not her earlier statements to the police, what was contained in the two statements to the police on 8 and 10 August 2007 clearly depicts a positive anticipation of the meeting on Mrs Rayney's behalf. What was described by Ms Porter can be accurately categorised as optimism.

312 Ms Linda Black, a barrister and friend of Mr Rayney, gave a statement to police on 14 August 2007.[169] In that statement, she spoke of speaking to Mr Rayney at 4.30 pm on 7 August 2007. She said:

> He said words to the effect of 'I am so relieved'. Corryn just came back from Melbourne and agreed to a counsellor being involved with them the children [sic] to enable the children to better handle separation issues.
>
> He stated that he had also suggested to her that they should talk about the property settlement rather than both wasting money on lawyers.
>
> He said that she was going to speak with him at 9.30 pm after her bootscooting lesson and that she seemed really willing to sit down and try and sort things amicably.
>
> He looked really happy and relaxed.[170]

313 Again, that account of Mr Rayney's approach to the proposed meeting can be reasonably construed as showing optimism.

314 Ms Shana Russell was a friend of Mrs Rayney who met with her at the Karalee Tavern at around 6.10 pm on 7 August 2007. The police obtained a statement from her on 24 August 2007. In that statement, Ms Russell said that Mrs Rayney told her that she was going to have a meeting with her husband after boot scooting that night and that 'she was very happy, she believed a lot of the issues were going to be solved'.[171] Ms Russell confirmed that evidence in these proceedings.[172]

315 In addition, on 6 August 2007 Mrs Rayney emailed her solicitor, Ms Gillian Anderson, speaking in positive terms of a discussion she had had with Mr Rayney that morning, and asking Ms Anderson to 'stop everything for a day or so and see what transpires'.[173] That email suggests optimism on Mrs

Rayney's part.

316 Notwithstanding the information available to police in early August, and certainly by the time DSC Williams gave evidence in these proceedings, DSC Williams steadfastly maintained that the sentence in Mr Rayney's handwritten statement concerning optimism about the meeting was a lie designed to mislead about the state of his relationship with his wife.[174] That proposition is unsupportable.

317 Similarly, DSC Williams refused to acknowledge that Mr Rayney was instrumental in making arrangements for Mrs Rayney's emails to be reviewed at the Supreme Court on 8 August 2007. He described as 'overstated' a proposition put to him that Mr Rayney procured approval from the Chief Justice for Superintendent Brandham to access all of Mrs Rayney's emails on her work computer.[175] He asserted that a court officer, Ms Yvonne Pereira, had the idea of checking the emails. That view was based on the statement taken from Ms Pereira on 20 August 2007 in which she said:

> I thought that we should check Corryn's emails. Prior to this Lloyd suggested contacting John Brandham, a police officer who he knew.
>
> Before John arrived I made sure that we contacted the Chief Justice. He needed to know that Corryn had not arrived and that we wanted to view her email.
>
> I took Lloyd to the Chief Justice, Wayne Martin.
>
> I introduced Lloyd to the Chief and left the [sic, them] to talk for five minutes.
>
> When they emerged the Chief advised me that I had full permission to check Corryn's email.[176]

318 A statement had also been taken from Ms Narelle Morris, who was at the time, Mrs Rayney's associate. In relation to looking at Mrs Rayney's emails, she said:

> Someone suggested we check Corryn's emails.

> Yvonne called Wesley Martin, the court's judicial support officer, and was advised we could access Corryn's emails but we would require further authority.

> Mr Rayney asked to see Chief Justice Wayne Martin and get authority to access Corryn's emails.[177]

319 Ms Morris then said that Mr Rayney and Ms Pereira then went to see the Chief Justice, and she was later told that permission had been given.

320 The Chief Justice provided a statement to the police on 2 October 2007.[178] He said that he was working in his chambers a little before 1.00 pm on 8 August 2007, when his executive assistant told him that Lloyd Rayney wished to see him as a matter of urgency. He saw Mr Rayney who advised him that his wife was missing and that he was very worried. He disclosed the marital problems which they were having. He said that Mr Rayney told him that the reason he had come to see him was that he had been advised that the Chief Justice was the only person with authority to grant access to the data on Mrs Rayney's computer to the police. He said that Mr Rayney told him that the police were there and wished to access her emails to see if they provided any clue to where she might be. The Chief Justice said that after considering the matter briefly, he advised Mr Rayney that he would authorise access to Mrs Rayney's computer by the police, but that Mr Rayney was not authorised to have access.

321 DSC Williams' refusal to acknowledge the significant role which Mr Rayney played in obtaining access for the police to Mrs Rayney's work emails is consistent with the general impression which I formed of his evidence, namely that he would not acknowledge anything which might tend to cast Mr Rayney in a favourable light.

322 DSC Williams was questioned about the coat which was found on Mrs Rayney's bed on 8 August 2007. He said that he could see two ways that the presence of that coat might be relevant. The first was that he believed Mr Rayney and Caitlyn Rayney directed police to the coat and suggested that it may have been evidence that Mrs Rayney got home from boot scooting because Caitlyn said she had not seen the coat earlier on the bed.[179] What DSC Williams described as the other possible significance was 'that Mr Rayney may have placed the coat there deliberately to direct police to it, as he did, and say "this is evidence that Corryn did get home" because that was what he was suggesting had happened ... that Corryn arrived home late after he had gotten to bed, and left the next morning'.[180]

323 In Mr Rayney's statement to police on 8 August 2007, he described what she was wearing when she left for boot scooting on the previous night. He said:

> I don't know if she was wearing a jacket but if she was, she would be wearing the red corduroy one or the black fluffy collar one.[181]

324 DSC Williams was crossexamined about his theory as to the potential relevance of the coat found on Mrs Rayney's bed. The following exchange took place:

> All right. Now, your theory was that Mr Rayney, to throw everybody off the scent, would say to you, if she was wearing a jacket, whether it be a red corduroy one or a black fluffy one, and then he would put on the bed a formal jacket that didn't match the description of either of the

> two jackets he had suggested were the only jackets his wife wore to boot scooting. That's your thesis, is itWell, I don't know what jacket was on the bed. I don't know what jacket he pointed out to police. This arose because you asked me a question about the evidence from the bootscooters and if I saw anybody with relevant evidence. And I explained that - you volunteered. And I agreed that there was two witnesses that saw Corryn wearing a black coat. And the - and that fitted with Mr Rayney directing police to the fact there was a black coat, and that - that was suggestive of Corryn arriving home, albeit Mr Rayney was suggesting she had arrived home much later after he had gone to bed 11.30 or midnight.[182]

325 After being shown a photograph of the coat found on Mrs Rayney's bed, which did not meet the description of either of the coats described by Mr Rayney in his statement, the following exchange took place:

> Your hypothesis is Mr Rayney put that jacket on the bed to throw the police off the scent, suggesting Mrs Rayney had come home and gone out againWell, Mr Rayney directed police to a jacket and suggested that that was evidence or could be evidence, at least, that Corryn had arrived home after he went to bed, and had gotten up very early. That was what was progressed by him.[183]

326 This is a further illustration of DSC Williams' tendency to draw prejudicial inferences against Mr Rayney regardless of any logical consistency with other material evidence available to him.

327 DSC Williams was asked some questions about the examination of Mrs Rayney's car. He had spoken with the vehicle examiners on 15 August 2007. His red book records the discussion regarding the position of the driver's seat.[184] It was suggested to DSC Williams in crossexamination that the position of the driver's seat was quite important, to which DSC Williams responded 'not to me'. When asked to explain, he said that he had heard it advanced that that would give some sort of indication as to the height of the offender, or at least of the driver. The following exchange then ensued:

> Okay. So the driver - one assumes if there is only one offender, it's the offender or if there's two offenders, one of the offenders is driving the vehicle when it unexpectedly ceased transmission and is forced to stopThat's right.
>
> Alights from the vehicle, locks the vehicle and leavesYes.
>
> Obviously in a state of some hurry because doesn't attempt to remove the purse, the contact lens, the blood, the sand or anything of that nature; is that rightThat's a reasonable assumption, I - I agree.
>
> And when they get out of the car and leave it, leaving fingerprints and DNA in the vehicle, the position the chair was in would consistently

> indicate the length of the driver's legsI - I don't accept that. I - I think that it - I think that it assumes too much. I think it assumes that it was placed into that position for the comfort of the driver which isn't necessarily the case. It could be that because Corryn's body was on the back seat it could be that the - the killer or the person assisting didn't want Corryn to fall forwards onto the floor and it could have been put back there to prevent that. It could have been that somebody wanting to remain anonymous - not get identified or seen driving Corryn's car, it might be that they want to stoop down low in the seat to avoid being seen.[185]

328 When that evidence is viewed in the context where the position of the driver's seat suggested a driver taller than either Mr or Mrs Rayney, the inherently unlikely alternative explanations for the seat position suggest a tendency on DSC Williams' part to disregard factors which might be inconsistent with Mr Rayney's involvement in his wife's death.

329 These are but a few illustrations of the constant tendency by DSC Williams to construe matters in the way most prejudicial to Mr Rayney and to approach his analysis of information from an assumption of guilt.

330 DS Correia demonstrated a similar tendency in the course of giving his evidence. From early in his evidence, he demonstrated an inclination to cast gratuitous aspersions on Mr Rayney with nonresponsive comments. In relation to a question as to whether there were other suspects as at 20 September 2007, DS Correia added to his answer 'Mr Rayney has never, to this day, been excluded as the suspect in this matter'.[186] Despite being reminded that he was being asked about the position as at 20 September 2007, DS Correia again said 'he could not be excluded and to this day he can't'.[187]

331 DS Correia described as 'suspicious' the fact that when Mr and Mrs Rayney subscribed for a mobile phone for Caitlyn Rayney in about 2003, it was subscribed in the name 'Patrick Lee', notwithstanding the possibility that that was done for security reasons having regard to Mr Rayney's position in the ODPP at that time.[188]

332 In his evidenceinchief, DS Correia outlined the various matters which he said founded his suspicion, as at 20 September 2007, of Mr Rayney. Many of those matters reflected matters which were alluded to by DSS Lee in his '50 pieces of evidence'. It is not necessary for me to traverse those in detail. In general, I found DS Correia to have tended to place the most sinister inferences from sometimes quite neutral or equivocal facts, and to have ignored what Brian Martin AJ described as 'improbabilities and uncertainties' which rendered the hypothesis underlying the defendant's case as 'glaringly improbable'.

333 To varying degrees, a number of other police witnesses also identified reasons why they held a suspicion of Mr Rayney's involvement in the murder of his wife as at 20 September 2007. It is unnecessary to review generally the evidence of each of those witnesses. The ultimate question to be determined is what circumstances existed, and what conduct Mr Rayney engaged in, and whether, objectively, those matters were capable of supporting a conclusion that either the conduct imputation or the suspicion imputation was true.

Circumstances in which conduct should be assessed

334 I turn now to consider the circumstances in which the defendant contends Mr Rayney's conduct should be assessed. Before embarking on that process, it is helpful to reflect on observations by Brian Martin AJ in his reasons in the murder trial, which are apposite to the evidence in this case and with which I respectfully entirely agree, concerning the approach to assessment of Mr Rayney's conduct. His Honour said:[189]

In the context of the particularly complex circumstances that existed following the disappearance of the deceased, great caution is needed before drawing from the accused's conduct inferences adverse to the accused and suggestive of his involvement in the death of the deceased. It is difficult to imagine a more complex and traumatic set of circumstances in which various overlays of complications interacted with each other.

Early on Wednesday 8 August 2007 the accused was faced with the sensitive problem of explaining the absence of the deceased to the children. Later that day, and in the following months, he faced the extremely difficult task of coping with young and vulnerable children who needed help and protection. The children suffered the most traumatic and distressing of experiences, beginning with the disappearance of their mother and followed by knowledge that she had died in horrific circumstances. Their entire life, as they knew it, was changed immeasurably overnight. Further, their lives became the subject of intense media and public scrutiny. The extent and impact of that public attention and scrutiny should not be underestimated.

The trauma for the children did not end with the loss of their mother and the glare of public attention. Suspicion quickly centred on their father and was confirmed by a public statement by the officer in charge of the Major Crime Squad on 20 September 2007 that the accused was the prime and only suspect.

It is difficult, if not impossible, to understand and appreciate properly the impact on the children of this combination of circumstances and the difficulties presented in endeavouring to deal with this situation. In addition, the problems facing the accused and the children were exacerbated by complexities associated with their wider family relationships. In the emotionally charged atmosphere, suspicions were harboured that the accused was involved in the death and the Coutinho family became very close to the police. The accused distrusted the police and distrust of the motives of the wider family is likely to have been aroused by Mr Coutinho's questions of the accused about various aspects. Eventually the wider family relationship collapsed entirely.

Given the case for the State that adverse inferences should be drawn from the accused's conduct, it is necessary to ask how a normal innocent person would be expected to behave in this most complex matrix of traumatic circumstances. The reason it is necessary to ask this question is because the State has set out to demonstrate that the accused did not behave in the way that a normal innocent person would have behaved in the weeks following the death of the deceased. Rather, argued the State, his behaviour with the Coutinho family and others was the behaviour of a person who had killed the deceased and was trying to hide his involvement.

> The answer to the question as to how a normal innocent person would behave in this complex situation is obvious. There is no such 'normal innocent person' who sets a standard of behaviour by which the behaviour of others is to be measured or judged. Such a person and standard are myths. In recent years the fallacies associated with this type of reasoning have been exposed in the context of sexual assault and whether victims of sexual assaults are to be expected to behave in particular ways.

> Speaking generally, the reactions of 'ordinary' people to situations of trauma, stress and grief vary infinitely. There is no 'normal' reaction to be expected in all circumstances. Emotions fluctuate and it is not uncommon for odd or seemingly illogical behaviour to occur. It is necessary to consider the particular individual, namely the accused, and the particular circumstances in which the conduct and statements occurred. As I have said, in the special and complex circumstances under consideration, great caution must be exercised before drawing the inference that particular conduct, including statements, points in the direction of guilt.[190]

335 I would add that conduct of Mr Rayney in the months leading up to August 2007 needs to be considered in the context of the breakdown of his marriage and the increasingly likely separation. It is, of course, not uncommon for parties to a failing marriage to behave inappropriately or discreditably in that context. While those circumstances do not excuse discreditable conduct, they may explain it. Care must be taken in assessing whether that conduct has significance beyond that context.

The plaintiff's relationship with Mrs Rayney (Defence [36(i), (ii), (iv), (v)] Reply [47A.1], [47A.2], [47A.4], [47A.5])

336 The defendant pleads that the plaintiff and Mrs Rayney lived at the Rayney residence but were separated and slept in different rooms. It contends that the separation had become acrimonious and the acrimony had worsened in the weeks preceding Mrs Rayney's death. It pleads that the plaintiff knew that Mrs Rayney was demanding that he leave the premises which he did not wish to do. It contends that the plaintiff knew that Mrs Rayney had decided to divorce him which he did not wish to occur.

337 In the Reply, the plaintiff admits that he and Mrs Rayney lived at the Rayney residence and that they were separated and slept in different rooms, but said that they continued to coparent, and act in the best interests of, their children, attend social events together and host social events at the Rayney residence. He pleads that whilst there was a level of acrimony between himself and his wife, the acrimony was principally limited to written communications and was particularly directed to him by email from Mrs Rayney and rarely in person. He says that he did not behave in an acrimonious manner towards Mrs Rayney and that for the majority of time the household operated and functioned without acrimony. He pleads that there was no worsening of animosity between Mrs Rayney and himself in the weeks prior to Mrs Rayney's death, that they both attended a friend's home to watch a football match on 5 August 2007 and their behaviour towards each other was normal. He pleads that on 6 August 2007, he and Mrs Rayney were observed at their home by a tutor of their children as being affectionate towards each other and behaving as a normal and happy family. He pleads that the matrimonial dispute between himself and Mrs Rayney was unexceptional and the anger expressed between the two of them was principally through emails or solicitors' letters and rarely in person.

338 The defendant called a number of witnesses who spoke of the relationship between Mr and Mrs Rayney, and Mr Rayney gave his own evidence as to the state of their relationship. As the pleadings reveal, there is no issue that the relationship between Mr and Mrs Rayney was troubled and was moving inexorably to a formal separation. The issue between the parties is simply as to the level of animosity between them. A number of the matters which are said to have provided a source of animosity or acrimony are dealt with later in these reasons as particular circumstances against which Mr Rayney's conduct is to be assessed. Those matters include the question of Mr Rayney's gambling, his reluctance to provide details of his income and an insinuation made by Mrs Rayney in an email to Mr Rayney to which Mr Rayney took offence.

339 Sharon Coutinho said that by 2007, her sister frequently spoke of her unhappiness with her marriage and her desire to seek a divorce. She said that around April or May 2007 Mrs Rayney made enquiries about getting a lawyer and had engaged an experienced family lawyer, Ms Gillian Anderson. In June 2007, Mrs Rayney told Ms Coutinho that 'she made Lloyd move out of her bedroom to a single bedroom downstairs at the back of the house'. 'She was shocked that he moved without complaint'. Around that time, Mrs Rayney also told her that she had learnt that, prior to Mr Rayney moving to Bermuda in 2002, he had been unfaithful to her.

340 It is clear that, by around May and June 2007, communications between Mr and Mrs Rayney had become strained, and Mrs Rayney was becoming increasingly anxious and agitated about questions of financial disclosure by Mr Rayney. Their email exchanges suggest an inability to discuss matters orally and a general loss of trust between them.[191] In contrast to the tone of the emails, Ms Margaret Howkins, who had been a tutor of the Rayney daughters since September 2006 and who went to the Rayney residence to tutor the girls on a weekly basis, perceived the family as close and supportive. She was at the Rayney residence on 6 August 2007. She said that as she left the house, she, Mr and Mrs Rayney and the girls were standing in the hallway excitedly celebrating one of Caitlyn's achievements. She described Mr and Mrs Rayney as 'very affectionate to each other'.[192] Ms Howkins' statement was tendered by consent and I accept her evidence. Mr Rayney gave evidence, that was not challenged, that on 5 August 2007, he and Mrs Rayney went together to the home of some friends to watch the West Coast Eagles play.[193]

341 Sharon Coutinho said that after a trip which Mr and Mrs Rayney took to Bali in April 2007, Mrs Rayney became concerned that Mr Rayney was not disclosing his income to her, and in particular, funds which he had received from his major client, Ms Rinehart or her company, Hancock Prospecting Pty Ltd. She said that Mrs Rayney told her that 'Lloyd had a big secret that he didn't want her finding out about' and that she had threatened to subpoena his clients to which Mr Rayney responded 'you will not besmirch my reputation'. Ms Coutinho continued:

> Corryn told me many times over the home phone that she was going to use this information to get the house and kids in divorce court after realising that this would not be an amicable settlement. She said she would not let him know that she knew this information, until it was most useful to her.[194]

342 The 'information' was, according to Ms Coutinho, information about 'shady deals with clients' and relating to 'some work with bikies' and whatever might have been the 'big secret that he didn't want her finding out about'. That Mrs Rayney said those things to her sister suggests a propensity on Mrs Rayney's part to make somewhat exaggerated criticisms of Mr Rayney to other people. There is, of course, in these proceedings no suggestion that Mr Rayney's conduct of his client's affairs was in anyway 'shady' or otherwise improper. It is no part of the defendant's case that allegations of that nature had any substance or merit, nor was it any part of the prosecution case in Mr Rayney's criminal trial.

343 Mr Rayney admits that Mrs Rayney had threatened to subpoena his clients and records to obtain disclosure of his income, but says that any attempt to subpoena records would have been unsuccessful and in any event he proposed to provide financial disclosure when advised to do so by his family lawyer. He says, and Mr Carr's evidence supports, that he had taken steps to provide Mr Carr with financial documents including certified copies of bank statements from Bermuda, for the purpose of disclosure. I accept that evidence. The exchange of correspondence between Mr Carr and Ms Anderson demonstrates that financial disclosure by Mr Rayney was likely to occur shortly after 7 August 2007.

344 Mr Rayney first consulted Mr Carr on 16 April 2007. Mr Carr provided him with advice about a number of issues, including Mr Rayney's obligation to provide disclosure in the event that there were financial proceedings, and general advice in relation to issues that might arise in relation to the children, and in relation to property.[195] Mr Carr conferred with Mr Rayney on a number of occasions between 16 April and 6 August 2007. Mr Carr's advice in relation to financial disclosure was that once there was a separation and it was clear that there was to be a financial settlement, the parties would have an obligation to make full and frank disclosure of documents and information relating to matters relevant to the case, and that that was a continuing obligation until the matter was finally concluded.[196] Mr Carr said that Mr Rayney's demeanour on receiving advice from him was 'always the same, that is he was "very calm, measured, unemotional" and that he appeared to accept that advice'.[197]

345 Mr Carr said that at the time that Mr Rayney consulted him, he did not have a view as to whether the marriage between Mr and Mrs Rayney had broken down, and that of the 'whole lot of elements that exist as part of the consortium vitae ... some of those elements had disappeared ... and some hadn't'.[198] He said that he received a number of documents from Mr Rayney relating to financial disclosure but, by 7 August 2007, had not received all of the documents that would be necessary for full disclosure. He agreed that Mr Rayney suggested that he could obtain certified copies of bank statements from Bermuda, but was not sure whether he had received those by 7 August 2007. He did agree that he had certainly received some bank statements.[199]

346 On 26 June 2007, Mrs Rayney consulted Ms Gillian Anderson of the law firm Dwyer Durack. It is apparent that, at that stage, Mrs Rayney was unaware that Mr Rayney had consulted Mr Carr because on 2 July 2007, Ms Anderson wrote directly to Mr Rayney on her client's behalf. The letter recorded instructions given by Mrs Rayney to Ms Anderson that, for a number of years, it had been agreed and understood that all details of Mr and Mrs Rayney's joint finances would be open or available to both of them, but from approximately August 2006 Mr Rayney had 'transferred funds to the joint account to assist with interest payments and living expenses when requested by Corryn' but otherwise had not completely disclosed his financial position. The letter called for full and frank financial disclosure and sought copies of various financial documents. The letter sought a response by 5 July 2007 on the basis of instructions that Mr and Mrs Rayney both wished to resolve the matter as soon as possible.[200]

347 The Dwyer Durack letter was referred to Mr Carr, who responded on Mr Rayney's behalf on 5 July 2007. The letter stated that Mr Carr had advised his client that there is no obligation on spouses (who have not separated) to provide the other with ongoing financial disclosure, but notwithstanding that advice, Mr Rayney would collate the information sought and provide it to Mrs Rayney in a timely way. It was said that the information would not be available for at least the next 14 21 days. The letter then went on to raise various other matters including a request that Mrs Rayney refrain from sending copious quantities of emails to Mr Rayney, that she refrain from engaging in 'an abusive and aggressive manner towards him especially in front of the children', that 'in the event there is a formal separation' Mr Rayney expected that the children would live with him and Mrs Rayney on a week about basis, and that Mr Rayney had no intention of vacating the Como property until such time as the child related and financial issues are resolved. Mr Carr advised

that, as there was likely to be a dispute about the arrangements relating to the children, Mr Rayney proposed that the parties make arrangements to attend upon a family relationships dispute practitioner, and suggested either Ms Katherine Doran or Ms Kerrie Harms as the agreed practitioner to assist the parties.

348 Ms Anderson responded to Mr Carr's letter on 13 July 2007. She expressed her client's surprise that Mr Rayney did not consider the parties to be separated, and advised that Mrs Rayney considered that the parties were separated and that separation had occurred no later than 25 June 2007. The letter advised that Mrs Rayney 'acknowledges your client's willingness to provide the information requested by her and would ask that it be done without delay'. It then responded to the various matters that had been raised in Mr Carr's letter of 5 July 2007.[201] In relation to a family disputes resolution practitioner, Ms Anderson advised that Lynette Hill, a former counsellor at the Family Court, had been recommended to Mrs Rayney. The letter enquired whether Mr Rayney would be willing to meet with Ms Hill for the purpose of obtaining a family disputes resolution s 601 certificate and expressed an understanding that Katherine Doran, but not Kerrie Harms, was available immediately.[202]

349 Mr Carr replied on 31 July 2007. He advised that he anticipated being in a position to provide Ms Anderson with the information requested in her earlier letters within seven days. It then dealt with the other matters which had been raised in the correspondence relating to arrangements for the children and certain financial matters. In relation to counselling, Mr Carr advised that his client did not object to Ms Katherine Doran or Ms Kerrie Harms counselling the parties as required and that he was prepared to engage Ms Doran if she was available straight away.[203]

350 On 3 August 2007, Ms Doran emailed Mr Carr advising that Ms Doran had been speaking to Ms Anderson who had told her that she and Mr Carr had clients who wanted to take part in family dispute resolution fairly soon. She advised that she had 'some availability in the next week and beyond to see them separately and then to convene a joint meeting with them soon thereafter, depending on their respective schedules'. She advised that Ms Anderson asked her to forward a request form so that Mr Carr could complete it with his client's details if he decided to refer his client to Ms Doran, and that Ms Doran had already provided Ms Anderson with the same form.[204]

351 On the same day, Ms Anderson wrote to Mrs Rayney by email referring to Mr Carr's letter of 31 July 2007 and dealing with its contents.[205] Ms Anderson recommended that Mrs Rayney agree to the appointment of Ms Doran as counsellor and that an immediate appointment be organised. She also suggested that if the financial information was not received from Mr Rayney by the following Tuesday (7 August 2007) then she should write advising that unless the information is provided, an application to the Family Court for a property settlement order would be made. Ms Anderson advised that if Mr Rayney's accounts did not adequately disclose his income then the matter could be approached from a different direction, for example by subpoenaing the records of his client in the Hancock matter to show how much he was paid.

352 On 6 August 2007, Mr Carr emailed Mr Rayney attaching a copy of Ms Doran's email of 3 August 2007 with its attachment and confirming that Mr Rayney was to provide Mr Carr with available times so that an appointment with Ms Doran could be arranged.

353 On 6 August 2007 at 10.20 am, Mrs Rayney emailed Ms Anderson saying:

> Lloyd is feeling the pressure and wanted to talk to me this morning. I had told him I was less than impressed with Carr's letter and it had done him no favours.

It sounds like he may be getting his head around the idea of moving out, and the fact that he will struggle to manage the girls on a week about basis.

I think it is best to stop everything for a day or so and see what transpires.

The word 'subpoena' seems to have had a tremendous impact.[206]

354 Rohan Coutinho described Mrs Rayney as being 'feisty and bossy'.[207] He described Mr Rayney as good with his children and 'very careful, almost overbearing, when it came to their safety'.[208] In relation to Mrs Rayney's treatment of Mr Rayney, Mr Coutinho said:

47. Corryn would be pretty full on with Lloyd. Corryn would say things to him, to insult him.
48. She would say things to him, that if Sharon had said them to me, I would have had a go back at her and then moved on.
49. But Lloyd would always sit there and take it, saying nothing. When I say Lloyd would take it I don't mean he would accept he had done something wrong, I mean he wouldn't fight back or respond to anything she said.
50. Corryn became even more 'hardnosed', I think to try and get some sort of response from Lloyd, which never came.
51. There was no sourness to my relationship with Lloyd because I was often sympathetic to Lloyd because of the way Corryn spoke to him at times.
52. This pattern increased as their relationship got worse.
53. For a long time I thought Corryn was in the wrong because of the way I saw her treating Lloyd. But my opinion changed in 2007.

355 Mr Coutinho said that the relationship deteriorated during 2007 and Mrs Rayney began talking with her family about leaving her husband and that divorce was the only choice which she had.

356 Both Mr Coutinho and Mr Da Silva spoke of Sunday lunches which the Da Silva family would have after church on Sunday. Mr Coutinho said that Mr Rayney ceased coming to those lunches during 2007. Mr Da Silva said that a couple of months prior to Mrs Rayney's disappearance, 'Lloyd's visits to (his home) became fewer'. In crossexamination, Mr Da Silva said that the family lunches at his home stopped after Mr Da Silva's wife died in the year 2000. [209] Mr Coutinho disagreed with the proposition that Sunday lunches at his fatherinlaw's house ceased in 2000, saying that he recalled having been to Sunday lunches 'after that' but that Sunday lunches were sometimes at his fatherinlaw's house and sometimes at his home.[210]

357 Sharon Coutinho spoke of Sunday lunches only in passing. She said that when Mr Rayney returned from Bermuda she noticed a change in the relationship between Mr and Mrs Rayney, and that she would attend family events, but Mr Rayney would only come to bigger events such as her 40th

birthday party, but would not come to Sunday lunches or smaller events.[211] In crossexamination, she agreed that the tradition of Sunday lunches at her father's house had gone, although lunches continued to be held at 'either my place or my sister's place or out'.[212]

358 Caitlyn Rayney said that she used to see her grandfather regularly on Sundays until she started playing soccer when she was nine years old, which would have been in about 2003.[213]

359 The focus of questions as to Mr Rayney's attendance at Sunday lunches at his fatherinlaw's home arose because of an article in *The Sunday Times* on 27 April 2008 in which Mr Da Silva was attributed as asserting that:

> [E]ach Sunday, Caitlyn and Sarah would join Mrs Rayney's sister Sharon, and their cousins at Mr Da Silva's modest Willetton home for a family lunch.
>
> There are no more Sunday lunches and Mr Da Silva does not call the house.[214]

(I reject a relevance objection to inclusion of this article in the Media Bundle. It is relevant to the question of Mr and Mrs Rayney's relationship a live issue in this action).

360 Comments about the Sunday lunches in the witness statements of Mr Da Silva and Mr Coutinho were no doubt intended to demonstrate the extent of the breakdown in the relationship between Mr and Mrs Rayney. Against the background of the acknowledged deterioration of Mr and Mrs Rayney's relationship during 2007, and having regard to the fact that for some years before 2007 the children's sporting commitments made them less available to attend Sunday lunches, I do not consider that Mr Rayney's nonattendance at the Da Silva family functions during 2007 was anything more than an indication as to the fact that the marriage was coming to an end. I accept Mr Rayney's evidence that the contact between himself and his wife's family had been reduced for some years prior to 2007 and its progress through 2007 was a natural response to the breakdown of the marriage.[215]

361 A number of friends of Mrs Rayney gave evidence as to what they observed of the relationship between Mr and Mrs Rayney. A neighbour, and a friend of Mrs Rayney, Ms Julie Porter said that she helped Mrs Rayney move a spare bed into the study room at the Rayney residence in June 2007 in order for Mr Rayney to sleep in that room. She said that Mrs Rayney had been communicating with Mr Rayney through emails trying to work out how they would separate. She said that, about six weeks prior to Mrs Rayney's disappearance, Mrs Rayney began sending her copies of email communications between Mrs Rayney and other parties including Mr Rayney and Ms Coutinho to Mrs Rayney's lawyer and Mr Rayney's lawyer.

362 As to the relationship between Mr and Mrs Rayney, having regard to the matters referred to above, I find that:

While there had been tensions in the Rayney marriage for some years, the relationship between Mr and Mrs Rayney became more strained from the early months of 2007.
Around May or June 2007, Mrs Rayney was becoming increasingly anxious and agitated about financial disclosure by Mr Rayney leading to Mrs Rayney consulting Ms Anderson.

On 25 June 2007, Mrs Rayney assisted by Ms Porter, moved Mr Rayney's belongings into a spare bedroom at the Rayney residence and thereafter they slept in separate bedrooms. Mr Rayney accepted that without complaint.

It is not accurate to say that Mrs Rayney was 'demanding' that Mr Rayney move out of their home, although she clearly wanted him to do so. It is likely that Mr Rayney had, by the beginning of August 2007 come to the realisation that he would be moving out of the house.

Mrs Rayney was open to her close friends and family about her marital problems, but there were occasions when Mr and Mrs Rayney did things together and portrayed themselves as a normal family.

Each of Mr and Mrs Rayney had engaged family law solicitors and each was apparently accepting and following the advice of those solicitors.

363 Acrimony is defined in the Macquarie Dictionary as 'sharpness or severity of temper; bitterness or expression proceeding from anger or ill nature'. [216] A number of the emails sent by Mrs Rayney to Mr Rayney during the course of 2007 can fairly be described as acrimonious. So too can Mrs Rayney's tone in some of the exchanges recorded by Mr Rayney on a dictaphone that are discussed later in these reasons. Mr Rayney's responses were generally far more subdued and I would not describe those as acrimonious. The evidence supports the matters pleaded by Mr Rayney in reply to these particulars.

Hiding amounts and sources of income (Defence [36(iii)] Reply [47A.3])

364 The defendant pleads that Mr Rayney had sought to hide some amounts and sources of his income in the context of acrimony between him and Mrs Rayney. Mr Rayney denies that particular and pleads that he followed the advice of his family lawyer, Mr Carr, not to provide financial disclosure at that time.

365 Despite that denial, Mr Rayney gave evidence that at some point in time he stopped giving his wife all the details of his work income. He could not remember the date but thought that it was in or about early 2007.[217] He said that the issue came about when Mrs Rayney wanted to know the names of his clients, but Mr Rayney told her that he did not think she was entitled to know their identities. Mrs Rayney expressed her unhappiness about his reluctance to provide that information, and became more demanding saying that she wanted to know the names of Mr Rayney's clients. He said that Mrs Rayney knew that he acted for Ms Gina Rinehart but not the names of other clients. They argued over the matter.

366 Mr Rayney said that after he refused to provide his clients' identities, Mrs Rayney began to seek details about his work income, and what individual clients paid him. Having regard to Mrs Rayney's work at the Supreme Court, Mr Rayney said that he considered that information confidential and refused to disclose it. He said that this was one of the first times in the marriage that he had stood up to his wife, and he refused to concede his position.

367 Notwithstanding his refusal to provide details of his income and identities of clients, Mr Rayney said that he continued to pay significant sums of money from his earnings into a bank account in joint names which was then used to meet household and other expenses. He said that, after about April 2007, he received legal advice from Mr Carr to the effect that he did not need to disclose information at that time, but would be required to do so if there were proceedings for dissolution of the marriage. He said that he calculated that he transferred approximately $320,000 from his work account to their joint account between July 2005 and June 2007, not including amounts which he provided separately such as providing Mrs Rayney and Caitlyn Rayney cash to go shopping, and he paid cash for the girls' babysitters, tutors and music teachers.

368 Mr Rayney said that he intended to provide full disclosure of his finances to Mrs Rayney but only when he was advised to do so by Mr Carr. He obtained certified bank statements from the Commonwealth Bank and the Home Building Society in preparation for providing financial disclosure when so advised by Mr Carr.

369 The exchange of correspondence between Ms Anderson and Mr Carr is substantially consistent with Mr Rayney's evidence as to the provision of financial information to Mrs Rayney, and I accept it.

370 I also accept that as the persistent demands in various emails make clear, Mrs Rayney became increasingly agitated by Mr Rayney's refusal to provide full disclosure of his income. It was clearly a source of tension in their marriage and is an aspect of the deterioration in their relationship which occurred during the course of 2007. I also find that Mr Rayney accepted Mr Carr's advice that financial disclosure had to be provided at some point, and was prepared to provide that disclosure in accordance with his solicitor's advice.

371 I am satisfied however, that in 2007 Mr Rayney took steps designed, if not to conceal his income from Mrs Rayney, than to at least obscure it. Between May and July 2007, Mr Rayney deposited three amounts totalling $208,574.32 that had been received from his client Hancock Prospecting Pty Ltd into an account with Home Building Society in Mr Rayney's name as trustee for Sarah Rayney. A few weeks after each deposit, the amounts paid into that account were then transferred out to Mr Rayney's business account. Mr Rayney's explanation for that action was to prevent Mrs Rayney learning details about Mr Rayney's clients who were involved in proceedings in the Supreme Court where she worked. It is difficult to accept that explanation. Mrs Rayney knew that Mr Rayney was acting for Ms Rinehart and Hancock Prospecting and he knew that she knew. If Mrs Rayney were somehow to see Mr Rayney's business account statements showing a series of large deposits, it would have been obvious where the money had come from. Whether the funds appeared in the business account by direct debit or via the Home Building Society account would have disclosed nothing about the details of the work done to earn those fees. If there were ultimately to be litigation on financial matters, the fact of the deposits would ultimately have been evidenced in the course of financial disclosure. Although Mr Rayney's explanation does not make much sense, it is not easy to see what else he might have hoped to achieve by the actions he took. Significantly, the funds found their way into his business account not long after they were received. His actions did not, therefore, have the effect of concealing the amount of his business income.

The plaintiff's concern of the effect of divorce on his and his family's reputation (Defence [36(vi)] Reply [47A.6])

372 The defendant pleads that the plaintiff was concerned about the effect that becoming divorced would have upon his reputation and his family's reputation. The plaintiff denies that he was concerned about that matter, and says that he did not believe that his or his family's reputation would be adversely affected by a divorce.

373 Mr Rayney's responsive witness statement dealt with those pleadings.[218] That portion of the responsive witness statement was subject to objection on the basis that the evidence was irrelevant and nonresponsive. I would not allow the objection. It is relevant to the issue raised in [36(vi)] of the Defence and the denial of that subparagraph in [47A.6] of the Reply.

374 Mr Rayney said that he did not believe that a divorce would bring any shame on him or his family or would harm his character or reputation. He said that he was very sad when the reality of a final separation became inevitable, especially out of his concern for his daughters. He said he spoke frankly with his sister and mother about the fact that there would be a separation. It was clear from the evidence of Mr Rayney's sister, Ms Raelene Johnston, that she was well aware of the impending separation in the weeks prior to Mrs Rayney's death. Mr Rayney said that he spoke with close friends about the impending divorce. That evidence is supported by the evidence of his friends, Ms Linda Black and Ms Elizabeth Smith. There is no evidence that suggests that Mr Rayney's account of her reaction to the impending divorce was other than as he describes, and I accept his evidence on that matter.

375 The defendant's plea that the plaintiff was concerned as to the effect of the divorce on his reputation and his family's reputation is not made out. I accept however that he was saddened by the impending end to his marriage.

The plaintiff's gambling (Defence [36(vii)(A)] Reply [47A.7])

376 This plea asserts that the plaintiff knew that Mrs Rayney learned that, as was the fact, the plaintiff was a compulsive gambler and had sustained substantial losses.

377 Mr Rayney admits that he was a gambler and that he had sustained losses and that Mrs Rayney knew that to be the case. He pleads however that the gambling losses did not affect his support of Mrs Rayney and their children, that he made at least 33 money transfers totalling $332,000 between 11 August 2005 and 1 August 2007 from his bank account to a joint account in his and his wife's name, that his gambling losses were affordable and that some of the gambling losses were shared with other persons. He pleaded that his gambling was not a secret and was a wellknown fact amongst his family and friends and those who knew him well and that on some occasions his gambling resulted in substantial winnings.

378 The evidence establishes that Mr Rayney's gambling was not a secret. His brotherinlaw, Rohan Coutinho said that on occasions he had been to hotels attached to Totalisator Agency Board (TAB) facilities with Mr Rayney, and saw him betting on those occasions. He remembered family holidays to Mandurah where Mr Rayney went to the TAB while others waited outside while he placed a bet. He recalled a conversation he had with Mrs Rayney in the early years of Mr and Mrs Rayney's marriage concerning Mr Rayney's prowess with betting on horses and that he would meet with friends to work on the form and make 'strategic bets on trifectas and winners'. He heard Mr Rayney speaking to his wife's uncle about racing matters at family functions.[219]

379 Mr Da Silva said that he saw Mr Rayney gambling on a family holiday to Broome, and that sometime later he noticed booklets dealing with horse racing at the Rayney residence when he was assisting Mrs Rayney to prepare the house for extensions.[220] These things occurred before Mr Rayney went to Bermuda in 2003.[221]

380 Ms Shana Russell said that it was no secret that Mr Rayney had an interest in betting and horses and that sometime prior to August 2007, she was present when there were discussions between her husband and Mr and Mrs Rayney about the Rayney's going into partnership with Mr and Ms Russell in buying a racehorse. She said that the Rayney's had been guests of the Russell's at the races. Ms Russell said that when she and Mrs Rayney spoke about Mr Rayney's gambling, Mrs Rayney told her that she was not concerned about the fact that Mr Rayney was betting but she wanted to know the amounts of his bets.

381 Mr Rayney described betting on races as 'often a social activity that I enjoyed with friends'. He said that he always abided by two principles, namely never to bet more than he could afford to lose, and secondly never to borrow money to place a bet. He said that he had never been in financial difficulties or unable to pay any bill because of gambling. He said that often bets were placed in conjunction with friends, with the winnings or losses shared.

382 Mr Rayney was crossexamined at considerable length about his gambling. He accepted that in October 2003, Mrs Rayney expressed concern in an email about Mr Rayney having been seen by a person at a TAB and about his 'habit continuing'.[222] He accepted that he and Mrs Rayney had agreed in late 2000 that he would cease betting, or not bet as frequently. He did not accept, however, that Mrs Rayney was 'bitterly opposed to' his gambling, but rather suggested that 'there were times when she did not like it and made that view clear, but there were times when she expressed views about me because other things were happening in her life'.[223]

383 Mr Rayney was crossexamined about a document put to him as an extract of his TAB trading account between 19 July 1997 and its apparent closure on 28 November 2007, although the statement contained no active transactions after 28 November 2000.[224] Mr Rayney said that he never received any statements from his TAB account, and thus was unable to identify whether the document put to him was a statement of his account. It appears however to be a document obtained by police from the TAB in the course of Operation Dargan and to be as described above. That document showed that between July 1997 and 28 November 2000 bets totalling $138,119.50 were made, and dividends of $69,259.15 were received, suggesting a loss of $68,860.35 on bets over that period. The statement also reveals that prior to a deposit made on 19 July 1997 of $500, the account had in it $40,567.50. Whether that sum represented money put into the account by Mr Rayney or was the product of winnings over the many years that Mr Rayney had operated his TAB account prior to 1997 is unknown. In the period between July 1997 and November 2000, deposits totalling $41,434.10 were made to the account, and withdrawals of $18,171.25 were made, demonstrating that, over that period of approximately 3 ½ years, Mr Rayney's net cash flow in the account was a contribution of $23,312.85, or approximately $9,325.00 per year, or on average, around $180 per week. Throughout that period, Mr Rayney held reasonably senior positions which would have been well remunerated. In addition, although he was unable to quantify amounts which represented bets laid with friends on a shared basis, to the extent there were such bets, then Mr Rayney's contribution to losses would be accordingly reduced.

384 In those circumstances, I accept Mr Rayney's evidence that his gambling was limited to amounts which he could afford to lose, and was at a level which did not put his family's financial position in jeopardy. I also accept, however, that Mrs Rayney was concerned at the losses which Mr Rayney incurred, and expressed that concern to him in 2000, and again in 2003. Mr Rayney accepted that Mrs Rayney had that concern in 2000, and that around that time had said words to the effect that she wished to control the financial arrangements within the family and that that was agreed between them.[225] The fact that Mr Rayney started with an asset of around $40,000 in July 1997, invested a further approximate $23,000 net over the next 3½ years, and lost those amounts, makes Mrs Rayney's concern about Mr Rayney's gambling understandable, whatever may have been the source of the initial asset of $40,067.50.

385 It is apparent that by 2006 and early 2007, Mr Rayney had resumed gambling through a Centrebet account. That account was analysed by a forensic accountant Mr Neil Barlow. His analysis involved a review of Mr Rayney's bank records and gambling records for the period 1 July 2005 to 30 September 2007. Mr Barlow assessed that, in the year ending 30 June 2006, Mr Rayney deposited just under $370,000 of receipts into his professional services account.[226] In the year ending 30 June 2007, a total of $670,115.44 was deposited into Mr Rayney's professional fee's account and a further amount was deposited into a Home Building Society passbook which represented fee's earnt by Mr Rayney. Having analysed those deposits, Mr Barlow assessed that in that financial year, Mr Rayney had earned professional fees of $660,850.49, or an increase of just over $295,000 over the previous year. Mr Barlow concluded that, on his analysis of the Centrebet information obtained, between 8 April 2006 and 4 July 2007, Mr Rayney incurred gambling losses of $46,800 which calculated out at an average of $780 a week or $3,120 a month.[227] Mr Barlow accepted that his analysis would not detect bets placed through that account for people other than Mr Rayney.

386 Mr Barlow's figures demonstrate a significant level of gambling by Mr Rayney during that period. The gambling losses were incurred at a time when Mr Rayney's income was at a high level, and again I accept his evidence that the level of gambling, whilst high, was not a threat to his or his family's financial security. Clearly, however, the losses were at a level which, had Mrs Rayney been aware of them, would have provided her with justifiable concern.

Unfaithfulness (Defence [36(vii)(B)] Reply [47A.9])

387 The defendant pleads that Mr Rayney knew that Mrs Rayney had learned that, as was the fact, Mr Rayney 'was unfaithful to his wife'. Mr Rayney admits that he was unfaithful to his wife, but says that Mrs Rayney and many other persons were aware of that fact, Mrs Rayney told many persons of that fact and he was aware that she did so. In addition, he pleads that Mrs Rayney was unfaithful to him and each of them was aware of each other's unfaithfulness.

388 Mr Rayney's unfaithfulness dated back to before he went to Bermuda in 2004. It is unclear on the evidence when Mrs Rayney first became aware of that fact. There is considerable evidence that in 2007, Mrs Rayney spoke to others about Mr Rayney's unfaithfulness. Ms Russell said that sometime around June or July 2007, Mrs Rayney told her that she had heard rumours in about 2005 that Mr Rayney had a girlfriend. She did not, however, say that those rumours were true.[228] Mr Coutinho said that 'sometime in early 2007' Mrs Rayney told him that she and Mr Rayney were not sleeping together and that he had moved out of their bedroom into a spare room, and that 'she'd found out about his gambling and his infidelity'. Given that Mrs Rayney moved Mr Rayney out of their bedroom on 25 June 2007, Mr Coutinho must either be wrong about the conversation being in early 2007, or may be confusing more than one conversation. Either way, his evidence on that point is of little assistance. Ms Coutinho said that she was told by Mrs Rayney about Mr Rayney's infidelity in March or April 2007.[229]

389 Ms Porter said that 'between 6 and 9 years ago'[230] she learnt from a friend of hers, Ms Elizabeth Woods, that Mr Rayney was 'a womaniser' and that he was 'seeing other women'. (I interpose to say that there is no evidence that Mr Rayney had been unfaithful other than with one person). That evidence of Ms Porter was given at the trial of this action, but the reference to six to nine years ago is obviously wrong, and is explained by the fact that that paragraph in her witness statement was lifted verbatim from her statement to police on 10 August 2007.[231] Ms Porter said that years before 2007 she had a discussion with Ms Woods about when the time would be right to tell Mrs Rayney about Mr Rayney's infidelity. She said that 'shortly prior to Mrs Rayney's disappearance' she phoned Ms Woods and said the time was right to ask Ms Woods to phone Mrs Rayney, and that Mrs Rayney later phoned Ms Porter and asked her to ascertain the name of the person with whom Mr Rayney had allegedly had an affair. She recalled that she then enquired of Ms Woods on Monday 23 July 2007, and conveyed the information to Mrs Rayney on 24 July 2007. Ms Porter said that in her conversations with Mrs Rayney about that information, 'Corryn did not appear to be angry about the affair but she told me she saw it as another piece of information to be used against Lloyd'.

390 Ms Woods said that she had a conversation with Mrs Rayney in May or June of 2007 about Mrs Rayney's relationship with Mr Rayney in which she told Mrs Rayney there were rumours that Mr Rayney was having an affair whilst in the ODPP.[232] Michael Halls, Ms Porter's husband, said that in conversation with Mrs Rayney, she told him that she had not known anything about Mr Rayney's infidelity until recently when a mutual friend, Ms Woods, told her 'all of the details'.[233] He said that he was told that probably about a week before 7 July 2007.[234]

391 The general thrust of that evidence is, and I find, that while it may be that she was aware of rumours some years earlier, Mrs Rayney became aware sometime around May or June 2007 of the fact that Mr Rayney had been unfaithful whilst working at the ODPP and before he went to Bermuda. She learnt more detail about that, and in particular the name of the other party, probably around 23 July 2007. Her main interest in learning that information was that she considered that it could be used against Mr Rayney in the context of their impending separation.

392 Whether Mr Rayney knew that Mrs Rayney had learned of his infidelity is less clear on the evidence. The plaintiff pleads that he was aware that Mrs Rayney knew of his infidelity, and he knew of hers.[235] That plea is inconsistent with Mr Rayney's evidence in crossexamination where he said that he learned after Mrs Rayney's death that Ms Woods had passed on the allegation of infidelity.[236] He also learned of her unfaithfulness after her death.[237] I am satisfied that, although Mr Rayney was concerned, and may have harboured suspicions about Mrs Rayney's relationship with Mr Ervin Vukelic, he did not become aware of the true nature and extent of that relationship until after her death. That is consistent with what Ms Linda Black, a friend of Mr Rayney's, told police in August 2007 of a conversation that she had had with Mr Rayney about four to six months earlier. Ms Black told police that Mr Rayney vaguely suspected that Mrs Rayney may be having an affair, although he was not convinced as to that.[238]

393 The defendant submits that Mr Rayney's pleaded assertion that he was aware of the fact that his wife was aware of his infidelity, could only be explained on the evidence by three alternative possibilities. The first was Ms Maria Soares' evidence. Ms Soares was a friend of the Coutinho and Rayney families. She said that, around 9 July 2007, Mrs Rayney said something to her about Mr Rayney's infidelity and something about the ODPP, in the context of her expressing concerns about various matters concerning Mr Rayney. She said that she and her husband invited Mr Rayney for dinner on 27 July 2007 when Mrs Rayney and her children were in Melbourne. She said that they discussed Mr and Mrs Rayney's marital problems in the context of which she asked him whether he was having an affair with anyone else, to which he replied no. She said that Mr Rayney mentioned that while he had been in Bermuda working, his parents had come to his house and found Mrs Rayney having dinner with Mr Vukelic.[239]

394 The second basis upon which the defendant submitted Mr Rayney's assertion is supported by the evidence relates to an account of a phone conversation with Mrs Rayney given by Ms Porter, said to be on 6 August 2007. Evidence of that conversation was led not as evidence of the truth of what Mrs Rayney said, but as to her general state of mind. It is not appropriate to rely on that evidence as truth of what was said and I accordingly put it to one side.

395 The third basis upon which the defendant says the admission is supported by the evidence is that, if a recording device was installed during either the period prior to 26 July 2007 or from 29 July to 5 or 6 August 2007, then the plaintiff had access to phone calls in which Mrs Rayney discussed his infidelity with her family and friends. The defendant submits that if the recording device was installed on 23 July 2007, then one of the first calls recorded was Mrs Rayney's discussion with Ms Porter about the other participant in the plaintiff's affair. Mrs Rayney was at work on 23 July 2007, and one of the phone calls recorded against her extension number was a call to Ms Porter's phone at 2.33 pm lasting one minute 20 seconds.[240]

396 There were also two phone calls between the Rayney home phone and Ms Porter's phone at 7.27 pm and 7.39 pm on 23 July 2007.[241] A further call is recorded between Ms Porter's phone and Mrs Rayney's home phone at 4.32 pm on 24 July 2007.[242] The timing of those calls is consistent with Ms Porter's account as to when she was asked to and did identify the other party to Mr Rayney's infidelity. An email sent by Mrs Rayney to Ms Porter and Ms Woods at 9.05 am on 24 July suggests that the information may have been provided on the evening of 23 July 2007. That email reads:[243]

> Thanks for that last night. It certainly focuses my mind on extracting the best possible result for the girls and I. He can now work hard and make up for all the waste over the years.

I am wondering whether to use the info to get him out of the house, or save it for later.

There is a definite look of panic in those eyes. Perhaps I will wait just a bit longer.

I can't think of too many other ways to flush him out. He would be reluctant to move because it would expose his inability to manage, and look like he was at fault.

397 Given the finding that I make below that Mr Pearson installed the recording device on 23 July 2007 and removed it on 26 July 2007 before downloading the calls and giving a disc to Mr Rayney sometime before 28 July 2007, it is more likely than not that Mr Rayney listened to the calls between Ms Porter and Mrs Rayney, and on that basis was aware of the fact that Mrs Rayney knew of his infidelity.

The email of 13 July 2007 (Defence [36(viia)] Reply [47A.8])

398 The defendant pleads that the plaintiff was disgusted with an insinuation made by Mrs Rayney in an email sent to him on 13 July 2007. The plaintiff admits that he was disgusted by the insinuation in that email. That circumstance is therefore established.

399 The insinuation contained in the email of 13 July 2007[244] is of significance in the context of the allegations regarding recording of discussions and phone conversations of Mrs Rayney. Mr Rayney's evidence was that the insinuation was what prompted him to arrange for Mr Pearson to record phone calls and that an earlier oral insinuation to the same effect caused him to make dictaphone recordings in about April 2007.[245]

Fear that Mrs Rayney would make public Mr Rayney's gambling, his unfaithfulness and the insinuation (Defence [36(ix), (ixa)] Reply [47A.10], [47A.11])

400 The defendant pleads that the plaintiff feared that Mrs Rayney would make public matters relating to the plaintiff's gambling and the matter the subject of the insinuation contained in the email of 13 July 2007 and that the plaintiff feared that publication of those matters may jeopardise his prospects of being appointed as senior counsel or to the judiciary, and that the plaintiff knew that Mrs Rayney had threatened to jeopardise his prospects of being appointed as senior counsel. The plaintiff denies those matters and pleads that Mrs Rayney had no input into the appointment of senior counsel and that he knew that fact.

401 The defendant submits that Mr Rayney's explanation as to why he recorded his wife's conversations lends itself to the inference that Mr Rayney was concerned about what Mrs Rayney might be telling people. That is one of several possibilities. Another is that Mr Rayney hoped to learn of Mrs Rayney's plans in relation to separation and custody, or to acquire information that might be of assistance in any litigation that might occur.

402 Mr Rayney said that he had no intention of applying for appointment as senior counsel in 2007, and had not done so.[246] He did, however, have aspirations to appointment as senior counsel, and had applied on 31 August 2004. Although unsuccessful at that time, he interpreted the response to his

application as leaving open the possibility of appointment at some future time, and he intended to apply again in 2008.[247] Ms Black told the police in her witness statement of 14 August 2007 that:

> I remember Lloyd telling me recently that Corryn had told him that if he doesn't give her what she wants, she will destroy his career and humiliate him in front of his family and friends.[248]

403 In giving that evidence in this trial, Ms Black said that she could not now remember much detail about that conversation but back at the time when she made the statement it was an honest recollection as best she could give it.[249]

404 It is apparent that, at least around June 2007, Mrs Rayney was making threats to damage Mr Rayney professionally. On 22 June 2007, Mr Rayney emailed Mrs Rayney saying that he agreed to provide her with financial information because of her 'threats to take family court proceedings and potentially embarrass and damage [him] professionally'.[250] In an email to Mrs Rayney a few days later, on 26 June 2007, Mr Rayney referred to a threat by Mrs Rayney to have court staff prevent Mr Rayney attending the public welcome of a newly appointed judge if he did not provide some specified information beforehand. He continued:

> I have asked you before and I am asking you again, please do not try and harm my career or reputation, or use your position at the court to achieve that end.

405 In his evidenceinchief, Mr Rayney said that he did not believe that conduct by his wife which might have amounted to threats by her to harm his career would actually do so.[251] He maintained that position in crossexamination.[252] He did acknowledge that he knew, by August 2007, that Mrs Rayney was spreading sometimes very unpalatable stories about him.[253]

406 I find that Mr Rayney was aware of the fact that his wife was saying highly critical things about him to her friends and was making threats to damage his career. Undoubtedly that was a cause of concern for Mr Rayney. I do not, however, find that Mr Rayney believed that Mrs Rayney was in a position to significantly damage his career. As the defendant accepts, Mrs Rayney did not have any input into the appointment of senior counsel, much less judicial appointment. Mr Rayney would have been well aware of that fact. Mr Rayney's concern was more likely about the potential embarrassment that his wife's criticisms might cause.

Disclosure of plaintiff's income (Defence [36(x), (xi), (xii)] Reply [47A.12], [47A.14], [47A.15])

407 These particulars assert that Mrs Rayney was insisting on the plaintiff giving full disclosure of his income to her and that he was unwilling to provide it. It is pleaded that the plaintiff knew that Mrs Rayney had threatened to subpoena his clients and records if necessary to obtain full disclosure of his income, which he did not wish to occur. Particular (xii) is that shortly before 7 August 2007, the plaintiff indicated to Mrs Rayney a willingness to provide financial documents and move out of the Rayney residence.

408 In response, Mr Rayney admits that Mrs Rayney was seeking full disclosure of his income, but says that he intended to provide it through his family lawyer, and had taken steps to do so. He admits that Mrs Rayney threatened to subpoena his clients and records but says that his advice, which he accepted, was that any attempt to do so would be unsuccessful as no proceedings were on foot. Particular (xii) was admitted.

409 The evidence in relation to these matters is dealt with above. The only issue between the parties that emerges from the defendant's closing submissions is whether the plaintiff was in fact willing to provide Mrs Rayney with financial information. The defendant contends that he was not. I reject that contention. It is inconsistent with its pleading in particular (xii). I accept that Mr Rayney would have preferred not to provide his financial information to Mrs Rayney. On the other hand, I accept that Mr Carr's advice to Mr Rayney was that he would be required to provide his financial information to his wife once separation had occurred, that he accepted that advice, and that he had taken steps to that end before August 2007. Once the decision to make disclosure had been made, threats of subpoenas became irrelevant.

Meeting between the plaintiff and Mrs Rayney planned for 9.30 pm on 7 August 2007 (Defence [36(xiii)] Reply [47A.16])

410 It is common ground that the plaintiff and Mrs Rayney had discussed meeting at the Rayney residence at about 9.30 pm after Mrs Rayney returned from her boot scooting class at the Bentley Community Centre that evening.

411 The issues between the parties in relation to the proposed meeting are relatively subtle and, in my view, not of great moment.

412 The defendant pleads:

> The plaintiff and Corryn Rayney were scheduled to meet to resolve issues arising from their separation at the house at the Rayney premises on 7 August 2007 at 9.30 pm, after Corryn Rayney returned from her bootscooting class at the Bentley Community Centre, and Corryn Rayney was looking forward to the meeting.

413 In the Reply, the plaintiff pleads:

> (xi) the plaintiff says that he and Corryn Rayney had discussed meeting at the Rayney premises after Corryn's bootscooting class at about 9.30 pm to discuss a resolution of separation issues and custody arrangements for the children but otherwise does not admit this paragraph.

414 The plaintiff submits that the difference between the parties is as to whether they were 'scheduled to meet', the topics to be discussed and the timing of the meeting 'at about 9.30 pm'. The first and third differences appear to revolve around the same question, and are simply of no significance. All of the evidence points to the fact that the parties were proposing to discuss their matrimonial matters on the night of 7 August 2007 with a view to reaching some agreement, and that could only have occurred after Mrs Rayney returned from her boot scooting class that night.

415 The defendant identifies the relevance of these issues as going to whether it was reasonable to expect Mrs Rayney wanted to return home immediately after boot scooting that evening. If so, that makes it more plausible that she did in fact return home that night after boot scooting. Whether or not she did return home creates or adds to the reasonable suspicion of the plaintiff having unlawfully killed Mrs Rayney.

416 Whether or not Mr or Mrs Rayney, or both of them, intended to talk about only custody and housing issues, or financial issues, or both seems to me to make no difference to the question of whether or not Mrs Rayney intended to return home after boot scooting.

417 The evidence suggests that both Mr and Mrs Rayney were approaching the proposed meeting in a positive frame of mind. I have dealt with some of the evidence in relation to that issue earlier in my discussion of DSS Lee's evidence.[254]

418 In particular, the evidence of Mr Halls and Ms Porter supports that conclusion. As noted above, on the morning of 6 August 2007, Mrs Rayney emailed her solicitor asking her to 'stop everything for a day or so' to see what transpires. That email was obviously as a result of Mrs Rayney's optimism that things may be resolved by discussion rather than through lawyers.[255] In crossexamination, Ms Coutinho said, although I think it highly unlikely that she accurately identified the date of the conversation, that in the days leading up to her disappearance, Mrs Rayney told her that she felt like progress was being made and that Mr Rayney would provide the financial information she wanted.[256] Mr Da Silva said that he had a conversation with Mrs Rayney on 6 August 2007 and she told him that she was to meet with Mr Rayney the following day and that she was excited, very happy, looking forward to the meeting and saw Mr Rayney's attitude as a breakthrough.[257] Ms Russell said that she had a discussion with Mrs Rayney in the afternoon of 7 August 2007 at which Mrs Rayney told her that there was to be a discussion with Mr Rayney that night after boot scooting. Ms Russell said that Mrs Rayney appeared very happy and said that she believed a lot of issues were going to be solved.[258] Mrs Rayney told her friend, Ms Dianne Miller, that she was looking forward to the meeting.[259] She told Sarah Rayney's classroom teacher Ms Jenke on 7 August 2007 in a relaxed conversation that Mr Rayney had come to the realisation that he needed to move out.[260]

419 The optimism was not only on Mrs Rayney's side. Mr Rayney said that, before Mrs Rayney left for boot scooting, he asked if they were 'still meeting at 9.30 pm' to which Mrs Rayney responded that she was happy to do so. Mr Rayney said that he was optimistic of reaching a resolution which could later be confirmed by solicitors. He said that Mrs Rayney's manner and the way she spoke, showed that she was in a good mood when she left.[261] Ms Black, in her statement to police on 14 August 2007, said that she had spoken to Mr Rayney at about 4.30 pm on 7 August 2007. She said that he looked 'really happy' and that they had agreed to talk about separation issues. She said that Mr Rayney told her that Mrs Rayney was going to speak with him at 9.30 pm after her boot scooting lessons and that she seemed 'really willing to sit down and try and sort things amicably'.[262]

420 I find that Mr and Mrs Rayney had arranged to meet after boot scooting shortly after 9.30 pm and that they were each looking forward to the meeting, and that it is likely that Mrs Rayney intended to go home after her boot scooting class.

Mrs Rayney leaving the boot scooting class (Defence [36(xiv), (xv)] Reply [47A.17], [47A.18], [47B.13], [47B.39])

421 The defendant pleads that Mrs Rayney left her boot scooting class on the evening of 7 August 2007 alive and well sometime between 9.15 pm and 9.30 pm, and that there was no obvious opportunity for her to come into contact with her killer between leaving the boot scooting class and arriving home, and the Rayney residence was only a 10minute drive from the boot scooting class.

422 Mr Rayney does not admit that Mrs Rayney left the boot scooting class between 9.15 pm and 9.30 pm, and submits that it was more likely after 9.30 pm. He otherwise pleads that several cars had been broken into whilst parked in the car park of the Bentley Community Centre during previous boot scooting classes, and that the same car park had been the scene of other criminal activity in the past. The plaintiff pleads that Mrs Rayney did not return to the Rayney residence after her boot scooting class on the evening of 7 August 2007, and was seen by Constable McLeod with two other people on Albany Highway in Victoria Park at a time after her boot scooting class had concluded. He pleads that a car which matched the description of Mrs Rayney's car was observed by Mr Robert Ellis being driven at speed after 1.41 am on Albany Highway with two or three occupants pushing, shoving and jumping around inside the vehicle, and that a female in Kings Park was heard screaming loudly in the early hours of 8 August 2007 and that, had the police

performed and completed proper enquiries of persons residing near the relevant area of Kings Park prior to 20 September 2007, they would have been aware of the fact that two witnesses had heard screaming in that area.

423 In the Reply, the plaintiff also pleaded that no one saw Mrs Rayney's car in the car park either before or after the boot scooting class, even though she had parked her car in that car park on previous occasions and had been observed by other boot scooters on those occasions.[263]

424 In closing submissions, the defendant posited that that pleading may have suggested that the plaintiff was asserting that Mrs Rayney did not drive her car to boot scooting on 7 August 2007. I do not construe the pleading in that way, and I did not understand the plaintiff to have suggested that that conclusion was open. It is quite clear that Mrs Rayney did take her car to boot scooting on 7 August 2007, notwithstanding that there is no evidence that anybody saw her arrive, or that anybody observed her car that night. Significantly, despite the fact that all those present at Mrs Rayney's boot scooting class on 7 August 2007 were interviewed by police, no one saw Mrs Rayney after she left the hall, and thus did not see her go to her car or drive her car away from the hall.

425 There was some evidence contained in statements made to police by boot scooters as to precisely when Mrs Rayney left the boot scooting class. Mr Glen Dale, the owner and operator of the company that runs the boot scooting classes at the Bentley Community Centre, gave uncontested evidence that Mrs Rayney arrived at about 7.45 pm on 7 August 2007, the class having started at 7.30 pm. He confirmed that cars had been broken into on three or four occasions over the two years prior to 7 August 2007 in the car park. He said he last saw Mrs Rayney dancing at about 9.30 pm, dancing the last dance, but did not see her leave the hall. He said that all cars had left the car park by about 9.40 pm.[264] Mr Dale's recollection of the time he left differs slightly from the recollection given by Mr John Tinker in his statement to police of 30 August 2007. He said that he left with Mr Dale at about 9.45 pm and as he left he saw a car with brake lights on and engine running, although he did not know whose car it was and it drove off just before they finished locking up. [265]

426 Ms Hildegard Kennedy said that Mrs Rayney came in late to boot scooting which was not unusual because 'she always came in late and left early'. On this occasion, she said that towards the end of the night, Mrs Rayney went to leave early, but came back to dance for one more song because one of her favourite songs came on. She danced that song and then left. She said she was still dancing when Mrs Rayney left the hall but Ms Kennedy left the hall at 9.40 pm.[266]

427 Another bootscooter, Ms Jill Kellock, told police on 11 October 2007 that she decided to leave the boot scooting class just before 9.30 pm when the last song was played. She did not recall whether Mrs Rayney was in the hall when she left or not.[267] In a statement to police on 16 October 2007, Ms KerryAnne Lunt said that she left after the last dance at about 9.35 pm at the latest.[268]

428 Ms Eva Bosnyak told police in her statement of 7 September 2007 that Mrs Rayney would have danced for at least half of the last dance. She said that she did not see Mrs Rayney leave and that she did not come up and say goodnight as she usually did. She said the last dance finished around 9.35 pm.[269]

429 Ms Colleen Little told police on 9 August 2007 that she did not recall when Mrs Rayney left the class which was 'weird' because she would usually make it known when she left by saying goodbye and waving.[270]

430 The weight of that evidence suggests that Mrs Rayney left the boot scooting class around 9.30 pm to 9.35 pm. Nobody saw her leave, get into her car, or drive away.

431 DS Correia accepted that the Bentley Community Hall car park had previously been used as a place of 'other criminal activity including as a place for the sale of drugs'.[271]

432 There is, and was at 20 September 2007, simply no evidence upon which to base any conclusion as to what Mrs Rayney did immediately after walking out of the Bentley Community Hall, nor as to whether anything may have occurred in her car or in the car park prior to her car being driven away.

433 Central to the defendant's case as to the truth of the suspicion imputation, and as a circumstance of significant relevance to the conduct imputation, is the proposition, inherent in its plea that there was no obvious opportunity for Mrs Rayney to come into contact with her killer between leaving the boot scooting class and arriving home, that she did in fact arrive home after boot scooting. In answer to that proposition, the plaintiff pleads a number of facts in support of his plea in [47A.18] of the Reply that Mrs Rayney did not return to the Rayney residence after her boot scooting class on 7 August 2007.

434 A number of those matters are not in dispute. They are:

police conducted a door knock of every residence on Monash Avenue, Como, and residences in nearby streets, and no one saw or heard Mrs Rayney's car arrive at the Rayney residence at 9.30 pm or at any time after that on 7 August 2007;[272]

the driveway to the Rayney residence did not have a gate and was clearly visible to neighbours across the road, pedestrians who walked past and occupants of cars which drove past;[273]

no one saw Mrs Rayney's car in the driveway or near the Rayney residence at any time after 9.30 pm on 7 August 2007;[274]

no one saw or heard Mrs Rayney's car depart the Rayney residence at any time after 9.30 pm on 7 August 2007;[275]

Mr Rayney and Sarah Rayney were at home when Mrs Rayney went to boot scooting until about 7.30 am on 8 August 2007;[276]

Sarah Rayney's bedroom was upstairs and overlooked the driveway;[277]

Caitlyn Rayney was at home between 10.30 pm and 10.45 pm until after 7.30 am on 8 August 2007;[278]

No one (including residents of Monash Avenue in Como) saw Mr Rayney in his driveway or outside his home on the evening of 7 August 2007 or in the early hours of 8 August 2007.[279]

435 A number of the other matters pleaded by the plaintiff were the subject of evidence by Caitlyn Rayney and Sarah Rayney, as well as Mr Rayney's evidence. Evidence given by Caitlyn Rayney and Sarah Rayney was not significantly challenged in crossexamination. In closing submissions, the defendant submitted that, in respect of certain matters, the evidence of those two witnesses should not be accepted, or at least treated with caution, because of inconsistencies with what was said to police in their statements taken shortly after their mother's disappearance. I will deal with those matters in the context of the particular issues raised in the pleadings. Generally, I found each of Caitlyn Rayney and Sarah Rayney to be credible witnesses. While they were crossexamined about what was included in their statements to police as distinct from what was in their witness statements in these proceedings, their explanation as to why there was additional matters addressed in their witness statement was not challenged.

436 Paragraph 47B.15 of the Reply pleads that the driveway and verge of the Rayney residence was brightly lit by a street light at the front of the Rayney residence. That was supported by the evidence of Mr Rayney,[280] and Caitlyn Rayney.[281] I find that there was a street light on the verge area outside the Rayney residence which lit up the driveway and part of the front garden at the time.

437 The plaintiff further pleads that the driveway and front yard of the Rayney residence would be brightly lit by two sets of security lights which were motion activated by any movement on the driveway or front yard.[282] That was also the subject of evidence by Mr Rayney which was unchallenged and which I accept.[283] It was also the subject of evidence by Caitlyn Rayney which was unchallenged.[284]

438 The house next door to the Rayney residence, at 4 Monash Avenue, had a large kitchen window upstairs which overlooked the driveway of the Rayney residence. Mr Rayney said that from his house he could see the male occupant at that address at night time often standing near the window, from which he assumed that that person could see their house.[285] That assumption was confirmed by the statement taken from the next door neighbour, Ms Jarvis, who confirmed that she could see the side of the Rayney house, and the front yard and driveway.[286] The residents of 4 Monash Avenue did not see or hear anything unusual at the Rayney residence after 9.30 pm on 7 August 2007.[287]

439 The plaintiff pleads that he was expecting his daughter Caitlyn's return to the Rayney residence, with Ms Russell and her daughter Kate, and another friend at about 9.30 pm on 7 August 2007[288] and that Ms Russell had told him that the concert would finish by about 9.30 pm.[289] In her witness statement, Caitlyn Rayney said that she had told her parents that the concert would finish at 9.30 pm and that she heard Ms Russell tell her father the same time when Ms Russell was at the Rayney residence before she left for the concert.[290]

440 The extent of her crossexamination on that evidence was as follows:

> [Y]ou say in your statement that you arrived home between 10.45 and 11 pmYes.
>
> But you had expected to be home earlier than that, hadn't youYes. I was told that the concert would finish much earlier and that we would be home much earlier.
>
> And you say in your statement, again in this proceeding, that you told your mother and your dad that the concert would finish at about 9.30Yes.[291]

441 Mr Rayney said that Ms Russell brought Caitlyn home between 10.30 pm and 10.45 pm, which was about an hour later than what Ms Russell had told him and when he had expected Caitlyn to come home.[292] Ms Russell said that before she left to take the girls to the Gwen Stefani concert, Mr Rayney asked her what time the concert would be finishing and she recalled saying that it would finish at 9.30 pm to 10.00 pm.[293]

442 The defendant contends that the evidence of those witnesses to the effect that Mr Rayney was led to believe that the concert would finish around 9.30 pm should be rejected. It notes that Ms Russell provided statements to police on 8 August 2007[294] and again on 24 August 2007.[295] The first statement was a handwritten statement made on 8 August 2007 at 9.25 pm, the evening after Mrs Rayney went missing. The statement makes no reference to any discussion between Ms Russell and Mr Rayney as to when the concert would conclude, but simply records that sometime between 10.40 pm and 11.00 pm, she dropped Caitlyn back at the Rayney residence. In her fuller statement on 24 August 2007, Ms Russell said that she dropped the children at the concert and went home, and that she was not sure what time the concert was going to end, although 'I sort of knew what time it would end due to attending the Christina Aguilera concert'. She said she rang the Holiday Inn, which adjoined the concert venue, at approximately 8.00 pm or 8.30 pm and was told that the concert would end between 10.15 pm and 10.30 pm 'because it started late' and had been meant to finish between 10.00 pm and 10.15 pm. She made no mention in that statement of having told Mr Rayney that the concert would end at around 9.30 pm to 10.00 pm.

443 Ms Russell was crossexamined about those passages in her 24 August 2007 statement. Ms Russell confirmed that she based her estimate on when the previous concert she had attended had completed. When put to her that the previous concert finished 'between 10 and 10.30, roughly?', she replied 'I think it was, yes'.[296] There then followed a lengthy exchange in relation to the issue, during which Ms Russell appeared to become quite confused by the questions. Ultimately, she accepted the proposition that, if she had told Mr Rayney anything about the finishing time of the conference, she would have told him 10.00 pm to 10.30 pm rather than 9.30 pm to 10.00 pm.[297]

444 The evidence suggests that Mr Rayney was concerned about his daughter attending a concert on a school night, and I consider it highly likely that he would have enquired, either of Caitlyn or of Ms Russell, or both, as to when the concert was likely to conclude. Each of Mr Rayney, Caitlyn and Ms Russell gave evidence that the time of 9.30 pm was mentioned. I do not accept that all three have mistaken their recollection of that event. The significance of this issue in terms of the suspicion against Mr Rayney would appear to be the proposition that Mr Rayney's statement that he expected the concert to finish at 9.30 pm, and for his daughter to be home relatively shortly afterwards, was designed to suggest that he would have been unlikely to embark upon the process of hiding his wife's body for fear that Caitlyn would return home and either find him in the course of that action or not at home because he was concealing the body or the car, or both. For my part, assuming as I do that Mr Rayney made enquiry and was told a time that the concert would finish, it makes little difference to the objective basis of suspicion whether he was told 9.30 pm, 9.30 pm to 10.00 pm, or 10.00 pm to 10.30 pm. That is because, as I have concluded above, the evidence available to the police as at 20 September 2007 makes it most likely that Mrs Rayney left boot scooting at or shortly after 9.30 pm. It is not in dispute that the journey from the Bentley Community Hall to the Rayney residence is a drive of approximately 10 minutes. Allowing for time to get to her car and drive home, that would have her arriving at home at around 9.45 pm or shortly thereafter. The police theory appears to be that she then went inside the house and at some point began to undress. Whether or not that occurred before or after she had spoken to Mr Rayney about the matters that they intended to discuss that night does not appear to have formed any part of the suspicion formed by police. Nor is it clear whether the police suspicion was of a premeditated murder or an unpremeditated murder. If it was the latter, then presumably it would have had to have been sparked by some disagreement or argument over matters to do with separation. That would have consumed some time. In any event, if Mrs Rayney was murdered at home, then presumably that would take some time after she had entered the house. It would then be necessary to hide her body and conceal her car, which presumably would require that it be driven somewhere far enough away not to be seen and then for Mr Rayney to return on foot to the house. Even if Mr Rayney expected the concert to have finished at 10.00 pm, as it might have done but for the late start, the opportunity to complete all of those actions would have been extremely limited.

445 The plaintiff pleads that he gave permission for Caitlyn Rayney to attend the concert but would not allow her to sleep over at Mr and Ms Russell's home, with the result being that Caitlyn Rayney was expected to return home during the evening of 7 August 2007 so that his refusal to allow her to sleep over would be inconsistent with him intending to harm Mrs Rayney that evening.[298] Caitlyn Rayney said that she was asked the day before the concert on 7 August 2007 by her friend Kate Russell if she wanted to go to the Gwen Stefani concert because a friend who was originally going had pulled out. She said she first asked her mother whether she could go, and Mrs Rayney agreed 'after a little bit of convincing from me', but only if Mr Rayney agreed. Caitlyn's original plan was that she would stay overnight at the Russell's house after the concert and be picked up the next morning and taken to school. She said that her mother agreed to her staying overnight at Kate Russell's house if her father agreed. She phoned Mr Rayney to get permission. It was in that context that she said she told her father that the concert would finish at 9.30 pm. She said Mr Rayney took some persuading but ultimately agreed to her attending the concert, but would not allow her to stay overnight at the Russell's house because it was a school night.[299]

446 Mr Rayney said that on 6 August 2007, Caitlyn phoned him as he was walking to his car after work and asked him about attending a concert. He said he was not in favour but Caitlyn told him that Mrs Rayney had agreed and as he did not want to be the 'mean parent', even though it was a school night, he told her that he agreed that she could go.[300]

447 Caitlyn Rayney was not crossexamined about her evidence of those conversations. Notwithstanding that, the defendant contends that the evidence does not establish that the plaintiff did not allow Caitlyn to sleep over at the Russell's home.[301] The defendant points to an email sent by Mrs Rayney to Caitlyn at 2.30 pm on 7 August 2007. The relevant portion of that email reads:

> Been talking to Shana. After dancing you are all coming back to our place for a quick dinner and to get dressed.
>
> It is more convenient for them if you don't sleep over. Shana has to get her hair done etc early for a special lunch that they are going to - which is the reason they are not now staying at Burswood. So don't put pressure on them. Kate might want you to sleep over, but it is not so convenient for Shana midweek - nor me.

448 Caitlyn Rayney was not questioned about the contents of that email insofar as it might be inconsistent with her evidence. It is not beyond human experience that a 13yearold child might continue to press to have a sleepover with friends notwithstanding one or both parents' initial refusal. Mrs Rayney's email of the afternoon of 7 August 2007 might easily be understood in that context. I do not consider that email to be a basis upon which I should reject the unchallenged evidence of Caitlyn Rayney, nor the consistent account of that evidence given by Mr Rayney.

449 The plaintiff pleads that when Caitlyn Rayney returned home, sometime between 10.30 pm and 10.45 pm, the plaintiff, who was dressed in his pyjamas, invited Ms Russell, Kate Russell, and Kate Russell's friend into his home when such conduct would be inconsistent with the plaintiff having been involved in Mrs Rayney's murder.[302] Mr Rayney gave evidence that he invited Ms Russell into the house but she declined.[303] Caitlyn Rayney gave evidence that, on returning from the concert, all four people got out of the car and went to the front door which Mr Rayney answered. She said he was wearing 'his green pyjamas'. She said that when her father opened the door, Kate Russell, her friend and Caitlyn walked inside, and Ms Russell stayed at

the door. She said Mr Rayney invited Ms Russell in and asked if they would like a drink or something, to which Ms Russell said no because it was getting late.[304] That evidence was not the subject of any crossexamination.

450 Ms Russell gave evidence that, on arriving at the Rayney residence, she walked to the front door with the three girls and someone rang the doorbell. She said that Mr Rayney was 'wearing a navy jumper with a round neck' and appeared to be 'wearing something dark'. She said that Mr Rayney invited all of them into the house but she declined because she had to drop the girls back home and it was a school night.[305] Ms Russell was crossexamined about that evidence on the basis that she had not included reference to having been invited into the house in her statements to police in August 2007. She said that she could not remember whether she had told the police of that invitation and it had not been included in the statements, or whether she had not told them at the time.[306] She said that the fact that the statements contained an account of her returning to the Rayney residence after the concert did not mean that there was no further conversation. She said 'For example, I'm sure I was asked, "How was the concert?" But ... that statement doesn't go in there either'. She confirmed that she had given consistent evidence at the murder trial that she had been invited in by Mr Rayney.[307] Notwithstanding that crossexamination, Ms Russell said that she still stood by that statement.[308]

451 The defendant submits that I should not be satisfied that the plaintiff invited Ms Russell inside. The basis of that submission is the fact that Ms Russell made no reference to the invitation in her prior statements to the police. I do not accept that the mere fact that something was not mentioned in earlier statements prepared by police is a reason to reject Ms Russell's evidence given at trial, apparently consistent with evidence previously given. Nor do I see any reason to reject Caitlyn Rayney's unchallenged evidence on the point. Nor do I consider that the evidence of an invitation inside is inconsistent with other evidence given by Ms Russell, namely that when he met them at the door, Mr Rayney was being quiet and said 'Ssh Sarah's asleep'.[309] Asking three 13yearold girls not to behave loudly is not inconsistent with inviting them into the home.

452 The plaintiff further pleads that when Ms Russell brought Caitlyn home after the concert, his demeanour was the same as his demeanour had been before 7.30 pm when he appeared normal, relaxed, not agitated in any way and there was nothing unusual in the way he spoke to them. Ms Russell gave evidence to that effect.[310] The defendant submitted that Ms Russell's evidence should not be accepted, essentially because in her statement to police of 24 August 2007, she gave no information about the plaintiff's demeanour when she spoke to him, but simply recorded that they spoke and what they spoke about.[311] For the reasons discussed in relation to Ms Russell's evidence as to an invitation to come into the house, I do not accept the defendant's submissions. I see no reason not to accept Ms Russell's evidence.

453 The plaintiff pleads a number of facts to the effect that Sarah Rayney would have heard Mrs Rayney come home had she done so immediately after the boot scooting class concluded. He pleads that Sarah went to bed and her light was turned off at about 9.45 pm, but she was awake until 10.00 pm, and if Mrs Rayney had returned home it would have been when she was awake and expecting her return.[312]

454 Sarah Rayney gave evidence that, on the night of 7 August 2007, she did some homework, showered, and dressed for bed before her father came upstairs and read to her before turning off the lights and going downstairs. She said that that would have occurred at about 9.45 pm. She said she fell asleep by about 10.00 pm. Up until that time, she did not hear her mother's car arrive home which she would have done if she was awake because her bedroom was above the garage and cars driving into the driveway at night would cause their headlights to shine into her bedroom.[313] She was

crossexamined on that evidence by reference to her statement to police on 9 August 2007.[314] In that statement, she said that approximately an hour after her mother left for boot scooting, she went to her bedroom after which her father came and read to her for a while and she also read to herself silently for a while. She said that 'around half an hour to an hour later dad turned my light off and left the room'. When it was put to her in crossexamination that that statement suggested that the lights were turned off between 9.00 pm and 9.30 pm, she said that she would 'still say between 9.00 pm and 9.45 pm'. [315] In her police statement, she said that she fell asleep 'a short time later'. In crossexamination, she was referred to her witness statement in which she said that she fell asleep about 10.00 pm and when asked 'You would agree that that's your best estimate as well, isn't it?', she replied 'yes'.[316] She said that she did not recall waking up after 10.00 pm, and did not hear Caitlyn when she came home from the concert that night.

455 Curiously, the defendant submits that I should find that Sarah fell asleep between 9.00 pm and just before 9.40 pm, 'before Mrs Rayney could have arrived home at about 9.40 pm'.[317] The reference to 'just before 9.40 pm', as distinct from Sarah Rayney's evidence in crossexamination that the lights were turned off between 9.00 pm and 9.45 pm and that her best estimate was that she fell asleep by 10.00 pm, can only be justified if it is assumed that Mrs Rayney did in fact arrive home when the defendant contends that she did. To so conclude would be to assume as fact something which is very much in contention, and in respect of which there is no direct evidence. It would be an error to reason in the manner implicit in the defendant's submissions. In any event, given my finding as to when Mrs Rayney left the boot scooting hall, she is unlikely to have arrived at her home before 9.40 pm given that it is a 10minute drive.

456 The position is that it cannot be said with confidence precisely when Sarah Rayney fell asleep. Given that she did not hear Caitlyn Rayney arrive home, her evidence is equivocal as to whether or not Mrs Rayney arrived home sometime after she fell asleep, whenever that may have been. The most that can be said is that it seems unlikely that any noisy altercation took place in the house that night.

457 The plaintiff also pleads that Caitlyn Rayney went to her bedroom at 11.30 pm but did not go to sleep until the early hours of the morning on 8 August 2007 because she was reading and listening for Mrs Rayney's return. He pleads that before she went to her bedroom, he told Caitlyn that he and Mrs Rayney had some things to talk about when Mrs Rayney arrived home, that she did not see or hear anything unusual that evening and did not hear or see Mrs Rayney's car or any other car after she returned home, and nor did she hear footsteps from Mrs Rayney's boots that evening.[318] In her evidenceinchief, Caitlyn Rayney said that after getting home from the concert, she set up her laptop on the table downstairs to do her homework, that her father helped her with that for about an hour and it was approaching midnight when she finished. She said that her father told her that he and her mother had some things to talk about when she arrived home. She said that she went upstairs and, as was her usual routine, read in bed and was listening for her mother to arrive home. She said that from her bedroom she could hear cars arrive in the driveway and noises from downstairs, and could see if the security lights came on at the front of the house. She did not see lights come on that night. She said she went to sleep after 1.00 am. She said that when she was later questioned by a police officer about what time she went to sleep, she told him that she was still awake at 1.00 am, but that was not included in her statement.[319] In her witness statement given to police on 8 August 2007, Caitlyn said that she had homework to complete and was helped by her father and that he told her to go to sleep because he had to talk to her mother who was still not home. She said that she had something to eat and went to bed around 11.30 pm. There is no mention of the time that she went to sleep.

458 The notes taken by Constable Hoey, who was the police officer who made notes while another officer, Constable Boyd took the statement from Caitlyn Rayney, contained the following entry:

Finished homework with dad. Read paper.

He said [dad] + mum something to talk about when she came home.

1.30 bed.

459 The witness statement of Constable Hoey was tendered by consent, and he was not crossexamined.[320] He said that, in asking questions of Caitlyn, he and Constable Boyd were trying to obtain the timeline of events from the day before and the morning of 8 August 2007 from Caitlyn's perspective, and in particular to find out from her whether there was anything out of the ordinary about the day before or that morning. Constable Boyd did not give evidence.

460 In crossexamination, Caitlyn Rayney acknowledged that there was no reference to her falling asleep after 1.00 am in the statement prepared by Constable Boyd. She said, however, that not everything she said to the police officers was written down. She did not, however, resile from her evidence as to when she went to sleep, and it was not put to her that that evidence was incorrect.[321] Her evidence that not everything she said was written down in the statement of 8 August 2007 is corroborated by the reference to 'bed 1.30' in Constable Hoey's notes. The fact that Caitlyn did not seek to amend the statement by inserting the time that she went to sleep, notwithstanding that Constable Hoey said that the statement was either read aloud to Caitlyn or that Caitlyn read it herself, does not, contrary to the defendant's submissions, give cause not to accept Caitlyn's evidence at trial. In 2007, she was a 13yearold child, no doubt asked to confirm that what was said in the statement was correct. To expect her to have volunteered additional information which the police had chosen not to include in her statement is simply unrealistic.

461 I see no reason to reject Caitlyn Rayney's evidence on this point.

462 As noted above, the plaintiff seeks to cast doubt on the proposition that Mrs Rayney did arrive home after boot scooting by reference to the observations made to police by Constable McLeod, Mr Robert Ellis and by persons living near the relevant area of Kings Park.

463 I have discussed the evidence of Constable McLeod earlier in these reasons.[322] The defendant contends that Constable McLeod's statement should be rejected for a number of reasons.[323] The first is that 'he is unable to give a clear timeframe of his sighting'. In his statement, Constable McLeod said that he saw a person whom he believed to be Mrs Rayney either at 9.25 pm or between approximately 10.40 and 11.30 pm, he and his partner, Constable Halstead, having resumed patrol at 10.30 pm.[324] As the defendant correctly observes, if Constable McLeod's sighting was at 9.25 pm in Victoria Park, it could not have been Mrs Rayney because by that time she had not left boot scooting. As to the possibility that the sighting was between 10.40 and 11.30 pm, the defendant submits that that cannot be correct as his and his partner's running sheet notes that between 9.40 pm and 23:00 hours they were engaged in 'admin' at Kensington, and from 23:00 hours to 23:30 hours, they were doing 'patrol' in Burswood. There is no explanation as to why, in his witness statement, Constable McLeod said that he resumed patrol at 10.30 pm, rather than 11.00 pm as his partner's running

sheet suggested. Either the statement in the running sheet must be inaccurate or his statement is inaccurate. Constable McLeod did not give evidence in this trial so that inconsistency was not explored. The possible sighting between 10.40 pm and 11.30 pm was said by Constable McLeod to be between Rushton Street and Mint Street Victoria Park. In order to travel from the Kensington Police station to Burswood, it would be necessary to travel across Albany Highway, and it would be unsurprising if, Albany Highway being an active street at night, police going on patrol from Kensington Police station to Burswood would not do so by driving at least some way along Albany Highway. The running sheet is not therefore, as the defendant contends, necessarily inconsistent with Constable McLeod's evidence. The rejection of his evidence on the basis of the running sheet is a further example of the approach of the police which was to dismiss any evidence which was inconsistent with their theory that Mrs Rayney returned to the Rayney residence after boot scooting.

464 Three of the defendant's other reasons for rejecting Constable McLeod's statement related to the description of her boots, a matter which I have discussed earlier in these reasons.[325] The final reason that the defendant contended that Constable McLeod's evidence should be rejected is that he described the person whom he saw as 30 to 35 years old, whereas Mrs Rayney was 44 years old. Whilst those discrepancies did exist, they are discrepancies of a type which might reasonably be expected in the context of a casual sighting on the street late at night. The defendant ignores the marked similarities in the description with Mrs Rayney and the clothes she was wearing on the night in question. I do not, of course, suggest that it can be found that the person whom Constable McLeod saw was in fact Mrs Rayney. On the other hand, it was a possibility that it was. Constable McLeod's evidence was simply another piece of evidence in the jigsaw of the investigation. It was merely an alternative line of enquiry from that focussed on Mr Rayney's possible involvement. I do not accept that it should have been rejected out of hand as it apparently was.

465 The plaintiff also points to the statement taken by police from Mr Robert Ellis on 5 September 2007.[326] Mr Ellis is an RAC emergency roadside mechanic. He told police that was working between 11.04 pm on 7 August 2007 and 6.30 am the next day. He said that whilst driving on Albany Highway, he saw a 'white 2002 or 2003 newer but not brand new model Holden Statesmen sedan fishtailing in the left hand side lane. It accelerated past him and appeared to be following a '2002 or 2003 model newer but not brand new silver Ford Fairmont sedan.' He said they were really close to each other. He said that he noticed two or three figures in the Ford Fairmont sedan and 'a lot of jumping around going on, like pushing of (sic or) shoving. I saw silhouettes going to and fro.' He said that he had not reported the information before 3 September because he had been working nightshift and had not been watching the news, so was unaware of Mrs Rayney's disappearance until he had a conversation with his employer who suggested he should report it.

466 The defendant submits that the evidence of Mr Ellis should not be accepted as a sighting of Mrs Rayney because:

Mr Ellis gave his statement on 5 September 2007, four weeks after it happened;
Mr Ellis does not identify Mrs Rayney or anyone in the cars;
his description is consistent with describing two or three cars racing along Albany Highway in the early hours of the morning; and
there was no sign of a struggle in Mrs Rayney's car.[327]

467 The first basis for rejection of Mr Ellis' evidence does not sit well with the defendant's reliance on statements made by witnesses after 5 September 2007 in relation to various other matters. Mr Ellis explained why there was a delay in his reporting the matter to police, but that delay is no reason to reject his statement as unreliable. The second and third bases for rejecting his evidence, while true, do not remove the possibility that the car which Mr Ellis saw was Mrs Rayney's car. Nor do I consider that the absence of any 'sign of a struggle' in Mrs Rayney's car necessarily renders Mr Ellis' observation unreliable. It may well be that Mr Ellis' evidence was too vague to produce any useful lines of enquiry, although he was able to identify the first two digits of

the number plate of the white Holden Statesman which, one might imagine, would provide a basis for some line of enquiry given that the two vehicles were described as travelling together. Like Constable McLeod's statement, however, Mr Ellis' statement raised a possibility contrary to the premise upon which the police were proceeding. It should not have been simply rejected as irrelevant.

468 The plaintiff also relies on the fact that police were told of screams heard in the Kings Park area on the night of 7 August 2007. Statements to that effect were made by Mr Dario Marchesani,[328] Ms Shane Mary BanisterJones[329] and Ms Glenda Marie Briton.[330] All of those statements were made in 2008, and accordingly the information was not available to the police as at 20 September 2007 and could not therefore have formed a factor undermining their grounds for suspicion.

Manner of disposal of Mrs Rayney's body (Defence [36(xvi)] Reply [47A.19])

469 The defendant contends that Mrs Rayney's body was disposed of in a grave in Kings Park 'in a manner calculated to ensure that it was not discovered, which is not typical of a random killing'.

470 The plaintiff admits that Mrs Rayney was buried in Kings Park, but otherwise denies particular 36(xvi). On the face of it, that denial is a denial that Mrs Rayney was buried in a manner calculated to ensure that her body was not discovered, and that manner of burial was not typical of a random killing. In closing submissions, however, the plaintiff positively asserted that Mrs Rayney's body was buried in a grave in bushland with an attempt made to conceal the grave by placing leaf litter and branches over the top of it.[331] That fact is clearly established on the evidence.[332] The only issue on the pleadings is whether it is correct to conclude from that fact that that manner of burial was not typical of a random killing.

471 Three police officers gave evidence that they considered the manner of burial not typical of a random killing. They were DS Moore,[333]DSS Lee[334] and DSC Albuquerque.[335] DSS Lee acknowledged in crossexamination a number of examples of notorious 'stranger killings' where the offenders concealed the bodies of their victims.[336] I note in this context that DSS Lee said that his suspicion of Mr Rayney never involved a suggestion that Mrs Rayney's killing was premeditated.[337] Rather, he posited the possible theory that 'an argument ... developed beyond where it should have gone and someone ended up dead'.[338] Why, if it is to be assumed that Mr Rayney was involved in an unplanned murder of his wife, he would be expected to take more care to dispose of the body than a random attacker (whether a random attack was planned or unplanned), is not readily apparent to me. If Mrs Rayney's death occurred as a result of an argument that became out of control, given the tight frame that would have been available to Mr Rayney to deal with this sudden situation, it would be surprising that he would then act in accordance with a carefully thought out plan for disposal of the body.

472 I find that Mrs Rayney's body was buried in a manner calculated to prevent its discovery, I do not accept that that fact indicates anything probative about the identity of the offender or circumstances in which her death occurred.

Timing of Mrs Rayney's burial and location of Mrs Rayney's car (Defence [36(xvia), (xxib), (xxic), (xxid)] Reply [47A.20], [47A.21], [47A.22], [47A.23])

473 The defendant pleads that Mrs Rayney's body was buried in, or no later than, the early hours of the morning on 8 August 2007. That pleading is not admitted by the plaintiff.

474 The defendant also pleads that a resident of 179 Thomas Street, Subiaco heard a car travelling with difficulty on Thomas Street just prior to 2.30 am on the morning of 8 August 2007 and that the car was found on Kershaw Street, Subiaco about 400 m from 179 Thomas Street, Subiaco. The distance between the location of Mrs Rayney's car on Kershaw Street, Subiaco and the Rayney residence was approximately 7.8 km.

475 The plaintiff pleads that at about 5.30 am on 8 August 2007, Mrs Rayney's car travelled in a northerly direction on Thomas Street and was observed emitting a loud pitched whining noise, black smoke, and was being driven by a man not answering Mr Rayney's description. He admits that the car was found in Kershaw Street and that it was approximately 7.8 km from the Rayney residence. He pleads that the time taken by DS Moore, who is younger and fitter than the plaintiff, to walk from Kershaw Street to the Rayney residence was 90 minutes. That it took DS Moore that time to walk that journey of 7.8 km is not in issue.[339]

476 The defendant's submissions as to the timing of Mrs Rayney's burial rest on two planks. The first is that the evidence of Mrs Kaylene Durrant should be accepted as establishing that Mrs Rayney's car was driven past Mrs Durrant's home on Thomas Street just prior to 2.30 am on 8 August 2007. The second is that the reenactment undertaken by police to test the assumption that Mr Rayney had killed and buried Mrs Rayney demonstrates that the transfer of the body from the Rayney residence to Kings Park, the burial of Mrs Rayney and concealment of the grave, the damage to the vehicle caused when it struck a bollard, the drive from Kings Park to Kershaw Street where the car was eventually found, and then a walk from Kershaw Street back to the Rayney residence could all have occurred in time for Mr Rayney to do all those things and to wake his daughters at 7.00 am on 8 August 2007. That second plank is obviously incapable of supporting a finding as to the time of Mrs Rayney's burial. All that can be said of all of that evidence is simply, or at best, it might demonstrate that if Mrs Rayney was buried in the early hours of 8 August 2007, the possibility of Mr Rayney's involvement would not, simply by reason of that fact, be excluded.

477 Mrs Durrant gave evidence at this trial. She lives on Thomas Street Subiaco, a short distance from the intersection of Thomas Street and Heytesbury Road. She went to bed at about 10.15 pm on 7 August 2007. Her house is 10 m to 15 m from the verge with a brick wall with spaces between bricked pillars dividing the house property from Thomas Street. Mrs Durrant said that while lying in bed she can hear traffic that travels along Thomas Street past her house. She said that she wakes intermittently during the night. On the night in question, she heard a vehicle travel along Thomas Street from the south sounding as though it was struggling to get into gear and making a strange noise, by which she meant a deep whining sound, which 'went on for a while'. She said that the vehicle took 'twice as long to pass as cars normally do'. She said that after it passed she looked at her alarm clock which said 2.25 am or 2.26 am, she being unable to distinguish between the last digits on her clock table without her glasses. She said that the following morning she noticed a 'dark splatter' on the road surface of Heytesbury Road which she later ascertained was a 'dark liquid'.[340] Mrs Durrant was crossexamined about whether, in light of her inability to distinguish between the numbers five and six on her clock, which was located some distance from the head of the bed, she may also have been mistaken as to whether the hour display was '02' or '05'.[341] She maintained that she heard the car at the time she had said, and that that was consistent with her propensity to be awake at about that time each night. I accept Mrs Durrant's evidence.

478 The police also obtained a statement on 17 August 2007 from Mr Paul McCreanor. Mr McCreanor also lives on Thomas Street. He said that shortly after he woke at 5.00 am on 8 August 2007, he was standing at his desk looking out of windows onto Thomas Street. He said he heard a loud high pitched whining noise from a car approaching his house. That made him look out of his window in a southerly direction towards the oncoming noisy car which was travelling in a northerly direction. He said that the car appeared to be driving erratically and in excess of 70 km per hour when it passed. He described the car as a 'silver colour late model sedan, not small but with a rounded back'. He said that he had a brief look at the driver who appeared to be a male of

slim build, with dark straight collar length hair. As it passed before the Heytesbury Road intersection with Thomas Street, Mr McCreanor said that there appeared to be black smoke coming from the rear of the car and he noted the passenger side window was 'down just a bit, maybe 4 inches or so'. When he went outside at 6.00 am, he said that he noticed a 'strong burnt mechanical smell, of hot engine or hot burnt fluid or oil', which he assumed to have been from the silver sedan which he had earlier seen. He said that on Thursday 9 August 2007, he rode his bicycle up Kershaw Street when he noticed an abandoned silver sedan parked against the kerb with the passenger side window 'down a little bit'. The plaintiff submits that Mr McCreanor's statement supports the conclusion that Mrs Rayney's car was driven on Thomas Street at 5.30 am on 8 August 2007.

479 The defendant contends that Mrs Durrant's evidence should be preferred to that of Mr McCreanor. Mr McCreanor's statement is criticised as being inconsistent with evidence of vehicle inspectors, Mr Freimann and SC Wells, whose reports were amongst the trial bundle. In particular, it is said that Mr McCreanor's statement that he saw the car 'drive erratically swerving within the centre lane ... in excess of 70 kmph' was inconsistent with that evidence. It is submitted that the car could not have been travelling at 70 km per hour only moments before it became undriveable due to the transmission oil faults. That proposition is said to be supported by a portion of SC Wells' report.[342] That page sets out what appear to be downloaded computerised transmission codes obtained by Mr Freimann from Mrs Rayney's vehicle. I am unable to discern from those data what it is that leads to the conclusion that the vehicle could not have been travelling at 70 km per hour shortly before the transmission fluid level dropped to a point where the vehicle became undriveable. It is further said, by reference to a number of photographs, that the oil trail on the road does not take an erratic path before veering to the left lane. Reference is made to a number of photographs. The only photograph referred to which appears to have been taken on Thomas Street appears to show an oil trail close to the lane dividing line, but slightly converging on that line.[343] The other photographs referred to do not appear to be in Thomas Street. I do not accept that the photographic evidence gives cause to reject Mr McCreanor's suggestion of erratic driving on Thomas Street.

480 Neither Mrs Durrant's evidence, based as it was on her hearing a vehicle making an unusual sound, but not seeing the vehicle, nor Mr McCreanor's evidence that he saw a vehicle matching the description of Mrs Rayney's vehicle making an unusual sound, enables a conclusion to be reached as to what time Mrs Rayney's vehicle was driven on Thomas Street. Either may have heard, or in Mr McCreanor's case, seen, a different vehicle. Either, or neither, may have observed Mrs Rayney's vehicle being driven past. The evidence simply does not enable any reliable determination of the time that the car was driven along Thomas Street, and accordingly does not support a positive finding that Mrs Rayney was buried in the early hours of 8 August 2007 notwithstanding that that may have been the case.

Access to a digging implement (Defence [36(xvii)] Reply [47A.24])

481 The defendant pleads that Mrs Rayney's killer had ready access to an implement such as a spade to dig the trench in which her body was buried. That is not admitted by the plaintiff.

482 There is no issue that a digging implement was used to dig Mrs Rayney's grave in Kings Park.[344] What appears to be in issue is the question of 'ready access', although in closing submissions the plaintiff says that the nonadmission centres on the question that there was a shovel not a spade. Nothing turns on that distinction.

483 How this is said to be a circumstance giving rise to suspicion of Mr Rayney is not clear. Presumably, the inference suggested is that if the assault on Mrs Rayney occurred at Monash Avenue, Mr Rayney would have had easy access to a digging implement because he lived there. The only evidence concerning digging implements at the Rayney residence was that, unbeknown to Mr Rayney,[345] a neighbour, Mr Halls had borrowed two shovels from

the Rayney residence in November or December 2006, and was still in possession of them when the police searched the Rayney residence on 22 August 2007.[346] During that search, Mr Halls rang Mr Rayney and told him that he had the shovels. Mr Rayney immediately told the police about Mr Halls' call, and the police then went across the road to speak to Mr Halls.

484 No other digging implements were located at the Rayney residence in the search on 22 August 2007 or otherwise. No digging implement thought to have been used to dig Mrs Rayney's grave was ever located anywhere, although it is clear that some type of shovel or spade must have been used. There is no evidence that Mr Rayney ever had any shovel or spade other than the ones borrowed by Mr Halls. There is, thus, no evidence that Mr Rayney had ready access to a spade. Oddly, when DS Correia was questioned about this aspect of his evidence, he speculated that Mr Rayney could have gone to his mother's house in Rivervale and picked up a shovel that night, but then said that no enquiries were made at Rivervale because they had no reasonable suspicion of anything to suggest that they should look there. There is no basis for that suspicion and it certainly could not contribute to any suspicion of Mr Rayney.

485 I find that a digging implement was used to bury Mrs Rayney's body and that either the killer or some accomplice therefore necessarily had access to such an implement at the time her body was buried. Whether that was 'ready access' in the sense of access immediately after the offence was committed cannot be established. There is no evidence that Mr Rayney had ready access to a digging implement.

Absence of reports of suspicious behaviour in the area of the Rayney residence on the night of 7 - 8 August 2007 (Defence [36(xviii)] Reply [47A.25])
486 The defendant pleads as a material circumstance the fact that there were no reports of suspicious behaviour in the area of the Rayney residence on the night of 7 8 August 2007. That is admitted by the plaintiff.

487 It is the case that there were no reports of anything untoward or unusual happening in Monash Avenue that night. Given the police belief that the assault on Mrs Rayney occurred at Monash Avenue, that she had been dragged at some stage near bricks and lawn at the front of the house, that her car must have arrived home and then been driven away to somewhere that it could not be seen, that Mr Rayney must have then returned home on foot to meet his daughter before then leaving again (with or without a spade or shovel) on foot, and possibly then returning to place Mrs Rayney's body in the car if that had not been done before the car was concealed, the absence of any report of unusual things occurring in the street that night is at best equivocal.

The plaintiff's statement to police on 8 August 2007 (Defence [36(xix)] Reply [47A.26])
488 The defendant pleads and the plaintiff admits, that the plaintiff made a statement to police on 8 August 2007 saying, amongst other things, that he was separated from Corryn Rayney, he was at the Rayney residence throughout the night of 7 8 August 2007, that he had arranged to meet with Mrs Rayney at their premises at 9.30 pm on 7 August 2007 after her boot scooting class, and that both he and she were optimistic of reaching a workable and fair solution which their lawyers would later confirm in writing. Those facts are therefore established. The significance of those facts relates to the defendant's allegation in [36(xxxix)] of the Defence that is dealt with later in these reasons.

Investigations as to the most likely place that Mrs Rayney met with foul play (Defence [36(xx)] Reply [47A.27])
489 The defendant at [36(xx)] of the Defence pleads that investigations identified the Rayney residence as the most likely place where Mrs Rayney met foul play on the night of 7 August 2007 or the early hours of the morning on 8 August 2007. It contends that the evidence supports a finding to that effect. That was, of course, emphasised by DSS Lee as a significant factor in his elevation of the plaintiff to the status of the prime and only suspect in the murder investigation. The plaintiff denies that subparagraph and pleads that there were a number of places in which Mrs Rayney may have met with foul play

other than the Rayney residence and relies on the matters pleaded in relation to the plaintiff's denial of [36(xv)] of the Defence in support of that contention.

490 The defendant contends that that conclusion is supported by evidence in relation to the coat found on Mrs Rayney's bed on 8 August 2007, the fact that her wallet was found in her car but her handbag was in her ensuite, her passport was missing and the finding of a place card with Mr Rayney's name on it in the vicinity of the gravesite. The defendant also relies in support of this conclusion on evidence from Mrs Rayney's car, evidence from Mrs Rayney's body and evidence from her boots.

491 I have discussed the evidence concerning the coat found on Mrs Rayney's bed earlier in these reasons in the context of considering the credibility of police witnesses. Various theories were floated by witnesses as to the significance of that fact including that it was planted there by Mr Rayney to support his initial statement that he assumed she had come home and left early for work, or that Mrs Rayney had in fact come home. I pause to observe that whoever killed Mrs Rayney knew that her car was in Kershaw Street and must have known that it was only a matter of time until it was located. It would then be plain that she had met with foul play, even though her body may not have been found. If Mr Rayney were the offender, it is difficult to see why he would be encouraging police to believe that she had come home after boot scooting. Likewise, if she had worn a coat to boot scooting, it might be expected that, if Mr Rayney was intending to conceal his actions, he would not take her coat with him to the gravesite. Those sorts of questions do not appear to have been considered by the investigating police (nor by the defendant in these proceedings). No findings as to the circumstances by which the coat came to be on Mrs Rayney's bed can confidently be made on the evidence in this trial. That is not to say that it was not a relevant piece of information. It is to say however, that it did not provide a basis for any cogent inferences to be drawn.

492 The defendant also relies on the fact that Mrs Rayney's wallet was found in her car, and that police knew, because Mr Rayney told them on 8 August 2007,[347] that Mrs Rayney never took her purse or handbag to boot scooting. This is said to support the inference that she must have come home after boot scooting. Presumably, the theory must be that after killing his wife, Mr Rayney collected her purse (but not her coat or handbag) and placed it in her car, perhaps to enable him to feign a robbery. If that is correct, it is surprising that Mr Rayney would volunteer to police that Mrs Rayney never took her purse or handbag to boot scooting. An alternative explanation might be that she left her purse in the car after going to buy takeaway chicken for her daughters before going to boot scooting. Like the evidence in relation to the coat, finding the wallet in the car was a relevant piece of information, but did not provide any basis for particular inferences to be drawn.

493 The issue of the passport and the place card are dealt with later in these reasons.

494 In relation to evidence from Mrs Rayney's car, forensic analysis identified a number of blood stains, a contact lens, and some vegetable matter, identified as pink diosma. Of those matters, in terms of the identification of the possible location of the assault on Mrs Rayney, only the pink diosma is of significance.

495 So far as the evidence in relation to blood staining is concerned the defendant submitted that a number of factual findings should be made.[348] In my view none of those facts, if found, point in any way to the location that Mrs Rayney was assaulted. SC McCance undertook a blood stain pattern interpretation on Mrs Rayney's car. Blood was found in the boot liner of the car, the rear passenger side doorframe and the passenger side of the backseat. SC McCance inspected Mrs Rayney's vehicle on 16 August 2007 at the police operational support facility forensic garage, and reviewed photographs taken of various relevant parts of the car.[349] He explained the difference between transfer bloodstains, passive blood stains and projected

or splatter bloodstains.[350] A transfer bloodstain is created when a wet, bloody surface contacts a second surface as a result of compression or lateral movement. Passive bloodstains are primarily created by gravity acting on liquid blood, such as dripping. A projected or splatter bloodstain is a pattern created when blood is repelled or released as a result of force additional to gravity. DNA testing demonstrated earlier that the bloodstains found in Mrs Rayney's car matched Mrs Rayney's DNA.[351]

496 The findings in relation to the analysis of blood found in Mrs Rayney's car are as follows:

> Conclusion 1
>
> The bloodstains and bloodstain patterns observed on the boot liner and the case of the 'C' pillar on the left hand side of the vehicle indicate that both the boot and rear passenger door were in the open or near open position when these bloodstains were deposited. It is not possible to define the exact mechanism(s) or object(s) responsible for the deposition of these bloodstain patterns.
>
> Conclusion 2
>
> The majority of the bloodstains and bloodstain patterns observed on the passenger side of the rear seat are suggestive of transferred patterns. It is not possible to define the exact object(s) responsible for the deposition of these bloodstain patterns. There were no object(s) located within the vehicle that could account for the transfer pattern as described.

497 There is nothing in those findings which contributes to the suspicion of Mr Rayney. The fact that, as at 20 September 2007, and despite the search of the Rayney residence, no bloodstains had been identified at the Rayney residence lends no support to the proposition that Mrs Rayney was assaulted at her home given the fact that at some stage prior to her burial, Mrs Rayney had been bleeding. No doubt the discovery of blood in the car, and the conclusion that Mrs Rayney had been bleeding, contributed to the decision by the police to undertake extensive luminol testing at the Rayney residence on the second search which commenced on 20 September 2007. Those tests failed to identify any traces of Mrs Rayney's blood at the Rayney residence.

498 The second item of forensic evidence found in the car was one of Mrs Rayney's contact lenses. The second lens was never found. The location of the contact lens in the vehicle says nothing about the location of Mrs Rayney's murder. There is no evidence as to how the contact lens may have come to have been dislodged, or whether that may have been a result of some struggle inside the vehicle. No contact lens was located by the police on either of their searches of the Rayney residence, and accordingly, there is nothing which links the contact lens to the Rayney residence.

499 During the course of the forensic examination of the car, three plant samples were located and seized. The interim exhibit log for Operation Dargan describes the contact lens (item GH180) to have been located 'on top of rear seat behind front pass seat - beside + on top of blood stain'. A 'vegetation sample' (item GH181) is described as being found in the same location, as does a soil sample (item GH182).[352] A photograph of the relevant area of the seat was contained in the trial bundle.[353] Two other items of vegetation were found, they were (item GH251)[354] found in the left hand side rear passenger seat base in the middle seam. A photograph of that small piece of vegetation was also produced.[355] The third item of vegetation was found at the left hand side 'rear pass seat base - near blood staining'.[356] A photograph of that was also produced. On 23 August 2007, a sample of vegetation taken from a pink diosma hedge growing adjacent to the driveway of the Rayney residence was taken by police in the course of their search. A photograph of that hedge shows it to be located a short distance from the driveway and at some point slightly overhanging the driveway.[357] The hedge appears to be of a very low profile.

500 I do not take it to be in issue that the samples of vegetation taken from the rear seat of Mrs Rayney's car were analysed to be pink diosma of the same variety as was growing at the Rayney residence. It is less clear, however, when the police received the results of forensic testing of the vegetable matter, and in particular whether it was before 20 September 2007.

501 On 14 September 2007, officers involved in Operation Dargan conducted what they referred to as a 'phase two meeting'. That involved going through a lengthy forensic matrix to consider all of the evidentiary items which had been seized in the course of the investigation, to discuss their significance and to determine what further investigations might be undertaken in relation to each item of evidence. SC Freegard, a forensic investigation officer attached to the forensic crime scene unit, attended the phase two meeting on 14 September 2007. She said that that was one of a number of phase two meetings which she had attended. She explained that the forensic exhibits matrix was maintained as an electronic document, but hard copies would be made for the purpose of a phase two meeting and handed to all attendees. She would then hand write notes on the forensic exhibits matrix during a meeting as each exhibit was discussed. Subsequent to the meeting, the information handwritten onto the hard copy of the forensic exhibits matrix would then be inputted into the electronic version in order to keep it up to date.[358] She produced a copy of a forensic matrix which she had annotated at the meeting which commenced on 14 September 2007, and was completed at some later time. In relation to the vegetation sample 'GH181', SC Freegard recorded by hand 'leaf diozma [sic], same as under deceased (Hedge) + one at Rayney house along driveway' and in a separate column wrote 'no diozmas'. When crossexamined about those entries at the trial of this matter, SC Freegard was unable to say what either of those entries meant.[359]

502 The copy of the forensic exhibits matrix produced by SC Freegard, which was 95 pages long, showed the use of a different pen from page 45 onwards. SC Freegard explained that as being that the meeting went over more than one day, and that she would have changed pens for the later meeting.[360] On that basis, I am satisfied that it is likely that SC Freegard made the entry set out above on the forensic matrix in relation to the sample GH 181 at the first day of the phase two meeting on 14 September 2007. Whilst SC Freegard was unable to elaborate on what she meant by the entry, the entry does demonstrate that, as of that date, the police at least suspected that the plant samples which they found in the rear seat of Mrs Rayney's car had come from the pink diosma plant planted in the front yard of the Rayney residence.

503 The suspicion that the presence of the vegetation supports the police theory that Mrs Rayney met foul play at the Rayney residence appears to be based on the proposition that the small piece of vegetation was located on top of an area of blood stain on the rear seat of the car. I have closely

examined the photographs of each of the pieces of vegetable matter which were identified in the car. What is immediately apparent is that the seamlines in the rear seats contain a considerable amount of sand and what appear to be other fragments of vegetation.[361] The location of the sand in the lines of the seams suggests that the dirt in the car had accumulated over some time. I do not understand the defendant to be contending that all of that dirt was deposited when Mrs Rayney was placed in the car. Several witnesses acknowledged that Mrs Rayney's car was in a quite untidy state, and sand on the floor mats and other debris can be seen from photographs of the foot well of the back seat.[362]

504 In those circumstances, the presence of small diosma particles in the rear of Mrs Rayney's car is quite equivocal. A proposition posited by Mr Rayney's counsel was that the presence of the diosma, along with all of the accompanying sand, might well be explicable by the Rayney daughters having placed school bags on the ground in the garden area containing diosma before placing them in the car to be driven to school. Plant matter from the diosma may have been attached to the bags. It seems to me that there could be any number of explanations for the presence of the fragments of diosma in the car which are quite unrelated to the assault on Mrs Rayney. The fact that a fragment of diosma was located apparently on top of an area of blood staining does not, in my view, take the matter much further. If the diosma fragment was somehow attached to Mrs Rayney when she was placed into the car (which appears to be the police theory), and became dislodged when she was placed bleeding on the rear seat, then it might be expected that the diosma fragment would be bloodied. I do not understand the evidence to say that that was the case. It is perfectly explicable, given that Mrs Rayney's body was obviously dragged from the rear seat, that the vegetation fragment may have been moved in that process. I do not consider that the presence of the diosma in the rear of the vehicle is of particular significance.

505 There is no doubt that the presence of Liquidambar seed pods said to have been found in Mrs Rayney's hair, which were consistent with the Liquid Amber tree in the front garden of the Rayney residence, was a highly significant factor in the belief of the police that the Rayney residence was the most likely location of Mrs Rayney's murder.

506 The plaintiff does not accept the evidence that two seed pods from a Liquidambar tree were found in Mrs Rayney's hair during the course of the postmortem examination on Mrs Rayney's body on 17 August 2007. Although the circumstances in which they were found and in which they were recorded as exhibits raised questions as to the regularity of the process, I am satisfied, on balance, that they were found in Mrs Rayney's hair in the course of the postmortem examination on 17 August 2007. I reject the suggestion implicit in the crossexamination of Constable Rogers, although not specifically asserted in the plaintiff's closing submissions, that the Liquidambar pods had been planted in Mrs Rayney's hair by Constable Rogers for the purpose of implicating Mr Rayney.

507 The postmortem on Mrs Rayney was carried out by Dr Gerard Cadden. In his report to the coroner of 20 May 2008, Dr Cadden reported that Mrs Rayney's hair contained 'three podlike, prickle surfaced objects in keeping with vegetation material'.[363] The record of attendance at the postmortem records that those present were Sergeant Siobhan O'Loughlin, SC Paul Gelmi, SC Stuart Byass, SC Peter Broekmuellen and DSC Carl Casilli. There is no record of Constable Rogers being in attendance.[364] Sergeant O'Loughlin was the supervising forensic officer. SC Byass was given the role of taking photographs and SC Gelmi was given the role of exhibits officer. SC Broekmuellen was charged with obtaining the fingerprints of the deceased.

508 At about 8.25 am, SC Gelmi, Byass and Sergeant O'Loughlin commenced a variable light source examination of Mrs Rayney's body.[365] Later that morning, the postmortem examination by Dr Cadden commenced. Sergeant O'Loughlin said that during the examination, Dr Cadden examined the back of Mrs Rayney's head using his fingers and she observed him pull two seed pods from her hair. He then laid the seed pods on the green sheet next to

Sergeant O'Loughlin who then directed that a photograph should be taken of the seed pods.[366] Photographs were then taken.[367] It is notable that, in neither of those photographs, was the usual procedure of placing an identifying label next to the exhibit followed. It is apparent however that the photographs of the seed pods were taken at a time consistent with the recording of the seed pods in the exhibit log kept during the course of the postmortem examination.[368] Sergeant O'Loughlin explained that, in 2007, police officers were trained where possible to mark an exhibit where it is located in situ and record the exhibit number of that exhibit on the marker and then photograph it so it is oriented in its position. She said, however, that on occasions the exhibit may have already been collected from the location in which it is found, and in those cases police are trained not to put the item back into its location because that would be to alter its position. In those cases, the exhibit is simply recorded from the position it was in after it has been removed.[369] I am satisfied that Dr Cadden, on examining Mrs Rayney's hair more closely, observed the seed pods tangled in her hair, and removed them before they were photographed by police on the green postmortem sheet on which Mrs Rayney's body was laid.

509 I am satisfied that Liquidambar seed pods were found in Mrs Rayney's hair during the course of the postmortem. It is not in dispute that there was a Liquidambar tree in the front garden of the Rayney residence.

510 The third piece of forensic evidence said to link the Rayney residence to Mrs Rayney's murder was the location of red brick dust located on Mrs Rayney's boots, that red dust being said to be consistent with the red bricks which paved the front driveway of the Rayney residence. On 20 September 2007, SC McCance received a briefing in relation to the examination of clothing removed from Mrs Rayney to be conducted by personnel from Pathwest Laboratories and Chemistry Centre of WA. He collected the left boot,[370] and the right boot,[371] being Mrs Rayney's boots which had been found in the foot well of the rear seats in Mrs Rayney's car. Later that day, examination of the left boot commenced at approximately 4.30 pm. SC McCance recalled observing a scuff mark on the outside of the left boot where the outsole met the upper leather/vinyl material. He thought it was possibly red brick dust. He considered that significant because he was aware that there was no brick dust in Kings Park, and that there was a brick driveway at the Rayney residence.[372] After discussing the matter with SC Matt Ward by phone, the examination of the left boot was ceased to enable the chemistry centre to continue the examination in their laboratory. There was no suggestion that any of that information was available to DSS Lee, or other Operation Dargan officers other than SC Ward as at 20 September 2007.

511 It would appear that, as at the time that DSS Lee gave his press conference on 20 September 2007, the possibility of brick dust on the heel of Mrs Rayney's left boot was not a matter known to officers of Operation Dargan generally and could not have formed part of the basis for suspicion at that time.

512 The presence of the Liquidambar seed pods was clearly a factor which gave support to the possibility that Mrs Rayney met foul play at the Rayney residence. It is by no means conclusive. A number of witnesses agreed that Liquidambar trees are commonplace in the Perth metropolitan area, and in particular in the older suburbs. There was a Liquidambar tree in the vicinity of the carpark of the Bentley Community Centre.

The occupants of the Rayney residence (Defence [36(xxa)] Reply [47A.28])

513 The defendant pleads, and the plaintiff admits, that the only occupants of the Rayney residence on the night of 7 August 2007 were the plaintiff, Mrs Rayney and their daughters. That fact is established.

Mrs Rayney's missing passport (Defence [36(xxb)] Reply [47A.29])

514 The defendant relies on the allegation that Mrs Rayney's passport was missing from the kitchen drawer in which the Rayney family's passports were routinely kept, and all other passports were still in the kitchen drawer. In answer, the plaintiff pleads that, given the nature of their relationship, Mr and Mrs Rayney stored important documents away from each other, that Mrs Rayney had taken Mr Rayney's own post office box key and bank security box key, and that she was in the process of planning a trip to Mauritius. The latter two facts are not in issue.[373]

515 The matter in issue is whether Mr and Mrs Rayney stored important documents away from each other. That fact is not established on the evidence. Mr Rayney agreed that all four of the family's passports were kept in one place.[374] Caitlyn Rayney said that the passports were probably kept in the kitchen.[375] That Mrs Rayney's passport was missing appears to have been discovered as a result of DS Robinson's enquiry made at about 5.30 pm on 8 August 2007 when he attended the Rayney residence in connection with the missing person investigation in relation to Mrs Rayney. He said that, at some point during a conversation with Mr Rayney, he asked if Mrs Rayney's passport was in the house. He said that one of the children, he thought Caitlyn, went and looked in a cupboard in the kitchen and told him it was not there.[376]

516 On the basis of that evidence, I am satisfied that the Rayney passports were generally kept together in the kitchen in a drawer or cupboard, that Caitlyn Rayney checked the cupboard or drawer for Mrs Rayney's passport at the request of DS Robinson, and that it could not be located and has not been located since. I note that there is no evidence, and it is not part of the defendant's case, that Mr Rayney volunteered to police that the passport was missing or in any way suggested to police that the fact that it was missing might indicate that Mrs Rayney had left of her own accord and might have travelled overseas.

Place card with plaintiff's name on it (Defence [36(xxi)] Reply [47A.30])
517 The defendant pleads that a card with the plaintiff's name on it which had been in his possession was found in close proximity to Mrs Rayney's grave on 11 August 2007.

518 The plaintiff does not admit that fact.

519 It is not contested that a card bearing the plaintiff's name on one side of it, and the words 'The Queen' on the other side, was found in Kings Park by Professor John Roberts on 11 August 2007. On that day, Prof Roberts was with his wife and daughter in an area of bush situated south east of Lovekin Drive. They came across a place card bearing Mr Rayney's name. According to DS McKenzie the card was located approximately 70 m from Wattle track and about 100 m from where Mrs Rayney had been located.[377] DS Correia agreed that it was around 150 m from the gravesite.[378] Those distances would appear to accord with where Prof Roberts marked the location on a plan.[379]

520 In crossexamination of Mr Rayney, the following exchange took place:

> But following from what you have accepted, you were at a table, on 28 July 2007, with a place card with your name on it - Lloyd Rayney - at a function with other barristers. That's correct, isn't itYes.

> And what I want to put to you is that do you also accept that that was the card, the place name with some writing on the other side of the - I think they're called 'tents,' aren't they, when you fold them like that - no, you don't know - within 30 metres or so of the entry to the track up which your wife's car was driven immediately before she was buried in the graveYes, I read that in the brief.
>
> Do you accept thatAccept it, yes.
>
> And did you accept that the card which was found 30 metres from the entrance to the track was the card which had come from the barristers gatheringYes, I accept that must be the card.[380]

521 I take those responses by Mr Rayney to be his agreement that the place card found had come from the function at the Bluewater Grill that Mr Rayney had attended on 28 July 2007. Although references to 30 m were made in the rolled up questions to Mr Rayney, he obviously had no personal knowledge of where the card was found.

522 Police subsequently became aware after 20 September 2007 that Mr Rayney had attended a dinner organised by Francis Burt Chambers at a venue known as the Bluewater Grill and that the card had originated from that dinner. That is discussed below.

523 How the place card came to be in Kings Park is unknown. The defendant contends that the presence of the place card adds to the suspicion about the plaintiff having been at Mrs Rayney's grave on 7 or 8 August 2007. Mr Rayney submits that one alternative hypothesis is that the card came from the vehicle or from Mrs Rayney's purse, the contents of which had been strewn on the floor of the car in front of the back seat.

524 I find that a place card with Mr Rayney's name on it was found in the vicinity of Mrs Rayney's grave in Kings Park probably somewhere between 100 m and 150 m from the gravesite.

The plaintiff's experience as a lawyer (Defence [36(xxii)] Reply [47A.31])

525 The defendant relies on the fact that the plaintiff was a senior lawyer and had lengthy experience as a State prosecutor, including experience in how Western Australian police interviewed witnesses (including child witnesses) and otherwise conducted investigations.

526 Mr Rayney admits that he was a senior lawyer and had lengthy experience as a State prosecutor, but otherwise denies the paragraph. The point at issue appears, therefore, to be whether Mr Rayney had experience in how Western Australian police interviewed witnesses, including child witnesses, and otherwise conducted investigations.

527 There was some issue in the evidence as to whether or not Mr Rayney had been involved in the preparation of a training package for officers involved in the interview of children who were the victims of, or witnesses to, criminal offences. The assertion that he was involved was made by DI Prins, a former Detective Senior Sergeant in the MCS.[381] That evidence was objected to by the plaintiff on the basis of relevance, but I would allow the evidence on the

basis that it goes to the matter pleaded in [35(xxii)] of the Defence. Mr Rayney said that he did not believe he assisted police in that task although he did remember allocating prosecutors to give talks to police as part of their training when he held a senior position at the ODPP.[382]

528 That issue is of no moment. I accept Mr Rayney's evidence that he represented the State in over 350 jury trials and over 100 appeals.[383] The process of preparation for and presentation of those trials would inevitably familiarise a prosecutor with police investigative methodology and the interview of witnesses, including child witnesses. That circumstance is made out.

Expectation that an innocent person would extend the fullest possible cooperation to a police investigation (Defence [36(xxiii)] [Reply [47A.32])

529 The defendant pleads that it was to be expected that an innocent person whose spouse was missing or found murdered would extend the fullest possible cooperation to a police investigation. The plaintiff does not admit that assertion.

530 I find, as a matter of common human experience, an innocent person whose spouse was missing and subsequently found murdered would be expected to extend full cooperation to a police investigation. Whilst that is not admitted on the pleadings, Mr Rayney's response was rather that he did extend full cooperation to police until he became suspicious of the police focusing their investigation on him, and his difficulties with DS McKenzie intensified, so that he gradually withdrew cooperation.[384]

531 The principal manner in which the defendant asserts that Mr Rayney failed to extend full cooperation is the subject of a number of the particulars of conduct dealt with later in these reasons. It is convenient at this point to deal with Mr Rayney's explanation for his mistrust of police which he says affected his level of cooperation with them.

532 Mr Rayney said that initially police attended his home daily, that they were made welcome, and that they often spoke to him and to his daughters, sometimes in his presence, and sometimes not.[385] Mr Rayney said that before the police executed the first search warrant on 22 August 2007, he was told in advance by a journalist that the search was to occur. He phoned DS Robinson who he understood to be the police media liaison officer. DS Robinson told him that the reporter was wrong and that there was no search to be conducted. He then spoke to DC Tan and DS McKenzie. The latter expressed disappointment that that information had been leaked. DS McKenzie eventually told him that the police would search his home that day but omitted details about the extent of the search that was about to occur. Mr Rayney said that as a result of what DS McKenzie told him, he did not expect that there would be 18 police officers undertaking a formal search of the house as subsequently occurred. He was concerned that his children were filmed by television channels as they left the house with him to drive to school, and that that evening on the ABC TV news he saw footage of his children, including them in their school uniforms, with their faces visible. Notwithstanding those concerns, Mr Rayney said that he cooperated with the police during the search, and told them that they could do whatever they liked in the house and that they had not needed a search warrant to have access to the house.[386]

533 Mr Rayney said that he did not wish to be recorded on video, but was told by DS Hart or DS Carter that he had to. DS Robinson confirmed that Mr Rayney rang him on the morning of 22 August 2007 and asked if police would be executing a search warrant that day, and that he lied to Mr Rayney in order to preserve the integrity of the search.[387]

534 As I have previously noted, it is clear that at least a number of the senior investigators within Operation Dargan formed a belief as to Mr Rayney's involvement in his wife's death very early after her disappearance. As early as 9 August 2007, DS Robinson recorded in the critical decisions log kept in

relation to Operation Dargan that consideration was given to the execution of a search warrant at the Rayney residence, but it was decided that there were insufficient grounds for a search warrant and that, although the disappearance appeared suspicious, 'it is too early to concentrate on Lloyd Rayney as POI'.[388]

535 Mr Rayney did become less cooperative with police as the investigation went on, as will be discussed below. I have no doubt that that occurred in a context of growing mistrust of the police on Mr Rayney's behalf. Two factors are likely to have influenced Mr Rayney's conduct towards police. The first is that, as discussed above, he was at the time acting as counsel in the CCC hearing in relation to the Mallard case.[389] In broad terms, that case involved the police focusing attention on Mr Mallard to the point of prosecution and conviction despite his innocence. The second influence is likely to have been a situation in which Mr Rayney found himself. That involved what appears to be a significant degree of isolation. His wife's family clearly held a view that he was involved in Mrs Rayney's death from a very early stage, notwithstanding there was absolutely no direct evidence to support that view. The police held a similar view as earlier discussed. I am satisfied that Mr Rayney focused his attention on what he perceived to be the welfare of his daughters, given that he was solely responsible for them. That was consistent with the highly protective attitude which he had displayed in respect of the children before his wife was murdered, and with what I assess, from the manner in which he gave his evidence, was a reserved and overly careful personality.

536 Notwithstanding those possible explanations for at least some of his behaviour, I accept that the police were reasonable to expect that he would extend cooperation to them, and to view any lack of cooperation as potentially contributing to some degree of suspicion.

Media conference of 12 August 2007 (Defence [36(xxiv)] Reply [47A.33])

537 The defendant pleads that the plaintiff appeared at the media conference on 12 August 2007 during which he appealed for the public's help in finding Mrs Rayney, and repeated his call for public help during subsequent contacts with the media.

538 Mr Rayney admits that pleading and says that he was requested by DS Robinson, in his role as police media liaison officer, to attend a media conference and speak. He pleads that prior to the media conference, he prepared, at the request of DS Robinson, a statement to be read and showed it to DS Robinson who approved of it. He read the prepared statement whilst Ms Sharon Coutinho was present and sat next to him. He pleads he was excluded from a subsequent conference at which Ms Coutinho appealed to the public for information to help the police.

539 The matters pleaded by the plaintiff do not appear to be in dispute. The defendant's position is that the manner in which the plaintiff portrayed himself to the public, through the media, as cooperating with and assisting the police investigation was inconsistent with his actual conduct. That inconsistency is said by the defendant to give rise to a reasonable suspicion that he unlawfully killed Mrs Rayney.[390]

540 Mr Rayney did make a public appeal for help locating his wife at the media conference on 12 August 2007. His exclusion from the subsequent appeal for public assistance which Ms Coutinho made at the police's request after Mrs Rayney's body was found was no doubt a contributing factor in Mr Rayney's concern as to the attitude of the police towards him. I do not consider that the assessment of what is said to be conduct inconsistent with the appeal for help (all of which is dealt with in relation to the allegations of conduct below) is affected by Mr Rayney's public appeal on 12 August 2007. The mistrust that developed on Mr Rayney's part developed after 12 August 2007, and the conduct said to be inconsistent with cooperation all occurred later in August or in September 2007.

Informant allegation (Defence [36(xxiva)] Reply [47A.34])

541 The final contextual circumstance pleaded is that an informant had reported to police on 21 August 2007 that another person had told him that the plaintiff had wanted that person to do a job for him to 'knock off his wife'. That is denied by Mr Rayney.

542 On 8 August 2007, when DS Robinson went to the Rayney residence following the report of Mrs Rayney's disappearance, he asked Mr Rayney if there were any persons who had a grudge against either Mr or Mrs Rayney. He said that Mr Rayney told him that a Mr Frank Roberts (Snr), who was then in prison for wilful murder, may have a grudge against him because he did not like advice that Mr Rayney had given him during a brief period that Mr Rayney was acting for him.[391] Mr Rayney agreed in crossexamination that he had named Mr Roberts, but said it was in response to a question as to who might want to cause him harm.[392]

543 A statement of Mr Frank Roberts prepared by police on 15 February 2008 was tendered pursuant to s 79C(1) and (2) of the *Evidence Act*. Mr Roberts is now deceased. He said that after his conviction for wilful murder, he came in contact with a Mr Joni Montani. Mr Montani told him that Mr Rayney was acting for Mr Montani on the latter's retrial on a charge of murder. Mr Roberts said that Mr Montani said 'I can't believe what the solicitor has asked me to do; I think he wants me to knock somebody off for him. He said it would be like another job for me'.[393] He said that Mr Rayney then commenced acting for Mr Roberts in relation to a possible appeal, and in that context, at Mr Montani's request, he wrote the word 'yes' on his hand and showed it to Mr Rayney during a meeting. Mr Roberts said that he had a later conversation with Mr Montani about Mr Montani 'knocking someone off for Rayney' in which Mr Montani said that he thought it was Mr Rayney's wife. He said that he subsequently had a conversation with Mr Montani in which Mr Montani suggested 'knocking off' the principal witness against Mr Roberts if Mr Roberts were to win a retrial. All of this was said to have occurred at some time in 2006.[394]

544 DSS Lee explained the background to obtaining the statement from Mr Roberts. He received a phone call from a solicitor, Mr Dobson, who told him that he had a client with information about the murder of Mrs Rayney. He arranged a meeting with Mr Dobson which took place at 3.00 pm on Friday, 17 August 2007. At the meeting, Mr Dobson reiterated that his client had supplied him with information, but said that the client would only speak to DSS Lee and would not speak to him in prison. As a result, a further meeting was arranged for Tuesday, 21 August 2007 at the Kwinana Police Station. DSS Lee said that he did not give Mr Roberts' account any credence at all, but he briefed DS Correia on what he had been told at the meeting by Mr Roberts the following day.[395] In crossexamination, DSS Lee said that he regarded Mr Roberts' account of events as worthless.[396] DSS Lee acknowledged that Mr Roberts was seeking to trade information for certain benefits including the quashing of fraud charges against Mr Roberts' wife, arranging for the DPP not to proceed with an appeal in relation to Mr Roberts, for deportation proceedings against Mr Roberts not to be pursued, for an approach to be made to the DPP to not actively oppose an appeal by Mr Roberts against conviction, and for a favourable review to early release.[397]

545 In those circumstances, I would attribute no weight to the evidence of Mr Roberts admitted under s 79C of the *Evidence Act*.

546 The defendant's case as to the significance of the fact that Mr Roberts' name was mentioned by Mr Rayney as a person with a grudge is that it contends that conduct was capable of materially contributing to the suspicion that Mr Rayney killed his wife because it raised the possibility that he knew that Mr Roberts had information that was detrimental to Mr Rayney. That is, Mr Rayney's conduct in nominating Mr Roberts could be seen as a selfserving attempt to discredit anything Mr Roberts may later tell police.[398] It is also suggested that that 'information created or added to the police suspicions

because Mr Rayney may have previously thought about killing Mrs Rayney and may have had an avenue available should he have wanted Mrs Rayney murdered'.[399]

547 The latter submission assumes the truth of Mr Roberts' report. Mr Roberts' statements lack credibility, and in any event are hearsay. There is no basis upon which a finding of fact that Mr Rayney did make such an enquiry of Mr Montani is open. There is thus no basis for any suspicion that Mr Rayney 'previously thought about killing Mrs Rayney'. That Mr Rayney should have had such thoughts would seem even less likely given the evidence that their relationship underwent a marked deterioration in the early part of 2007, before which they had not separated and do not appear to have been seriously contemplating separation.

548 Nor do I find that Mr Rayney's mention of Mr Roberts' name can reasonably be construed as an attempt to discredit Mr Roberts lest he come forward with information about Mr Rayney. There are a number of reasons for that conclusion. First, if that was what was intended, it might be expected that Mr Rayney would have mentioned Mr Montani and not Mr Roberts. Mr Roberts' account is not that Mr Rayney ever said anything to him about killing Mrs Rayney. On Mr Roberts' account, the only basis upon which it could be said that Mr Rayney may have suspected that Mr Roberts knew of what was alleged to have been said to Mr Montani was Mr Roberts' story that he wrote 'yes' on his hand and showed it to Mr Rayney, although Mr Roberts said that he did not know the question to which the answer 'yes' was being given. It is tenuous to conclude that Mr Rayney would have assumed that Mr Montani had passed on to Mr Roberts the alleged conversation and that Mr Roberts might then come forward with that information and for that reason gave Mr Roberts' name to police so as to damage Mr Roberts' credibility. That is particularly so given that the conversation with DS Robinson occurred the day after Mrs Rayney disappeared, but before her body had been found. One obvious consequence of mentioning the name of a person who may wish harm on Mr Rayney or Mrs Rayney would be to increase the likelihood that the police would proceed to interview that person. If Mr Roberts in fact had information detrimental to Mr Rayney, it would seem unlikely that Mr Rayney would direct police attention to that person.

549 In the circumstances, I do not consider that the mention by Mr Rayney of Mr Roberts' name to DS Robinson is of any significance to any suspicion of Mr Rayney's involvement in the death of his wife.

The conduct allegations

550 The conduct which is said, in the light of the above circumstances, to give rise to a reasonable suspicion that the plaintiff had murdered his wife is particularised in 29 paragraphs. The evidence, and my findings in relation to that evidence of conduct, are as follows.

Attendance by plaintiff at function at Bluewater Grill (Defence [36(xxivaa)] Reply [47A.35])

551 The defendant pleads that on 28 July 2007, the plaintiff, unaccompanied by Mrs Rayney, drove his car to and attended a Francis Burt Chambers function at the Bluewater Grill, where he sat at a place marked by the card identified in particular (xxi) above and used that card in a game of celebrity heads at that function. The circumstances in which the card was subsequently found is discussed above at [517] to [524].

552 As earlier noted, subsequent to 20 September 2007, investigating police ascertained that Mr Rayney had attended the function at the Bluewater Grill. Mr Rayney confirmed that he had done so. Police ascertained from another barrister, Ms Elizabeth Needham that Mr Rayney sat on a table at which a game of 'celebrity heads' was played. It was common ground that celebrity heads is a game where a name of a famous person is written on a card which is then placed on the forehead of a participant and the other participants then attempt to guess the name of the celebrity. That was how the words 'the

Queen' came to be written on the back of Mr Rayney's place card. There was no evidence, and the position appears unclear, as to whether Mr Rayney or some other participant utilised that place card for the purposes of the game, or what became of the card at the conclusion of the evening.

553 Also subsequent to 20 September 2007, police obtained statements from Mr Paul Bevilacqua, another barrister who was present at the Bluewater Grill dinner on 28 July 2007. Mr Bevilacqua's witness statement in these proceedings was tendered by consent and I accept his evidence.[400] Mr Bevilacqua said that he accepted a lift from Mr Rayney after the dinner and that Mr Rayney was driving his car, a Toyota Camry, and not Mrs Rayney's Ford Falcon which she was driving on the night she disappeared, and which was subsequently found in Kershaw Street Subiaco.

554 This particular is established.

The plaintiff's reaction to Mrs Rayney's statement to their daughter's classroom teacher (Defence [36(xxivb)] Reply [47A.36])

555 The defendant asserts that the plaintiff purported to be taken by surprise at Mrs Rayney's statement to Sarah Rayney's classroom teacher that she and the plaintiff had separated in circumstances where the plaintiff had engaged or made enquiries of family law practitioners from as early as February 2007, the plaintiff had met with William Carr, a family lawyer, on 16 April 2007, the plaintiff had ceased sharing a bedroom with Mrs Rayney on or about 25 June 2007 and the plaintiff knew that Mrs Rayney was demanding that he leave the Rayney residence. The plea that Mr Rayney had made enquiries of solicitors from as early as February 2007 was not pressed by the defendant.[401]

556 Mr Rayney pleads that he was genuinely surprised at Mrs Rayney's statement to Sarah Rayney's classroom teacher that he and Mrs Rayney had separated because Sarah Rayney had not yet been told by her parents that they had separated. Mr Rayney pleads that his surprise was because of his belief that Mrs Rayney's statement would lead to Sarah becoming aware of the separation from someone other than her parents. He admits that he met with Mr Carr on or about 16 April 2007, that he had ceased sharing a bedroom with Mrs Rayney on 25 June 2007 and that she had requested him to leave the premises.

557 Ms Kerry Jenke was Sarah Rayney's classroom teacher in 2007. Ms Jenke's evidence, which I accept, was that she had a standard end of semester meeting with Mr and Mrs Rayney to discuss Sarah's progress on 6 July 2007. After a general discussion as to Sarah's progress, Mrs Rayney asked Ms Jenke to 'keep an eye on Sarah because she and Lloyd were separating'. Mr Rayney turned and looked at Mrs Rayney and said something to the effect 'thanks for letting me know'. She said that he said that with 'some surprise' but maintained composure. Mrs Rayney replied by saying 'well you don't go and see a lawyer for nothing' to which Mr Rayney replied 'it would have been nice to know'. She said that Mrs Rayney stated that information in a very matter of fact way, and neither Mr nor Mrs Rayney became emotional about it in front of her.[402] Mr Rayney subsequently saw Ms Jenke on 24 July 2007 to explain that Sarah would be missing some school by reason of her trip to Melbourne that weekend, and in the course of that conversation, he requested her not to mention the question of separation to Sarah as it had not yet happened.

558 The defendant contends that, given Mr Rayney had moved to a separate bedroom on 25 June 2007, the surprise which he expressed at Mrs Rayney's comment to Ms Jenke could not have been genuine. The defendant submits that:

> Consequently, when view[ed] against the entire factual matrix of the separation the plaintiff's expression of surprise at the parent teacher meeting reasonably contributes to the overall suspicion as it demonstrates that the plaintiff's words and actions cannot be taken at face value.

559 I reject that submission. Even if Mr Rayney had demonstrated a reluctance to publicly acknowledge his private matrimonial arrangements, that is hardly a basis for attributing a suspicion of murder or treating Mr Rayney as generally lacking in credibility. In any event, as at 6 July 2007, while Mrs Rayney was no doubt intent on having Mr Rayney move out of the family home, there was clearly no consensus that that was to occur. As Mrs Rayney told a number of people around 6 or 7 August 2007, it was only then that Mr Rayney appeared to have accepted that he should leave the Rayney residence. It is not in dispute that on 6 July 2007, Mr and Mrs Rayney had not told Sarah of any proposed separation. That Mr Rayney should react to Mrs Rayney asserting to her daughter's classroom teacher that they were separating without having forewarned him of her intention to do so is not surprising.

560 I do not consider that the reaction to Mrs Rayney's statement to the classroom teacher makes any contribution to the basis for suspicion against Mr Rayney. The fact that some police officers, and the defendant in these proceedings, sought to rely on this matter as somehow contributing to suspicion of Mr Rayney's involvement in his wife's murder illustrates how they construed almost anything Mr Rayney did, however innocuous or equivocal, as contributing to suspicion of him.

Arrangements in relation to listening device (Defence [36(xxv), (xxvi), (xxvii), (xxviii), (xxix), (xxx), (xxxa), (xxxi), (xxxii)] Reply [47A.37], [47A.38], [47A.39], [47A.40], [47A.41], [47A.42], [47A.43], [47A.44], [47A.45])

561 These allegations were the subject of extensive evidence, and lengthy crossexamination of Mr Rayney on the subject. The defendant asserts that the plaintiff arranged and paid in cash for the installation of a listening device on the phone line of the house at the Rayney residence on or about 23 July 2007, which enabled him to record all phone conversations made over that landline. It contends that he had the listening device removed for the first time for the purpose of retrieving conversations recorded on the device on or about 26 July 2007. Then, in order to ensure all phone conversations were recorded, he arranged and paid in cash for the equipment to be modified so that when the recording component of the device was removed for the purpose of retrieving conversations recorded on it, another recording component could be immediately put in its place. It pleads that those arrangements were put in place on the weekend of 28 and 29 July 2007, that the plaintiff arranged and paid in cash for the listening devices to be removed and another one installed on 4 August 2007 so that recordings could be retrieved from the recording component that had been removed. It is then said that, on or about 5 August 2007, the plaintiff sought and obtained instructions from Mr Pearson, who had done the work in relation to the listening devices, about how to remove the second listening device, which the plaintiff then did remove between 5 August 2007 and 20 September 2007. It is then said the plaintiff took delivery of discs containing the recordings of Mrs Rayney's phone conversations and received instructions as to how to play the recordings on his computer. He is then said to have listened to the recordings of Mrs Rayney's phone conversations which had been intercepted and knew from listening to the recordings that he was at risk of being discredited by Mrs Rayney in any divorce proceeding. All of those matters are denied by the plaintiff.

562 In support of these particulars, the defendant relied on the evidence of Mr Pearson. Mr Pearson attended trial on subpoena. He was a most reluctant witness, and it was quite apparent that his evidence was greatly affected by the obvious stress which he experienced in giving evidence. That stress was most vividly demonstrated when, at one point during his evidence, Mr Pearson rose from the witness box and wandered through the court to speak to one of the team of lawyers for the defendant, apparently telling them he was unable or unwilling to continue giving evidence. Mr Pearson's evidenceinchief commenced at 12.15 pm on 3 April 2017, and after a luncheon adjournment between 1.00 pm and 2.00 pm, continued until 3.30 pm at which point an application to have Mr Pearson declared hostile was made by senior counsel for the defendant. That application occupied the rest of the day, and on the morning of 4 April 2017, I rejected the application. At that point, counsel for the defendant applied to tender a statement of Mr Pearson dated 29 August 2007 pursuant to s 79C of the *Evidence Act* as truth of its contents. That application was opposed. After lengthy argument, I allowed the application by the

defendant on the basis that the requirements of s 79C(1) and (2) of the *Evidence Act* were met, and concluded that the plaintiff's objections for its admission were matters ultimately going to the weight which should be given to the evidence.[403]

563 Mr Pearson said that in 2007, in addition to his regular work, he conducted a business under the name 'Quick Stream'. He said that, in August 2007, he went to the Rayney residence at Mr Rayney's request.[404] He agreed that he had purchased a recording device, known as a CRU2, from an organisation which he called 'National Communications'. An email from Mr Pearson to Mr Williams of National Communications dated 17 July 2007 confirmed the order.[405] Mr Pearson said that he transferred funds to pay for the CRU2 unit on 18 July 2007.[406] Mr Pearson said that Mr Rayney funded that purchase.[407] The cost of the unit was $219. Mr Pearson described how he installed the CRU2 listening device in the ceiling space of the wardrobe room at the Rayney residence which already housed the security system for the house. Adjacent to the security system was a phone outlet. His memory of the precise manner in which he did that was poor. In addition to the CRU2 unit, Mr Pearson installed a device called a 'Notetaker' which he had purchased from Dick Smith Electronics.[408]

564 Mr Pearson said that he retrieved the digital recorder from the space in the roof 'just a couple of times ... just once or twice'.[409] He then downloaded what was recorded on the Notetaker onto a disc. He said that the Notetaker contained phone call recordings.[410] He said that that occurred in 'the July/August kind of time 2007'.[411] He gave the disc to Mr Rayney, he thought at the Rayney residence. He could not recall how many discs he made, but he thought it was just one.[412] He did think that it was possible he made two discs both copying the same recording, possibly because the first one 'didn't burn properly'. Contrary to his earlier evidence that he had delivered the disc to Mr Rayney at the Rayney residence, Mr Pearson said that Mr Rayney came to his property on two occasions, the second being to obtain the disc from Mr Pearson.[413] He said that he did not ever remove the CRU2 unit from the ceiling.[414] He said that after he gave Mr Rayney the discs, 'that was the end of it' and he thought Mr Rayney took the Notetaker from him.[415]

565 Much of what was said by Mr Pearson in his statement to police on 29 August 2007,[416] which was admitted pursuant to s 79C of the *Evidence Act*, was broadly consistent with his oral evidence. There were, however, differences as to the precise sequence of events, and significantly, from the perspective at least of Mr Rayney's credibility on this issue, as to the timing of events which took place. There are clear inaccuracies in the timing of events set out by Mr Pearson in his police statement. In the police statement, Mr Pearson said that he was initially contacted by a friend on 20 July 2007 about whether he would be able to assist in the installation of a phone tap. He said that he immediately phoned Mr Rayney that day, but Mr Rayney told him he would call him back. He said that Mr Rayney called him back a couple of days later and came around that evening to Mr Pearson's house. He said that Mr Rayney gave him $700 to buy a scanner and voice recorder. Mr Pearson said that he thought that that occurred on a weekday. 22 July 2007 was in fact a Saturday, so Mr Pearson was either inaccurate about it being a weekday, or about Mr Rayney calling him back a couple of days after 20 July 2007.

566 Mr Pearson said that the following day he purchased a scanner and digital note taker. However, a receipt obtained from Dick Smith Electronics shows that that purchase was made on 17 July 2007.[417] Mr Pearson said that he then took that equipment home and tested it, but found that it was not suitable for the intended purpose. In his police statement, Mr Pearson said that, having spent the night and the next day putting together and testing the scanner and voice activated recorder, and having found it unsuitable, he tried to think of other ways to record phone conversations. He said that he

checked the website of a company called National Communications and found a device called a call recorder unit. He said the following evening Mr Rayney came back to his house and after they tested the equipment that Mr Pearson had bought, Mr Rayney agreed that it would be necessary to hardwire the system and agreed to Mr Pearson purchasing the equipment from National Communications. He said that Mr Rayney gave him another $500 to cover the cost of that equipment and Mr Pearson ordered the call recorder the next morning by faxing an order form to National Communications.

567 That sequence of events is clearly inaccurate. An email exchange between Mr Pearson and National Communications concerning the purchase of a call recorder by Mr Pearson was obtained by police in the course of Operation Dargan. That email exchange shows that Mr Pearson first made enquiries about the equipment on 17 July 2007, and the fax containing the order for the equipment was sent on 18 July 2007. Those documents show that both the purchase of the scanner and digital note taker and the emails directed to the purchase of the call recorder from National Communications occurred on the same day, namely 17 July 2007. Mr Pearson's statement which separates those two events by days, and asserts that Mr Rayney attended his premises between those two events, cannot be correct. If Mr Pearson's account of the sequence of events between the initial phone call enquiring as to his capacity to assist and the purchase of the call recorder from National Communications is correct, then he must have been mistaken about the date of the initial phone contact which would have had to have occurred around 13 July 2007.

568 In his police statement, Mr Pearson said that the call recorder was received a couple of days after it was ordered, and that he was quite sure that it was a Friday. On Mr Pearson's adjusted sequence of events (being adjusted as to the date of ordering the CRU2), that would have had to have been Friday, 20 July 2007. He said that he immediately contacted Mr Rayney and left a message that the equipment had arrived. Having heard nothing back from Mr Rayney, he said that he called him on the following Sunday and made arrangements to attend at the Rayney residence the following day at 1.00 pm. It is common ground in these proceedings that Monday, 23 July 2007 was a pupil free day at Penrhos College where Mr Rayney's two daughters were students.[418] Mr Pearson said that he received a call from Mr Rayney at midday on the day that he had arranged to go to Mr Rayney's residence. The call was to confirm that Mr Pearson was still attending. He said he arrived at 1.00 pm and went to the front door where he was met by one of Mr Rayney's daughters whom, he told police, he thought was Sarah Rayney because he had subsequently seen photographs of her in the newspaper. Mr Pearson told police that the daughter told him that she did not know where her father was, but that Mr Rayney arrived on foot at the front door a short time later. He was then shown inside the home where he installed the equipment in the ceiling of the walkin robe in the front bedroom, adjacent to the security system which utilised a phone point just under the ceiling. Although Mr Rayney does not deny that Mr Pearson installed the call recorder, he denies that it occurred on that day or that his daughter was at home at the time.[419] I pause to note that it seems surprising that Mr Rayney would arrange for Mr Pearson to install the call recording system in the house while his daughters were there given the likely prospect that they would mention something to their mother. However, Mr Rayney's electronic diary has an entry at 11.00 am 23 July 2007 that records 'Call Tim'.[420] The records of Mr Rayney's mobile phone show that there were two phone calls between Mr Rayney's phone and Mr Pearson's phone on 23 July 2007 at 10.34 am and 11.42 am respectively. [421] Phone records also show that Mrs Rayney was at work from at least 9.32 am until around 7.00 pm because calls were made from her extension at those times.[422] The first phone call made from Mr Rayney's chambers on that day was 2.30 pm.[423]

569 It is an agreed fact that, on 25 July 2007, Mrs Rayney and her daughters travelled to Melbourne for a holiday.[424] Their flight was at 6.10 pm but they left home at 4.30 pm. They returned to Perth on 30 July 2007.

570 In his police statement, Mr Pearson said that 'a couple of days later' he received a phone call from Mr Rayney to say that there was a problem with the alarm system, and arrangements were made for him to attend the following day to examine the problem. On Mr Pearson's adjusted sequence of events, that call would have occurred on or about 25 July 2007, and his visit the following day to examine the problem would have occurred on 26 July 2007. Those dates are consistent with the records of the security company 'Securus' that monitored the alarm system at the Rayney residence. Those records of 25 and 26 July 2007 reveal that at 8.18 pm on 25 July 2007, Securus rang Mr Rayney and told him that they had lost mains power to the alarm system. [425] In crossexamination in these proceedings, Mr Pearson agreed that on the day he installed the device he received a phone call from Mr Rayney saying that the burglar alarm was going off continuously, and that he received a further phone call from Mr Rayney the next day asking whether he was coming to fix it.[426] That evidence is consistent with Mr Rayney's account of events but inconsistent with Mr Pearson's police statement in which he said there were a couple of days between the installation and phone call concerning the alarm system fault. Later in crossexamination Mr Pearson said that he could not remember if it was the same day, but that it was 'some time after [he] installed the appliance' and that it might have been the next day. [427] For reasons discussed below, I do not accept Mr Pearson's evidence in crossexamination on this point.

571 Shortly after 8.00 pm on 26 July 2007, Mr Rayney rang Securus to tell them he was about to replace the battery in the alarm system.[428] Mr Pearson told police that, on the day that he found the plug to the alarm system had become dislodged, he took the recording device from the ceiling and took it home in order to download the recordings that had been made to that point. He said that the following day he downloaded the phone conversations that had been recorded onto two DVD discs which took 112 minutes to download. In his examinationinchief at trial, Mr Pearson said that downloading calls of that nature would take about five to 10 minutes.[429] But when crossexamined about the estimate contained in his police statement, Mr Pearson said that the figure of 112 minutes was his guess rather than something put to him by the police.[430]

572 Mr Pearson said that the following day (which on his sequence of events would be 28 July 2007) he rang Mr Rayney to tell him the discs were ready and was requested to deliver them to Mr Rayney, which he did that night. He said that he removed the whole of the recording device from the ceiling that night in order to make modifications so that the recorder could be removed from the ceiling and replaced with another one for the purpose of downloading recordings. Mr Pearson's police statements said that he did make modifications to the unit and went around to the Rayney residence at around 3.00 pm the following day (29 July 2007) to reinstall the unit. That evidence was inconsistent with Mr Pearson's evidence in crossexamination that he returned to the Rayney residence for the last time in order to do some work on Mr Rayney's internet problems.[431]

573 Mr Pearson's police statement said that, about a week later on a Friday, Mr Rayney sent a text message to him asking him to call Mr Rayney. He said he did so that night and that Mr Rayney asked him to purchase a new voice recorder and to come the following night to swap recorders. He said that he did that the following night (which would have been, on Mr Pearson's sequence of events, Saturday, 4 August 2007). Mr Pearson told the police that he was sure that it was a Saturday night because he had a party to go to that night and he 'was a bit hesitant to go over'.[432] By that time Mrs Rayney and her daughters had returned from Melbourne and were living in the house. Mr Rayney gave evidence, that was unchallenged and I accept, that he, Mrs Rayney and their daughter Sarah went to the house of some friends on Sunday 5 August 2017 to watch the Eagles play.

574 Mr Pearson said that Mr Rayney paid him a further $400 on the Saturday night. He said that the following day, Mr Rayney rang him at 2.00 pm and said that he wanted to drop by and pick up the latest recordings of phone conversations. Mr Pearson said that he had difficulty downloading the

recordings successfully, but that he eventually arranged for Mr Rayney to come to his home at 8.00 pm that night to collect the new disc. Mr Pearson said that, in the course of downloading those recordings, he briefly listened to a recording to make sure that the process was working successfully. He said that the conversation was the very last file on the computer so it would have been one of the last phone conversations recorded before he had removed the recorder on the Saturday night. He said the conversation consisted of 'the same female with the Indian accent' speaking to another lady. The female with an accent is a reference to a person whom Mr Pearson had earlier said he had heard in a short passage in a conversation he had listened to when downloading conversations on the first occasion. He said:

> The other lady was talking about, something like an affidavit or some type of legal document. The female with the Indian accent cut the other lady of [sic] short, saying we'll discuss it later, as if she didn't want to talk about it in any more detail over the phone. The female with the Indian accent said that she would meet the other lady at 1.30 pm at Ocean Reef.

575 The defendant contends that this conversation was between Mrs Rayney and a homeopath, Ms Jaya Krishnan, whom Mrs Rayney was consulting and who conducted her practice from her home in Ocean Reef. Phone records show that a call of 97 seconds duration was made at 7.23 am on 4 August 2007 from the Rayney landline to Ms Krishnan's Ocean Reef premises.[433]

576 Mr Pearson said that Mr Rayney came around to his home at about 8.20 pm that night. He paid Mr Pearson $100 for copying the discs, took the disc with him, but before doing so asked how to remove the recording device from the ceiling. In his police statement, Mr Pearson said that Mr Rayney told him that 'if anyone asks, just tell them that you fixed my computer'.

577 There are a number of reasons why I do not accept that the phone call containing a reference to 'Ocean Reef' was the conversation recorded in the phone records as having occurred at 7.23 am on 4 August 2007.

578 First, Mr Pearson said 'it was the very last on the computer, so would have been one of the last phone conversations recorded. The phone records show that after the 7.23 am call there were 21 calls recorded by 19.32 that night.[434] One of those was an incomplete dial, and three were calls to Sharon Coutinho, that were of zero seconds duration and thus apparently were unanswered. One was an incoming call from Mr Ervin Vukelic that appears not to have been answered. The balance appear to be calls to Mrs Rayney's friends. Mr Pearson said in his police statement that he went to the Rayney residence on the Saturday night. The phone records suggest that Mrs Rayney was at home that night, at least until around 7.30 pm. Regardless of that inference, the call to Ms Krishnan's phone would not have been anywhere near the last call recorded if Mr Pearson removed the recorder that night.

579 Second, Mr Pearson spoke of one female with an Indian accent. The clear inference is that he was referring to the same person whom he said he heard in the first conversation he listened to when first downloading calls, and that that was Mrs Rayney. Ms Krishnan gave evidence. She had a pronounced Indian accent. On the defendant's theory, she must be the 'other lady' referred to by Mr Pearson. That he did not describe the other lady as having an Indian accent is inconsistent with the other lady being Ms Krishnan.

580 Third, the 'other lady' was said by Mr Pearson to have talked about 'something like an affidavit or some type of legal document'. Ms Krishnan gave evidence that she was with a patient when Mrs Rayney called to reschedule her appointment. She said that Mrs Rayney 'sounded in a hurry'.[435] She was unable to recall much about the conversation. There is no reason to think that, in a conversation rescheduling an appointment, Ms Krishnan would have any reason to be talking about a legal document, especially while she was with another patient.

581 Fourth, there is no reason why Mrs Rayney would say she would meet Ms Krishnan at 'Ocean Reef'. Both Mrs Rayney and Ms Krishnan would have discussed the rescheduling of the appointment in the context that it would take place, as had the many earlier consultations, at Ms Krishnan's premises. There is no apparent reason for either to mention the suburb in which they were to have the rescheduled appointment.

582 I do not accept therefore that the reference to this conversation by Mr Pearson in his police statement establishes that the recording device was installed at the Rayney residence on 4 August 2007.

583 Despite the pleaded denials of the conduct relating to the listening device, Mr Rayney admitted in his evidenceinchief that he did make recordings, both by way of the call recorder installed on the phone, and, earlier in April 2007, by the use of a dictaphone. He said that his purpose in making those recordings related to what was referred to at trial as the 'insinuation' contained in the email of 13 July 2007. Mr Rayney said that 'without a lot of prethought, I believed that a recording of Corryn acknowledging (either directly or indirectly) that what she'd said was untrue was security for me that the insinuation was untrue. It may also have been useful as an acknowledgement that she had, in fact, made such an insinuation'. He said that he gave instructions to Mr Pearson over a particular weekend in or about July 2007 to make recordings of phone conversations, and that he instructed Mr Pearson that the recordings were to be made lawfully and legally, which Mr Pearson confirmed would be done.[436]

584 In crossexamination, Mr Rayney said that the recording equipment was in place when Mrs Rayney left for Melbourne on 25 July 2007.[437] He said that the problem with the alarm occurred the next day and that Mr Pearson removed the recording device when he came to attend to the problem with the alarm system. That evidence that the problem with the alarm occurred on 25 July 2007 is consistent with Mr Pearson's police statement (save as to Mr Pearson's inaccuracy as to dates) and with the independent records of Securus. Mr Rayney's evidence was, however, that he presumed that Mr Pearson took the equipment with him because there was some connection with the alarm problem, rather than simply to download the conversations as Mr Pearson suggested.[438] Mr Rayney said that when Mr Pearson took away the recording equipment, he was no longer able to record any conversation of his wife which might serve the purpose for which he said he had installed the equipment, and at some point during the period that Mrs Rayney and the children were away, he resolved just to let the attempt to record conversations go.[439]

585 Contrary to his earlier assertion that the equipment was in place when Mrs Rayney left for Melbourne, Mr Rayney subsequently agreed with the proposition that Mr Pearson had come to his house after Mrs Rayney had left to go to the airport on 25 July 2007, and installed the recording device at that time.[440] Mr Rayney denied that Mr Pearson returned the following Sunday to reinstall the unit to enable recordings to start again.[441] He said that Mr Pearson came to his home on another occasion to assist with problems that Mr Rayney was having with his computer, but that visit was not connected to what Mr Rayney had asked him to do with recording phone calls.[442] He said that that visit may have occurred on 3 August 2007.[443] He denied that he collected any second disc from Mr Pearson on 5 August 2007.

586 Mr Rodney McKemmish is a computer forensic specialist. He was appointed as an expert court assistant to assist in the proceedings involving legal professional privilege claims by Mr Rayney in relation to documents seized by police. In that role, he carried out an analysis of two computers seized from the Rayney residence.

587 When he first gave evidence on 27 March 2017, Mr McKemmish said that he had identified certain WAV files designated by the prefix CALL followed by a sequential number, which had been played on one of the computers seized from the Rayney residence. The only call that was able to be recovered

and listened to was CALL01.WAV. That file contained a dial tone, a phone recording message and then the phone was hung up.[444] Mr Kemmish's analysis of the computer showed that that file had last been played at 9.20 am on 28 July 2007. He identified that there were other files with a similar naming convention, being 'CALL', such as CALL02.WAV and CALL27.WAV which had been accessed from the computer. The contents of those calls was not able to be recovered, but Mr McKemmish was able to say that they had been accessed at some time prior to the access to CALL01.WAV.[445] In crossexamination, Mr McKemmish confirmed that there was no record on either computer of a CD being played with a WAV file later than 9.20 am on 28 July 2007. The effect of that evidence was, on the assumption that the WAV files with the prefix CALL were those downloaded by Mr Pearson, there was no evidence of any access on the Rayney home computers to a second CD, onto which calls were downloaded by Mr Pearson, sometime in early August 2007 as his statement suggested.

588 After Mr McKemmish had completed his evidence, and as a result of further enquiries made of him by the defendant's solicitors and counsel, Mr McKemmish undertook some further analysis of the information obtained from the Rayney computers. In the course of that analysis, he discovered that there were inconsistencies in the conventions used to identify dates in his earlier report, and that some dates had been shown in the Australian date format of DD/MM/YYYY, and others had been shown in the United States format of MM/DD/YYYY. Those dates were relevant to a suggestion of misconduct made in the course of crossexamination of certain police officers to the effect that the police had accessed Mr Rayney's computers after they had been seized and before questions of privilege had been resolved. The defendant was given leave to recall Mr McKemmish to clarify that matter, but also to give evidence of certain audio files played from the CD drive of the Rayney computers which Mr McKemmish had identified when further reviewing the matter. The evidence in relation to the date convention removed any suggestion of inappropriate access by police to the computers after they had been seized.

589 The additional audio files identified by Mr McKemmish were identified in a supplementary report.[446] By examining the registry reports on one of the computers seized, and in particular registry reports RP156 and RP157, Mr McKemmish identified nine files which had been accessed from a CD and which were located in a file called 'out'. Those files were:

D:/out/100-48.wav;
D:/out/61-10.wav;
D:/out/40-38.wav;
D:/out/124-59.wav;
D:/out/136-31.wav;
D:/out/120-58.wav;
D:/out/124-32.wav;
D:/out/72-25.wav.

590 Mr McKemmish ascertained that the file D:/out/100-48.wav was played on 5 August 2007 at 16:41 hours UTC (GMT) or 12.41 am on 6 August 2007 in Perth local time. RP155 is a snap shot of the computer system's registry settings prior to the creation of RP156 and RP157 registry reports. Mr McKemmish ascertained that RP155 did not make any reference to the playing of the WAV files in the 'out' folder which was shown on RP156. From that information, Mr McKemmish was able to say that the audio files listed above were played sometime between 10.29 am on 4 August 2007 (when RP155 created its snapshot of the computer) and 12.41 am on 6 August 2007 when RP156 was created.

591 The defendant relied upon these conclusions by Mr McKemmish to support Mr Pearson's suggestion in his statement to police that he had created a second CD of calls about a week after the first disc was downloaded. In his police statement, Mr Pearson had said that, when creating the first disc, 'I would have saved them into folder #########, or, Output, or Out, I am not sure which one but computer records might show it.'[447] Mr Pearson did not make any reference to what folders he would have used to save the recordings on the second disc.

592 Before turning to my findings in relation to the pleadings found at [36(xxv)] to [36(xxxii)], it is necessary to consider the weight which should be attached to Mr Pearson's police statement. In the course of crossexamination of Mr Pearson and Detectives Carter and Hart, who took Mr Pearson's police statement on 29 August 2007, it was suggested that either or both of Detectives Carter and Hart acted improperly by suggesting what Mr Pearson should say and pressuring him to include matters in his statement which were untrue. Reference was made to Mr Pearson's vulnerability, to suggestions that the police officers had at least down played any interest in prosecuting Mr Pearson, and the fact that Mr Pearson was effectively detained at Curtin House from around 1.30 pm until 9.30 pm after which the police executed a search warrant at his home. On that basis, the plaintiff submitted that anything contained in Mr Pearson's police statement was unreliable and should be given no weight.

593 The evidence does not establish any improper conduct by Detectives Carter or Hart in relation to their interview with Mr Pearson. Several times in the course of crossexamination, Mr Pearson made reference to his belief when interviewed that he should assist the police.[448] I accept, however, that the police were focused on their murder investigation, and principally saw Mr Pearson as an important witness whom they wanted to keep cooperative. I also accept that Mr Pearson was tired and undoubtedly stressed by the circumstances in which he found himself and was anxious to have the process over with.[449] The available objective evidence demonstrates that Mr Pearson's recollection of the timing of events as set out in his police statement is inaccurate. What was said in his police statement was inconsistent with oral evidence which he gave, particularly in relation to the question of the number of discs which he created and the number of times he attended the Rayney residence. He was undoubtedly under stress in giving evidence in this trial, although as I found in declining the defendant's application to have him declared hostile, it could not be said that he was not endeavouring to give truthful evidence. In those circumstances, I have placed little weight on the detail of Mr Pearson's evidence, both in his statement to police and at trial, and in particular, do not consider that it could be relied upon to demonstrate the untruthfulness of the evidence given by Mr Rayney.

594 I turn now to consideration of the pleaded particulars concerning this issue. As to [36(xxv)], I am satisfied that Mr Rayney arranged and paid cash to Mr Pearson for the installation of a device which would enable the recording of phone conversations made over the landline at the Rayney residence. I consider it likely that this occurred sometime shortly before 23 July 2007. It is likely that it was installed on 23 July. There are several reasons for that conclusion. First, it is likely that it was installed sometime prior to Mrs Rayney and her daughter's departing for Melbourne because of the number of WAV files which the evidence suggests were downloaded by Mr Pearson. If Mr Rayney's contention that the recording device was installed after Mrs Rayney left for the airport on 25 July 2007 were correct, it is likely that there would have been very few calls recorded before Mr Pearson removed the device the next day. Secondly, Mr Rayney's diary entry to 'Call Tim' and the phone records for that day are consistent with Mr Pearson's account that Mr Rayney called him on the day he attended to install the device. Thirdly, it is consistent with Mr Pearson's statement to police that he received a call about the power problem a couple of days after the installation. On balance, and notwithstanding the surprising suggestion that Mr Rayney would have arranged for Mr Pearson to come to his home when his daughters were there to observe what was happening, the installation of the recording device was more likely to have occurred on 23 July 2007 than 25 July 2007.

595 I accept that that leaves unexplained why the interruption to the alarm system power supply was not detected until 25 July 2007. Any explanation is a matter of conjecture. The evidence does not disclose how long it was from the time that the mains power service was interrupted, to the time when the fact of the interruption was communicated to Mr Rayney at 8.18 pm on 25 July 2007. I note in passing that a photograph of the manhole in the robe where the security system is located shows suitcases stored in close proximity to the power point on top of the robe shelving.[450] Mrs Rayney and her daughters had travelled to Melbourne that day, and presumably took suitcases. One of the range of possibilities is that the power plug to the security system was dislodged in the course of removing suitcases from the top shelf. That, of course, is a matter of mere conjecture, but illustrates that a range of possibilities, other than that the plug was dislodged by Mr Pearson when he installed the listening device, do exist.

596 Particular 36(xxvi) is that the plaintiff had the listening device removed for the purpose of retrieving conversations recorded on the device on or about 26 July 2007. I find that the recording device was removed by Mr Pearson on that day and for that purpose. I do not accept Mr Rayney's evidence to the effect that he assumed that the device was being taken away in order to resolve the problem with the power to the alarm system. Given that the solution to that problem was as simple as reinserting the power plug, it is inconceivable that Mr Pearson would not have told Mr Rayney that the problem had been resolved in that manner and there could have been no need to remove equipment for purposes associated with that problem.

597 Particular 36(xxvii) pleads that in order to ensure that all phone conversations on the landline were recorded, Mr Rayney arranged and paid in cash for the equipment to be modified so that when the recording component of the device was removed for the purpose of retrieving conversations, another recording component could immediately be put in its place. This pleading was based on Mr Pearson's police statement. I am not satisfied that plea is made out. There is no documentary evidence of any second recording device being purchased by Mr Pearson, and his oral evidence did not support this event taking place. It follows that I also do not find particular 36(xxviii) established, that being a plea that the arrangement for the second recording device was put in place on the weekend of 28 and 29 July 2007.

598 For reasons explained earlier, I also am not satisfied that particular 36(xxix) is made out. That particular plea is that Mr Rayney arranged and paid cash for the listening device to be removed and another one installed on or about 4 August 2007. It may well be that Mr Pearson did attend the Rayney residence around 4 August 2007, but on the basis of his oral evidence, which coincides with Mr Rayney's evidence, he did so to carry out certain work associated with problems Mr Rayney was having with the internet.

599 Particular 36(xxx) pleads that on or about 5 August 2007, Mr Rayney sought and obtained instructions from Mr Pearson as to how to remove the second listening device. I am satisfied that at some point Mr Rayney did ask Mr Pearson what needed to be done to remove the device in the ceiling, but precisely when that occurred is not clear on the evidence. Particular 36(xxxa) pleads that between 5 August 2007 and 20 September 2007 the plaintiff removed the second listening device. At some point, Mr Rayney removed the equipment in the ceiling, comprising at least the CRU2 unit, cutting the wire which connected that unit to the phone jack. That certainly happened before 20 September 2007 when the police carried out their second search of the premises, but whether it happened earlier than 5 August 2007 is not possible to say.

600 Particular 36(xxxi) asserts that Mr Rayney took delivery of a disc containing recordings of Mrs Rayney's phone conversations and received instructions as to how to play the recordings on his computer. I find that Mr Pearson did provide a disc of the recordings made prior to 26 July 2007 to Mr Rayney. That occurred prior to 28 July 2007.

601 Particular 36(xxxii) is that Mr Rayney listened to the recordings of Mrs Rayney's phone conversations which had been intercepted and knew from listening to them that he was at risk of being discredited by Mrs Rayney in any divorce proceedings. It is this particular that the defendant says gives significance to the conduct pleaded in particulars 36(xxv) to 36(xxxi). That is, as I understand the defendant's contentions, the relevance of the conduct surrounding the installation of a recording device is that that conduct ultimately led to Mr Rayney hearing conversations of a type which caused significant concern. In the context of conduct said to give rise to reasonable grounds for suspicion of murder, the significance of these particulars is that they support the existence of a motive.

602 The evidence does not establish that Mr Rayney listened to any particular conversation which might have caused him concern or inflamed his anger. The highest the evidence reaches is an inference that Mr Rayney listened to a call in which Mrs Rayney said something about sensing 'his fear' and described him as a 'very wicked man'. If it is accepted that conversations of that nature were recorded, and were listened to by Mr Rayney, it is a further factor which goes to the state of their relationship. It adds little to the picture which emerges from the exchange of emails, particularly those sent by Mrs Rayney, and the correspondence between their respective solicitors.

603 Whatever his motivation for engaging Mr Pearson to record Mrs Rayney's phone conversations, Mr Rayney's conduct was discreditable and inappropriate. The conduct is examined in these proceedings on the basis of the defendant's contention that the conduct supports the truth of the conduct imputation or the suspicion imputation. For that to be true, there must be some logical connection between Mr Rayney's conduct in arranging for the recordings to occur and the suspicion of involvement in murder. That connection is not readily apparent. Beyond the suggestion that resulted in Mr Rayney hearing conversations to which his wife was a party which in turn contributed to motive, the installation of the listening device does not, of itself, suggest some implication of involvement in murder. Certainly, if a suspicion is of a premeditated murder, engaging a third party to participate in some clandestine activity would seem to be unlikely. If the suspicion is as to an unpremeditated murder, the installation of a recording device on the phone line would seem to be entirely equivocal.

Recording of conversations with dictaphone (Defence [36(xxxiii)] Reply [47A.46])

604 The defendant asserts that the plaintiff, using a dictaphone, recorded conversations between himself and Mrs Rayney without her consent. The plaintiff admits that he used a dictaphone to record conversations between himself and Mrs Rayney, but otherwise denies the assertion that that was done without her consent.

605 During the search on 20 September 2007, nine dictaphone recordings, which were identified as ID 1 to ID 9 were seized by police. It is common ground that the recordings were made by Mr Rayney on a handheld dictaphone sometime before 17 April 2007. After the seizure of the disc containing the recordings, Mr Rayney claimed privilege in relation to the disc, but that claim was eventually unsuccessful, and the recordings were released by the court and given to police on 29 October 2010. The content of the disc and the nature of the recordings was not therefore information available to police as at 20 September 2007 so as to be capable of providing a basis for the suspicion imputation, but the evidence is relevant to the truth of the conduct imputation.

606 The defendant accurately summarised the general description of the recordings in the following table:[451]

Title	Parties	Description	Duration (mins:se
ID1	The plaintiff & Mrs Rayney	Recording of argument about whether the plaintiff should	6:06

		attend an unidentified social function.	
ID2	The plaintiff & Mrs Rayney	Recording of argument about whether the plaintiff should attend a birthday party which their daughter is attending.	0:59
ID3	The plaintiff, Mrs Rayney and a child (or children)	Recording of discussion on the plaintiff assisting with children.	0:47
ID4	The plaintiff and a child	Recording of the plaintiff using a microwave to make popcorn for the child.	0:45
ID5	The plaintiff and children	Conversation that took place inside the plaintiff's car in which he first drops off Ms Caitlyn Rayney, and later Ms Sarah Rayney.	4:38
ID6	The plaintiff & Mrs Rayney *Telephone conversation*	Recording of the plaintiff's end of a telephone conversation about a proposed holiday in Bali.	2:03
ID7	The plaintiff & Mrs Rayney *Telephone conversation*	Recording of the plaintiff's end of a telephone conversation about bookings and costing for a proposed holiday.	1:36
ID8	The plaintiff & Mrs Rayney	Recording of an argument, apparently in a kitchen, about food preparation.	1:13
ID9	The plaintiff, Mrs Rayney and children	Recording of argument between the plaintiff and Mrs Rayney about preparing lunch for the children.	3:24

607 Mr Rayney said that the reason he made the recordings was that he wanted to record, if it were possible, Mrs Rayney acknowledging that an insinuation that she had made (being an insinuation repeated in the email of 13 July 2007 discussed above) was not true. He maintained that Mrs Rayney was aware of the conversations being recorded and that the dictaphone was visible to both of them at the times when they spoke in person.[452] He said that he believed he had Mrs Rayney's consent from the first time that he recorded her,[453] but in crossexamination clarified that it was only in the first facetoface conversation where he showed her the dictaphone and said something to the effect that he was proposing to have a record of their conversations. Thereafter, he said that he did not need to say that he was recording conversations on each occasion.[454] Mr Rayney said that his purpose in making the recordings was to try to obtain an acknowledgement that Mrs Rayney had made the insinuation to give to his lawyers for advice or possible use in future litigation.[455] He accepted that he did not disclose that intended purpose to Mrs Rayney.[456]

608 I do not accept Mr Rayney's evidence that Mrs Rayney consented to the recording of conversations by Mr Rayney in April 2007. Mr Rayney's evidence was inconsistent as to whether the dictaphone was obvious and visible on each occasion that recordings were made. There is no capture of any consent on any of the recordings. That fact was accepted by Mr Rayney.[457] The quality of the sound recordings is inconsistent with the dictaphone being in an open position, and consistent with it being located somewhere in the plaintiff's clothing, for example, in a pocket. Several of the recordings appear to have

been made as persons were moving about.[458] The relative volume of the speakers suggests that the dictaphone was, in most if not all cases, closer to Mr Rayney than to other speakers.

609 Nor do I accept Mr Rayney's evidence that the recordings were prompted by a desire to obtain an acknowledgement or retraction of the 'insinuation'. The assertion made in these proceedings by Mr Rayney that the insinuation had been made orally by Mrs Rayney sometime prior to the recordings being made was not mentioned in an affidavit sworn by Mr Rayney in the context of the legal professional privilege proceedings in the Magistrates Court.[459] In that affidavit, Mr Rayney said that the purpose of making the recordings related to the insinuation contained in the email of 13 July 2007. Given that two of the recordings appear to relate to a planned trip by Mr and Mrs Rayney to Bali, which took place from 6 9 April 2007[460]they cannot have been made in response to the 13 July 2007 email**.** Furthermore, the suggestion that recordings were made following discussions with Mr Carr, which is also made in Mr Rayney's legal professional privilege affidavit, cannot have been correct since Mr Rayney first consulted Mr Carr on 16 April 2007.

610 I also accept the defendant's submission that the plaintiff's evidence that the insinuation prompted his recordings of Mrs Rayney is unconvincing. In none of the conversations was there any discussion of the insinuation, and nor was any discussion likely to arise. A number of the conversations recorded were in the presence of the children[461] or were conversations about completely unrelated matters.[462]

611 I find that Mr Rayney used a dictaphone to record conversations between himself and Mrs Rayney sometime before midApril 2007 and did so without her consent.

Plaintiff's instruction to Mr Pearson (Defence [36(xxxiv)] Reply [47A.47])
612 The defendant asserts that on 4 August 2007, the plaintiff instructed Mr Pearson, who had done the work in relation to the listening devices, that the work was confidential and that he should lie if asked about his role and that he repeated that instruction in a phone call at approximately 8.53 am on 20 September 2007 between himself and Mr Pearson, which was a call listened to by police at the time the call was made. This allegation is denied by Mr Rayney.

613 The source of this allegation is a statement contained in Mr Pearson's police statement in which he says that when Mr Rayney came to his house at approximately 8.20 pm on Sunday, 5 August 2007, Mr Rayney gave him $100 for downloading the conversations to disc, and before leaving said 'if anyone asks, just tell them you fixed my computer'. This is said by the defendant to have been corroborated by the comment by Mr Rayney in the pretext calls (set out above at [226]) where Mr Rayney said to Mr Pearson 'you know what I said about computers'.

614 Mr Rayney denied that he said the thing attributed to him in Mr Pearson's witness statement.[463] Mr Rayney said that he did speak about computers with Mr Pearson in the context of Mr Pearson doing some work for him dealing with a computer problem which Mr Rayney had. He said, in the course of that, he joked with Mr Pearson about his lack of knowledge of computers. He said:

> I'm asking you about Pearson, aren't IYes. It's in that context that I said to Mr Pearson tell them about what I said about the computers. Pearson was there when he was doing whatever repairs, fixing my computer, the internet, all of those problems. And in - when I was speaking to him I was making a joke about what I didn't know about computers, my lack of knowledge. That's what I meant by that comment.[464]

615 In examinationinchief, Mr Pearson was not asked about the conversations with Mr Rayney referred to in his police statement. In crossexamination, he was asked whether Mr Rayney had said to him that 'this is confidential. I don't know you; this never happened'. Mr Pearson's response was that he 'wouldn't be able to remember anything like that'. It was then suggested to Mr Pearson that the police officers had suggested to him, when preparing his police statement, things that Mr Rayney must have said or might have said to Mr Pearson. His response was that he 'felt obligated to assist them with their investigation' or 'a responsibility to help them with their investigation'.[465]

616 I do not accept Mr Rayney's explanation as to his comment to Mr Pearson during the pretext call, 'you know what I said about computers'. There is no cogent reason why Mr Rayney would suggest to Mr Pearson that he tell the police that Mr Rayney was ignorant about computers. Mr Rayney suggested in crossexamination that the comment was made in the context of a conversation he had with DS McKenzie the day after Mr Rayney's computers were seized by police on 22 August 2007. That conversation concerned Mr Rayney's claim for privilege over the content of his computers. Mr Rayney's evidence was that he was trying to convey that his lack of understanding of computers was the basis on which he was unable to be specific about what parts of the contents of the computers were to be the subject of the privilege claim.[466] If that was what Mr Rayney was referring to, it was a particularly cryptic comment. On the other hand, the comment is much more readily comprehensible if it was a reference to an earlier suggestion by Mr Rayney to Mr Pearson to tell anyone who asked simply that Mr Pearson had assisted Mr Rayney by fixing his computer. Whether or not Mr Rayney believed that what Mr Pearson was doing in relation to the recording of phone calls was lawful, it might reasonably be expected that Mr Rayney would have sought to keep that activity confidential. It is unsurprising that he would tell Mr Pearson to keep it confidential and, should anybody ask, to tell a halftruth that Mr Pearson merely fixed Mr Rayney's computer.

617 In those circumstances, I am satisfied that what Mr Pearson reported to police as to Mr Rayney's request to keep the work confidential should be accepted as true. That conclusion does not amount to a finding that when he first made that request to Mr Pearson, Mr Rayney was instructing Mr Pearson to lie to police. There was, at the time of those conversations, no suggestion of any police involvement in relation to Mr Pearson's activities. The likelihood is that the statements by Mr Rayney were directed to disclosures which Mr Pearson might make in the course of casual conversation.

618 The transcript of the two intercept calls made by Mr Pearson to Mr Rayney is set out earlier in these reasons.[467] It will be noted that the transcript of the first call ends with Mr Rayney saying something which was indistinct on the recordings. Mr Rayney gave evidence that what he said at the end of that conversation was 'just tell the truth'. It might reasonably be expected that, if Mr Rayney had told Mr Pearson during the first call to tell the truth he might have repeated that advice in the second call, or at least made reference to it. In those circumstances I am not prepared to find that Mr Rayney did say those words to Mr Pearson in the first intercept call. Instead he made the comment 'you know what I said about computers'. I find that, in making that comment, Mr Rayney was suggesting to Mr Pearson that he not disclose to police that he had installed a listening device in the Rayney residence.

The plaintiff's use of the landline at the Rayney residence while listening device was in place (Defence [36(xxxv)] Reply [47A.48])

619 The defendant pleads as a relevant circumstance that the plaintiff did not use the phone landline at the Rayney residence while the listening device was in place, but resumed using it after 8 August 2007. That assertion is not admitted by the plaintiff. In its closing address the defendant conceded that that particular is not made out.[468]

Delay in making enquiries about Mrs Rayney's whereabouts when she failed to attend the meeting on 7 August 2007 (Defence [36(xxxvi)] Reply [47A.49])

620 The defendant pleads that notwithstanding that Mrs Rayney was habitually punctual, the plaintiff did not promptly make enquiries about her whereabouts after she failed to attend her meeting planned for the evening of 7 August 2007. The plaintiff denies that Mrs Rayney was habitually punctual and says that he did not make enquiries about Mrs Rayney's whereabouts on the evening of 7 August 2007 because he did not believe that any harm had come to her, he believed she may have deliberately chosen not to attend the meeting with him for strategic purposes, that she had on a few previous occasions when she had been at social functions arrived home long after her expected return time and he believed it possible that she had met with friends to socialise after her boot scooting class. Finally, he pleads that, on at least one prior occasion, Mrs Rayney had chastised him for trying to ascertain her whereabouts when she had not arrived home by her expected time after socialising.

621 It is not in issue that Mr Rayney did not make enquiries on the night of 7 August 2007 as to his wife's whereabouts. Mr Rayney said that he was annoyed when Mrs Rayney did not return, but assumed that she was either catching up with some friends after her class or that she wanted to 'have the upper hand' in their negotiations by being late. He said that this was not the first time that Mrs Rayney had stayed out late without forewarning Mr Rayney or his daughters. He gave examples of two occasions after social events when she had come home several hours after she had indicated she would be home.[469]

622 Mr Rayney said that he did not call anyone to enquire about Mrs Rayney's whereabouts because he did not believe there was any reason to be concerned for her safety, and that she had her own social life which she kept independent of Mr Rayney's social life.[470]

623 The defendant submits that Mr Rayney's suggestion that Mrs Rayney may have been seeking to gain the upper hand in negotiations by being late should be rejected for a number of reasons. Those reasons principally turn on Mrs Rayney's frame of mind as to the importance of the meeting that had been scheduled.[471] As I have found, Mrs Rayney was looking forward to the meeting. Mr Rayney told police on 8 August 2007 that they were 'both optimistic' of reaching a solution. In an email to Mrs Rayney's office on the morning of 8 August 2007 that I discuss below, Mr Rayney expressed annoyance that Mrs Rayney had not come home in time to discuss matters as planned. Given the nature of their relationship at the time, I do not consider that Mr Rayney's musings about why she had not come home as planned are inherently unlikely or unreasonable.

624 Mr Da Silva said that occasionally Mr Rayney would call him on his home phone number 'mostly in the evening after work at around dusk or on the weekend' asking him where Mrs Rayney was. He said he did not know for certain how often such calls took place, but he estimated every couple of months, and that they had happened for years since they were married.[472] He repeated that evidence in crossexamination. When asked whether Mr Rayney made any such calls during June or July 2007, when their separation was being discussed, he responded that he did not know.[473]

625 Mr Coutinho said that Mr Rayney had not called their home on the evening of 7 August 2007 to ask about Mrs Rayney's whereabouts. He said that he estimated that about 10 times a year Mr Rayney would call asking if Mrs Rayney was with them, 'mostly in the evenings'. He said he had no issue with Mr Rayney making those calls, 'it was just what our family did'.[474]

626 Ms Coutinho said that 'occasionally Lloyd might call the house if he couldn't find Corryn'.

627 Several observations could be made about that evidence. The first is that each of Mr Da Silva, Mr Coutinho and Ms Coutinho are unspecific as to the timeframe to which they are referring. None said that such enquiries had been made of them in the months during which Mr and Mrs Rayney's relationship had deteriorated leading up to August 2007. When specifically asked about the timeframe and frequency of such calls in 2007 when the relationship was

deteriorating, Mr Coutinho was unable to recall calls in that period.[475] Second, both Mr Da Silva and Mr Coutinho spoke of those calls being made in the evening and, in Mr Da Silva's case, 'around dusk'. It is a different thing to make a call late at night. Third, there is no apparent reason why Mr Rayney might have expected that Mrs Rayney would have gone to visit family members some distance away in Willetton after boot scooting.

628 In the context of the strained relationship between Mr and Mrs Rayney, I do not consider that Mr Rayney's failure to make enquiries as to Mrs Rayney's whereabouts before going to bed contributes to a basis for suspicion of his involvement with her murder.

The plaintiff's enquiries as to his wife's whereabouts on 8 August 2007 (Defence [36(xxxvii)] Reply [47A.50])

629 The defendant relies on an allegation that the plaintiff informed various persons and made enquiries on the basis that Mrs Rayney had gone to work early when she was not at the Rayney residence on 8 August 2007, although Mrs Rayney was not in the habit of going to work early, or leaving home without first informing one of their daughters, and he knew that Mrs Rayney's bed had not been slept in.

630 In response, the plaintiff pleads that he and both his daughters, Caitlyn and Sarah, believed that Mrs Rayney had left home early to go to work. He pleads that on a few occasions she had left home early and gave going to work as the reason for leaving early, but unbeknown to Mr Rayney and his children she had on a few occasions met a man after leaving home before arriving for work. Reference is also made to an email on the afternoon of 25 June 2007 from Mrs Rayney to Mr Rayney in which Mrs Rayney referred to her needing to get to work early and stating that she left the house at 7.40 am.[476] Reliance is also placed on an email from Mr Rayney to Mrs Rayney dated 26 June 2007 in which Mr Rayney complains that Mrs Rayney left home without telling Mr Rayney or either of the children.[477] In support of the proposition that Mrs Rayney occasionally had coffee before going to work, the plaintiff refers to an email of 9 February 2007 from Mrs Rayney to Ms Dianne Rice and Ms Dianne Miocevich,[478] an email from Mrs Rayney to Registrar Christo dated 1 May 2007[479] and an email from Mrs Rayney to Ms Rice dated 1 May 2007,[480] all of which refer to Mrs Rayney having coffee before work.

631 In his evidence at trial, Mr Rayney said that when he found Mrs Rayney was not at home on the morning of 8 August 2007, he thought she must have gone to work early.[481] He made two calls to Mrs Rayney's office after dropping the children at work. At 7.52 am, Mr Rayney used the landline at the Rayney residence to call Mrs Rayney's work landline. The call lasted 19 seconds.[482] That is consistent with Mr Rayney's evidence that he left phone messages for Mrs Rayney at her work number, although Mr Rayney suggested he made calls from his mobile phone and from his chambers to leave those messages.[483] That Mr Rayney made a call from his mobile phone to his wife's office is confirmed by the phone records of Mr Rayney's mobile phone which show a call made to Mrs Rayney's work number at 8.38 am on 8 August 2007.[484] There is no record of Mr Rayney making a call to Mrs Rayney's number from his work landline on the morning of 8 August 2007.[485]

632 Ms Narelle Morris was employed as a registrar's associate at the Supreme Court in 2007. After Mrs Rayney failed to attend at work where she was due to conduct a mediation, Ms Morris undertook attempts to locate her. In the early afternoon, she listened to the messages recorded on Mrs Rayney's phone. She said that the earliest message from Mr Rayney said words to the effect 'Did you come to work early, you didn't tell me. Give me a call'. She did not know what time that message was left.[486] She said that there was one other message from Mr Rayney but she could not recall the content of that

message. Regrettably, the messages left on Mrs Rayney's work phone were not downloaded by police, and eventually, despite subsequent efforts to download them, that became impossible. It is clear, however, that Mr Rayney did phone Mrs Rayney's office twice before 9.00 am on 8 August 2007.

633 Mr Rayney also made an enquiry as to Mrs Rayney's whereabouts in a phone conversation which he had with Ms Janine Taylor at 7.57 am on 8 August 2007 from the landline at the Rayney residence. According to Ms Taylor, Mr Rayney asked her if Mrs Rayney was at Ms Taylor's house. She replied, 'No' to which the plaintiff replied that 'she must have gone to work early'.[487] Ms Taylor said that she subsequently phoned Mrs Rayney's work number and left a message to see if she was okay and to tell her that Mr Rayney was looking for her.[488]

634 At 9.23 am on 8 August 2007, Mr Rayney emailed Mrs Rayney. The email read:[489]

> Corryn
>
> I have left 2 messages. Please let me know the arrangements for soccer training today. Sarah wasn't sure who was taking her and Caitlyn presumed Big Sarah was driving her.
>
> I don't understand why you didn't get back in time to discuss what we would (sic) after boot scooting. I thought we had agreed to agree on some important matters and have my lawyer write to yours to do away with the wasted time and money. I didn't know you had left for work and nor did the girls - if you have to be in early please let me know. As you know I am in the CCC today.
>
> I have booked Aldo for lunch time on the 21st. You call him if you want a separate time to see him.
>
> I won't have time to respond to your earlier emails now. I'm not being rude but suggest we focus on what's important, rather than bins, pillows etc
>
> Lloyd

635 The reference to 'Aldo' is a reference to a counsellor, Mr Aldo Gurgone. Mr Rayney then attended as counsel for Superintendent Brandham at the CCC hearing on the Mallard matter.

636 Ms Shari Paradise, who was secretary to Mr Rayney and two other barristers in 2007, said that she remembered Mr Rayney on 8 August 2007 saying to her that 'he was so annoyed as Corryn was gone when he got up in the morning and she hadn't said anything to him the day before about going to work early'.[490]

637 Ms Linda Black said that she spoke to Mr Rayney on the morning of 8 August 2007, that he looked disappointed and a little bit annoyed, and told her that he had stayed up until 11.30 pm waiting for Mrs Rayney to come home. He told her that he did not see Mrs Rayney in the morning either and that she had gone to work early without bothering to tell him.[491]

638 Mr Rayney rang Ms Sharon Coutinho around 11.15 am on 8 August 2007. He asked her if she knew where Mrs Rayney was. She continued:

> Lloyd told me that he couldn't find Corryn - that she went boot scooting last night and that about 9.30pm had planned to discuss their separation.
>
> Lloyd told me that he had stayed up and Caitlyn had been at a party and was dropped home about 10.15pm.
>
> Corryn was not home at this time and they had all gone to bed.
>
> Lloyd told me that he noticed Corryn's car was not home.
>
> Lloyd told me that he had assumed Corryn had come in late and left for work early - but he had phoned her work and discovered she was not there either.[492]

639 Mr Rayney also spoke to Ms Morris at 11.45 am, having received a message conveyed to him from Ms Morris that Mrs Rayney had missed an appointment that morning. She said that Mr Rayney said something to the effect of 'what do you mean she missed her appointment' and then said that he assumed she had gotten up early and come to work. Mr Rayney told her that Mrs Rayney would normally tell him if she was going to work early but she did not on this occasion.[493]

640 Caitlyn Rayney also said that, when she woke up on 8 August 2007, her mother was not home. She said that she was anxious but assumed that Mrs Rayney had gone to work before she woke up.[494] Sarah Rayney also said that she assumed that her mother had gone to work early when she was not home after Sarah Rayney woke up and that she expressed that assumption to Mr Rayney and Caitlyn.[495] She also said that it was her mother's regular routine to make her bed in the morning before she would leave the house.

641 The defendant contends that there are a number of reasons why it should not be accepted that Mr Rayney, Caitlyn Rayney and Sarah Rayney in fact made the assumption that Mrs Rayney must have left for work early. One of those is that Mrs Rayney was not in the habit of going to work early. I accept that the evidence establishes that Mrs Rayney was not 'in the habit' of going to work early. The emails to which Mr Rayney refers in his pleading, which are referred to above, support the proposition that on occasions Mrs Rayney did go to work early, although none suggests she went to work before 7.00 am which is when Mr Rayney said he woke up and found she was not at home. I also accept that, as Mr Rayney acknowledged in his statement to police on 8 August 2007, 'it would be unusual for [Mrs Rayney] to leave work without telling [him] or the girls'.[496] The fact that Mrs Rayney was not in the habit of leaving early for work does not, of course, exclude the possibility of her doing so, notwithstanding that it might be unusual. In a context where, if it is assumed Mr Rayney was not involved in her murder, Mr Rayney and his daughters had no reason to suspect foul play, and Mrs Rayney's level of communication with Mr Rayney was strained, the assumption that she must have gone to work early is not one which I consider unreasonable.

642 Nor do I think that it is of any moment that Mrs Rayney's bed was made. Sarah Rayney's evidence was that it was Mrs Rayney's practice to make her bed in the morning before she would leave the house.[497] Ms Porter gave evidence that when she went to the Rayney residence in the afternoon of 8 August 2007 and went into Mrs Rayney's bedroom she was 'interested in finding out what [Mrs Rayney] was wearing'.[498] She said she remembered 'thinking it was very strange that the bed was made so neatly'.[499] In reexamination, Ms Porter's attention was drawn to evidence which she gave at the murder trial in which she said she found the bed unusually neat and made, and explained that she was 'often at Mrs Rayney's home when she was getting up ready in the morning to go to work and that she often left the bed unmade or maybe just pulled it over the duvet cover but didn't make it neatly'.[500]

643 The defendant submits that Ms Porter's evidence should be preferred in circumstances in which she was with Mrs Rayney regularly as she got ready for work whereas Sarah Rayney was not in that position.[501] I reject that submission. There was simply no evidence as to whether Mrs Rayney's bed was made when she left to go to boot scooting on 7 August 2007. There is certainly no evidence that it was not. Mrs Rayney had picked up Caitlyn Rayney from the dentist after work, taken her to dancing class and attended the Karalee Tavern with Ms Russell. Ms Russell then collected Caitlyn from her dancing class and by the time she returned home, Mrs Rayney had gone out to buy takeaway chicken for her daughters' dinner. Very shortly afterward she left for boot scooting. It would seem highly unlikely that she made her bed that evening. The likelihood is that the bed was made before Mrs Rayney left for work on 7 August 2007. In her statement to police on 8 August 2007, Caitlyn Rayney said that when she arrived home from the concert the previous night she walked past her bedroom and noticed that her 'bed was still made'.[502] That suggests that Sarah Rayney's evidence that her mother generally made her bed before going to work is supported. There is no basis to prefer Ms Porter's evidence which I consider to have been affected by her obvious bias against Mr Rayney. It is grasping at straws to attribute any significance to the fact that Mrs Rayney's bed was found to be made on the afternoon of 8 August 2007 and I do not accept that the evidence in relation to the bed supports any inference as to whether or not Mrs Rayney came home on the night of 7 August 2007.

Inconsistent statements about Mrs Rayney's failure to return home after boot scooting (Defence [36(xxxviii)] Reply [47A.51])

644 The defendant says that Mr Rayney made inconsistent statements about Mrs Rayney's failure to return home after her boot scooting class in that he told one of his colleagues that Mrs Rayney had gone to work early without bothering to tell him, and he told a staff member at his daughters' school that Mrs Rayney had not returned home on the evening of 7 August 2007, but he had told his children that Mrs Rayney had gone to work early.

645 Mr Rayney accepts that he said words to one of his colleagues to the effect of those pleaded by the defendant. It was clearly said to Ms Black as discussed above. He pleads that that comment was made before he was made aware that Mrs Rayney's whereabouts were unknown.

646 The statement said by the defendant to be inconsistent with that statement was made to Ms Kelly Nebel, a staff member at the girls' school, Penrhos College. Ms Nebel's witness statement was tendered in evidence by consent. Ms Nebel said that she received a phone call from Mr Rayney at about 1.30 pm on 8 August 2007. She said:

> Mr Rayney wanted me to know that Corryn Rayney had not returned from her boot scooting class on the Tuesday night. He said that he had now asked the police to be involved and that at this stage Sarah and Caitlyn did not know that she was missing.
>
> Mr Rayney said he had told the girls that Mrs Rayney had gone to her work early and that was why she was not home when they got up. He said that Caitlyn had sent an email to Mrs Rayney's work to see how her mum was going and also tried to call her at work. He asked that I look out for Caitlyn and see how she was going.[503]

647 Mr Rayney gave evidence that when he learnt that Mrs Rayney had not attended work on 8 August 2007 he was very concerned and feared that something bad had happened. By the time he spoke to Ms Nebel, he had undertaken a number of enquiries in order to try to ascertain Mrs Rayney's whereabouts, all of which had proved fruitless. Mr Rayney said in crossexamination:

> Why do you say I don't think I would have said that? Because by that time, by the time I had been to the court, the staff had told me, our own inquiries, something untoward had happened to Corryn. There was no doubt about it. She hadn't just come home and wandered off. She - she was a responsible worker and a mother and she took both things seriously. She did not just wander off and I never thought it by that stage.[504]

648 Any basis for the assumption that Mrs Rayney had left home for work early was clearly no longer in existence once Mr Rayney had attended the Supreme Court on 8 August 2007. Assuming Mr Rayney was not involved, and he had no reason to believe that Mrs Rayney was the subject of foul play at the Rayney residence, then by the afternoon of 8 August 2007 the logical conclusion to reach was that Mrs Rayney had not made it home.

649 I agree with the plaintiff's submission that there is no substance in this particular of conduct.

Statements to Sharon and Rohan Coutinho by the plaintiff on 8 August 2007 (Defence [36(xxxviiia)] Reply [47A.52])

650 The defendant pleads that on 8 August 2007, the plaintiff told Sharon and Rohan Coutinho that Mrs Rayney's lawyer Gillian Anderson had told the plaintiff to look in the Perth Clinic for Corryn Rayney, when Ms Anderson had never spoken to the plaintiff, and also told them that Corryn Rayney might

have left home early to drop her car at the mechanics.

651 The defendant's case is that the plaintiff's conduct in making those statements was suspicious either of itself because the possibilities raised were so unlikely on the information known to the plaintiff or because the statements are examples of the plaintiff giving inconsistent and confusing accounts which may have delayed relevant lines of enquiry.[505]

652 The plaintiff pleads that it was his family lawyer, Mr Carr, who suggested to him and Ms Johnston the possibility that Mrs Rayney had disappeared for a day or a night staying at a hotel, with family or in a hospital clinic and that Mr Carr specifically said the name 'Perth Clinic'. It is further pleaded that Mr Carr phoned Ms Anderson, at the request of the plaintiff, in the presence of Mr Rayney and his sister and then informed her that Mrs Rayney's whereabouts were unknown and enquired whether Ms Anderson knew of Mrs Rayney's whereabouts. The defendant accepted that those matters are not in issue,[506] and they are consistent with the evidence of Mr Carr.[507] Those matters are established.

653 It is also not in issue that Mr Rayney had not spoken to Ms Anderson on 8 August 2007.

654 The basis of the defendant's assertion is the evidence of Mr and Ms Coutinho. Ms Coutinho said that when she and her husband and children went to the Rayney residence on 8 August 2007, they were talking with Mr Rayney about what could have happened to Mrs Rayney. She said that Mr Rayney said that he had spoken to Ms Anderson and that she told him to check Perth Clinic. She said that Ms Johnston and her husband were also present during the conversations that they had.[508]

655 Mr Coutinho gave evidence to the same effect, although he said that when the conversation took place only Mr Rayney, Ms Coutinho and he were participating in the conversation.

656 Ms Johnston also gave evidence as to the events at the Rayney residence on the evening of 8 August 2007. She said that she was with Mr Rayney when he spoke with Mr and Ms Coutinho. She said:

> Lots of things were spoken about. It was hectic. People were moving around, the police were coming and going, talking to everyone. We were all asking each other different things about Corryn and where she could be and what could have happened.[509]

657 She was not asked about Mr and Ms Coutinho's account of the conversation concerning contact with Ms Anderson.

658 Mr Rayney denied that he told Mr and Ms Coutinho that Ms Anderson had told him to check at the Perth Clinic. He said he had not met or spoken to Ms Anderson.[510]

659 I accept Mr Rayney's denial. It would, of course, have been unethical for Ms Anderson to have spoken to Mr Rayney knowing he was represented by Mr Carr. Mr Rayney would undoubtedly have been aware of that ethical position. It would be unlikely that he would suggest that he had spoken to Ms Anderson.

660 It is much more likely, and I find, that in the context of what Ms Johnston described as the hectic environment where undoubtedly every possibility, however unlikely, and all enquiries that had been made that day, would have been discussed, Mr Rayney reported on what Mr Carr had said, and on the fact that Mr Carr had rung Ms Anderson to enquire as to her knowledge of Mrs Rayney's whereabouts. In those circumstances, it is easy to understand

how Mr and Ms Coutinho may have misheard or misunderstood what Mr Rayney said or inaccurately recollected it. The fact that both of them gave evidence to the same effect is not surprising given, as I have noted earlier, Mr Coutinho's acknowledgement that he and his wife discussed their observations, suspicions and recollections on an almost daily basis in August and September 2007.

661 I find that Mr Rayney did not tell Mr and Ms Coutinho that he had spoken to Ms Anderson.

662 In the context of describing the various matters discussed at the Rayney residence on the evening of 8 August 2007, Ms Coutinho said that 'Lloyd also said that Corryn may have taken the car in for a service early that morning before he and the girls woke up'. She asked if Corryn had left a note to let them know that she had taken the car for a service, and Mr Rayney looked through paperwork on the kitchen bench but could not find any notes.[511] Mr Coutinho said that after Ms Coutinho had asked Mr Rayney and his daughters to go through what happened in the morning, Mr Rayney said that she might have come home and gone early and that 'he thought she might have left home early to drop her car at the mechanics or have left early to fix her car'.[512]

663 Mr Rayney was crossexamined about that conversation. He said he recalled saying something about her car in the context that someone at the Supreme Court that day had said that Mrs Rayney had had a minor accident in the car or the car was due for a service and that someone had made some enquiries as to that. He said he was merely passing on that information.[513]

664 DS Robinson, who was involved in the early investigations in relation to Mrs Rayney's disappearance recorded an entry at 3.50 pm on 8 August 2007 in his red book 'fuel card - car booked in today ? ?'[514] In the critical decisions log prepared by DS Robinson, he made an entry against the time 5.00 pm on 8 August 'cannot confirm MP in 1CDS564, as possibly booked in to unknown smash repairs for panel repairs'.[515] On 9 August 2007, DS Robinson instructed an officer to make enquiries of 'Nova Smash Repairs' in East Perth.[516] He said that was as a result of receiving information that the car was possibly involved in an accident.[517]

665 It is apparent therefore that in the early stages of the investigation, no doubt as everyone concerned tried to think of all relevant matters that might provide some clue to Mrs Rayney's whereabouts, questions of repairs to her car were being discussed. I have no reason to reject Mr Rayney's evidence that something was said to him at the Supreme Court on 8 August 2007 about repairs or service to Mrs Rayney's car and that, in the course of discussions between Mr Rayney and Mr and Ms Coutinho about what enquiries had been made and information obtained during the course of the day, that was mentioned. I reject the submission that there was anything suspicious about those comments, or that they can be construed as designed to cause confusion or delay enquiries.

Failure to mention acrimonious separation when making statement to police (Defence [36(xxxix)] Reply [47A.53])

666 The defendant relies on a contention that, when making a statement to police on 8 August 2007, being a statement referred to in [36(xix)] of the Defence, the plaintiff made no reference to 'the acrimonious separation from Corryn Rayney'.

667 In response, the plaintiff pleads that he made Superintendent Brandham aware of the fact that he and Mrs Rayney were separated immediately after he became aware that Mrs Rayney's whereabouts were unknown, that hours before making the statement to the police, he assisted in ensuring he

obtained access to Mrs Rayney's work emails which included emails between himself and Mrs Rayney, and that in his statement to the police on 8 August 2007 he said he was estranged from Mrs Rayney.

668 The defendant accepts that when he gave his statement to police on 8 August 2007, it included a statement that he was separated from Mrs Rayney. What Mr Rayney said in his statement was:

> Corryn and I are separated at the moment. Although we live in the same house we sleep in separate bedrooms.[518]

669 He also told police:

> Corryn came in to say goodbye and I asked her if we were still meeting at 9.30 pm after her boot scooting to discuss a resolution of our separation issues and custody arrangements for the children. She said she was happy to do that. We were both optimistic of reaching a workable and fair resolution which her lawyers would later confirm in writing.[519]

670 As I have earlier found,[520] there was optimism on both Mr and Mrs Rayney's part as to the resolution of their separation issues when they were to meet after boot scooting on 7 August 2007. It was not misleading of Mr Rayney to so advise the police. As I have also noted above,[521] the Chief Justice in his statement to police said that Mr Rayney disclosed the existence of his marital problems to him in the course of seeking the Chief Justice's authority for the police to access her emails. It was inevitable that the police would, as they did, access Mrs Rayney's email upon which the defendant's contention that the separation was 'acrimonious' would appear to be largely based. While it is correct that Superintendent Brandham said that he only looked at the emails briefly, he knew that investigators would examine them more closely thereafter.[522]

671 It is not readily apparent to me what the defendant says Mr Rayney should have said. It is a nonsense to suggest that the failure to use the adjective 'acrimonious' somehow gives rise to suspicion. Presumably, what the pleading intends to convey, is that Mr Rayney should have provided some more detail as to the nature of his relationship with his wife. I reject that contention. Having been quite open as to the fact of his separation from Mrs Rayney, and the fact that there were issues to be resolved, and having facilitated access by the police to Mrs Rayney's email knowing that those emails conveyed numerous statements of Mrs Rayney's attitude to Mr Rayney, I do not accept that Mr Rayney's failure to do any more was capable of contributing to any suspicion against him.

Response to DS Robinson's question concerning alarm system (Defence [36(xl)] Reply [47A.54])

672 The defendant contends that the plaintiff failed to provide a truthful answer to DS Robinson's question about whether the alarm system would provide any details of alarm activations and deactivations at the Rayney residence by saying that he was having problems with the alarm system and could not use it, notwithstanding that in fact the alarm system was in working order. The plaintiff denies that contention.

673 DS Robinson attended with SC Wheatley at the Rayney residence on the afternoon of 8 August 2007. After conducting a search with Mr Rayney's consent and removing a few items to obtain Mrs Rayney's DNA, he had a conversation with Mr Rayney. He said that he asked Mr Rayney if he usually activated the home alarm system and asked if that would provide any details of activations and deactivations. He said that Mr Rayney responded that he was currently having some problems with the alarm system and that it wasn't working.[523] DS Robinson made no note of that conversation.[524]

674 DS Robinson said the fact that Mr Rayney told him that the alarm was not working when, in her statement to police on 8 August 2007, Caitlyn Rayney said that when she arrived home that day she went inside and turned the alarm off,[525] contributed to his suspicion of Mr Rayney's involvement in his wife's death.[526]

675 SC Wheatley said that he recalled DS Robinson asking Mr Rayney about the alarm system and Mr Rayney replying 'to the effect that it was not working'.[527] SC Wheatley was crossexamined by reference to findings by Brian Martin AJ in the murder trial where his Honour concluded that he was unable to rely on SC Wheatley's evidence in any respect because he was far from satisfied that SC Wheatley exercised an independent mind and memory when preparing his statement.[528] He maintained that he retained an independent recollection of the 'gist of what was said'.[529] He agreed that Mr Rayney may have said that he was having a few problems with the alarm system and that he took that to mean that it was not working which may have been a misunderstanding on his part.[530]

676 Mr Rayney did not deal with this issue in his evidenceinchief. In crossexamination Mr Rayney denied that he said that the alarm system was not working. He said that he said that there had been problems, being a reference to the loss of power shortly before when Mr Pearson had rectified the problem.[531] Mr Rayney said that the alarm was not activated when Mrs Rayney went to boot scooting because he and the children were in the house. He acknowledged that the alarm system was working at that time.[532] That is consistent with Caitlyn Rayney's advice to the police that she turned off the alarm on arriving home on 8 August 2007.

677 It is difficult to determine whose evidence should be preferred on this issue. SC Wheatley's evidence is equivocal as to precisely what is said and goes no further than confirming the uncontentious issue that there was some discussion between DS Robinson and Mr Rayney about the security system. DS Robinson made no record of the conversation. In the murder trial, Brian Martin AJ referred to DS Robinson having made a witness statement on 9 September 2008 in the context of his Honour's discussion of the conversation concerning the alarm.[533] That statement formed part of the original trial bundle, but was removed on the basis that it had not been referred to in the course of this trial, and accordingly forms no part of the evidence before me. I infer, however, from Brian Martin AJ's observations, that whatever was said in the statement of 9 September 2008 by DS Robinson was his recollection, without any note, more than 12 months after the event. In those circumstances, I am unable to conclude that the defendant has satisfied the burden of establishing that Mr Rayney was untruthful in his discussions with DS Robinson about the alarm system. There may well have been some misunderstanding between Mr Rayney and DS Robinson in relation to Mr Rayney's answer to DS Robinson's enquiry about the alarm system. I therefore find that this particular is not established.

Identification of possible enemies or persons who may have a grudge against him (Defence [36(xla)] Reply [47A.55])

678 The defendant asserts that in response to an invitation from police to identify any person who might be a possible enemy or who might have a grudge against him, the only person the plaintiff identified was someone who subsequently became a police informant. The pleading is a reference to Mr Roberts, the person referred to in [36(xxiva)] of the Defence. I have already dealt with this issue in the context of that paragraph. For the reasons previously given, there is no significance in this allegation.

Plaintiff's insistence on his sister being present (Defence [36(xli)] Reply [47A.56])

679 The defendant asserts that when DS Robinson and DI Prins attended at the Rayney residence on 9 August 2007 to discuss the plaintiff's concerns and the investigation in general, the plaintiff insisted that he would not say anything without his sister being present. That pleading is denied.

680 The defendant's evidence in relation to this particular was given by DI Prins and DS Robinson. DI Prins said that he was on duty as operations manager for the MCS on 9 August 2007. He became involved in the missing person investigation in relation to Mrs Rayney, and was briefed during the course of that day. At 7.15 pm on 9 August 2007, DI Prins was told by DS Robinson that Mr Rayney had phoned and had expressed concern regarding the media reporting relating to his wife. A short time later, he and DS Robinson attended the Rayney residence. They were ushered into the lounge room where Mr Rayney introduced DI Prins to his sister, Raelene Johnston. The four of them sat in the lounge room and discussed Mr Rayney's concerns relating to the media reporting of his missing wife. DI Prins said that Ms Johnston was taking notes using a pen and notepad. During the conversation, a phone rang which Ms Johnston answered. She left the room to take the call. DI Prins said that DS Robinson attempted to continue the conversation but Mr Rayney said that he would not speak without Ms Johnston being present in the room. He said that DS Robinson then made a general enquiry as to Mr Rayney's wellbeing, to which Mr Rayney reiterated he would not say anything until Ms Johnston returned. He said that there followed an awkward silence while they waited approximately three minutes before Ms Johnston returned. The conversation regarding the media coverage of Mrs Rayney's disappearance then continued.[534]

681 In crossexamination, DI Prins said that Mr Rayney was polite in his request. It was suggested to him that Mr Rayney had said 'could you just hang on a second. She will be back' to which DI Prins responded 'something along those lines, yes'.[535] DI Prins was unable to recall anything about watching the ABC news while with Mr Rayney, a matter recorded in the critical decisions log and referred to below.

682 DS Robinson gave evidence to the same effect as DI Prins, and said that he found Mr Rayney's behaviour in not saying anything until Ms Johnston returned strange because they were not interviewing him as a suspect, but rather simply advising him how the investigation was proceeding. DS Robinson's notes in the critical decisions log for that day recorded that Mr Rayney was unhappy with what was depicted on the Channel 9 news regarding the 'homicide slant and linkage to him and [his] position', that he had had a visit from a media person knocking on his door that day, that they watched the channel 2 news (ABC) with Mr Rayney and there were 'further issues re reporting on marital status', that there was a discussion as to the family liaison officer, and that Mr Rayney provided names of persons whom may be able to assist in the investigation.[536]

683 DS Robinson was crossexamined in relation to this conversation. He confirmed that, after he and DI Prins first arrived, they watched the ABC news. He confirmed that half way through a conversation, Ms Johnston's phone rang and she left the room only for a few minutes.[537] He said the conversation with Mr Rayney lasted for over an hour. He agreed that Mr Rayney was 'a very quiet person'.[538]

684 Mr Rayney said that he did not tell the police that he would not speak to them without his sister being present. He said that he most likely said 'just hang on a second. She'll be back' or 'just wait a second'.[539] He said that his sister was not away for as long as three minutes, but only for a short time. He said that if Ms Johnston was going to be away for other than a short period, he would have continued on, and that the police were not interviewing him. He said it was a trivial matter that she left.[540] Ms Johnston was not asked any questions about this occasion.

685 I find that at the meeting with DI Prins and DS Robinson on the evening of 9 August 2007, Ms Johnston received a phone call and left the room to speak. I find that Mr Rayney did say words to the effect of asking the officers to pause the discussion until Ms Johnston returned. It is likely that that was

done simply to enable Ms Johnston to be present for the whole discussion, rather than Mr Rayney having to update her when she returned or later report things that were said in her absence. There is nothing particularly strange about that conduct. Even if it might be thought by the police officers to be something unusual, it seems to me that it is not capable of contributing to suspicion against Mr Rayney. It is not inconsistent with his reserved and quiet personality. The nature of the discussion was not such that Ms Johnston's presence was necessary to avoid anything incriminating being said. As DS Robinson acknowledged, the discussion was not in any sense an interview of Mr Rayney, but was occurring at his request so as to enable him to express his concerns relating to the media.

686 The particular is not made out in the terms pleaded, but in any event, it would not contribute towards any suspicion of Mr Rayney.

Plaintiff's intervention of interview with his daughter Sarah (Defence [36(xlii)] Reply [47A.57])

687 The defendant pleads that, while police officers were taking a statement from his daughter Sarah, the plaintiff intervened on several occasions to question Sarah's recollection of events about, amongst other things, the time that Sarah had gone to sleep on the evening of 7 August 2007. This allegation is denied.

688 In closing submissions, the defendant abandoned the allegation that the plaintiff intervened in relation to Sarah's statement as to the time that Sarah had gone to sleep on the evening of 7 August 2007. It maintained the assertion that the plaintiff intervened on several occasions to question Sarah Rayney's recollection.[541] The nature of the interruptions is therefore not identifiable on the defendant's pleading.

689 Sarah Rayney's statement was taken by DC Tan and Constable Heather Daniel at the Rayney residence on Thursday, 9 August 2007. Neither DC Tan nor Constable Daniel were called to give evidence. I have dealt above with the application to have a statement of DC Tan admitted under s 79C of the *Evidence Act*,[542] including his email statement that his evidence would not benefit the defendant.

690 Sarah Rayney said that when police took the statement from her on 9 August 2007, her father told her to try to remember as much as she could and tell the police everything she could remember. She said that Mr Rayney was present only for a short time at the start, but then left and Ms Johnston stayed with her for the remaining time. She said that while she was speaking to the police, her father made one remark and it was about brushing her teeth because she had forgotten to include that in her account of what happened the previous night.[543] She said that was the only time her father interrupted her when speaking to the police. There is no mention in Sarah Rayney's statement of her cleaning her teeth.[544]

691 Mr Rayney said that he did not interfere with the police speaking to Sarah or try to influence in any way what she said. He said that he was present only for a short time whilst the police spoke to Sarah. He said that while he was present, Sarah said something to the officer about what she did which Mr Rayney knew could be referenced to a TV program so that a time could be established for the events described, but the officer was not interested in noting the time when he asked the officer about it. He said he simply asked the officer if she was going to record the time by reference to what was on television. The matter was left at that.[545] Mr Rayney denied in crossexamination that he interrupted the officers during the course of their interview of Sarah, other than in the manner described in his evidenceinchief.[546]

692 Ms Johnston said that she remembered Sarah making some reference to knowing the time because of something that was on television and said that Mr Rayney said that that should be in the statement but the officer said it was not important. That evidence was the subject of objection on the basis that

it was hearsay. I reject that objection. It is direct evidence of the fact of a conversation heard by the witness. Ms Johnston said that she did not see Mr Rayney prompt Sarah about what to say.[547]

693 The defendant submits that both the plaintiff's and Ms Johnston's evidence should be rejected, but seeks to rely on the evidence of the plaintiff and Sarah to establish that the plaintiff interjected twice during the course of the interview. The plaintiff's evidence was, however, that he did not interject, but merely made a comment to the police officer about noting a time by reference to a television program.

694 The plaintiff's evidence does not support a finding that he interjected in the interview with Sarah Rayney in any way which might contribute towards suspicion against him. I find the particular of conduct is not made out.

Constraints on children's communications with others (Defence [36(xliii)] Reply [47A.58])
695 The defendant contends that, after 9 August 2007, the plaintiff:

refused to permit his children to be interviewed by police officers;
refused to permit his children to see members of Corryn Rayney's family without his supervision;
instructed staff members at his children's school that his children were not to be permitted to speak to anyone about Corryn Rayney's disappearance or murder and that they were not to be collected from the school by anyone other than the plaintiff's sister; and
refused to permit the children to see counsellors to help them manage issues arising from Corryn Rayney's disappearance and murder, despite having being prepared prior to 7 August 2007 for the children to see a counsellor to help them to manage issues arising from the separation from Corryn Rayney.
These allegations are denied by the plaintiff.

Refusal to permit children to be interviewed by police

696 The defendant relies on a number of communications said to be requests for police to formally interview Mr Rayney's children. The first of those communications was 28 August 2007, and the balance occurred between that date and 18 September 2007.

697 DS McKenzie said that at about 6.25 pm on 28 August 2007, he spoke to Mr Rayney at the Rayney residence. Amongst the matters he discussed was 'the prospect of interviewing his daughters Caitlyn and Sarah'. He said that he explained the necessity of having the children interviewed, being that the investigation team wanted to develop an understanding of Mrs Rayney's movements and their relationship given that the original statements were taken when Mrs Rayney was a missing person. He said that Mr Rayney explained that he did not want the children to go through a further interview as they had indicated they did not want to do any more regarding the enquiry as they were too stressed about it.[548] That evidence is consistent with the note recorded in DS McKenzie's running sheet for 28 August 2007.[549]

698 According to DS McKenzie, the question of the children being interviewed was discussed with Ms Johnston at a meeting at the home of Mr and Ms Coutinho on 31 August 2007. DS McKenzie said that both he and DS Correia explained the importance of having Caitlyn and Sarah interviewed again and that DS Correia told Ms Johnston that Mr Rayney had been requested by police to have the girls interviewed.[550] DS Correia gave no evidence of his participation in that meeting. DS McKenzie's entry in the Operation Dargan running sheet for that day records that 'Carlos had discussed with Raelene that

Lloyd had been requested to have the girls interviewed however he had declined. He expressed his desire for this to occur as a matter of urgency. Raelene asked to take the request back to Lloyd'.[551]

699 Ms Johnston said that she had no recollection of DS Correia asking her to ask Mr Rayney to have the girls interviewed.[552] That paragraph of Ms Johnston's responsive witness statement was the subject of objection on the basis that it was nonresponsive and irrelevant. It is clearly responsive to DS McKenzie's evidence and relevant on that basis and is admissible. Ms Johnston was not crossexamined about that statement.

700 The third communication is said to be reflected in a phone conversation recorded in the Operation Dargan running sheets at 2.40 pm on 6 September 2007. An entry made by DS McKenzie records:

> TPC from Sharon.
>
> She spoke with Lloyd last night and this morning.
>
> She asked if he was going to let the girls be reinterviewed as a result of Carlos and Mark's discussion and said he didn't know anything about a further request. When she said she was willing to take them he said he would take them.
>
> All the funeral cards have been taken by her from Lloyd and she will photocopy them and have them available for Monday to be picked up.
>
> A DVD of church service has been secured and she will give it to police on Monday as well.
>
> He rings her daily asking if she has heard anything and he even asked her why Ernest wasn't talking to him.
>
> Detective Sergeant McKenzie asked Sharon should she speak with Lloyd to tell him that we have located the two wills in her office at Supreme Court and he could arrange to have them given to him if he rings me.[553]

701 I pause to notice that that entry illustrates something of the relationship between Ms Coutinho and the police, and DS McKenzie in particular, and their obvious suspicion of Mr Rayney.

702 Late in the afternoon of 6 September 2007, Mr Rayney and DS McKenzie spoke by phone. That call was recorded. After almost 11 minutes of discussion in which DS McKenzie spoke about various developments in the investigation, the subject turned to a further interview of Caitlyn and Sarah Rayney and Mr Rayney. The conversation then went as follows:

MCKENZIE: So that's pretty good. So, now, the only other things I was going to let you know is one thing that we spoke to Raelene about on Friday when you were with your mum is just Carlos wants to again just broach the idea about having a - getting the girls interviewed. And I know I spoke to you about it the other - about a week ago. It's something that Carlos has mentioned with me again and I said, look, I'll speak to you about it. Look, we would really like the girls to be interviewed to try to get as much information as we possibly can.

RAYNEY: Yeah, it's

MCKENZIE: And with that - and, look, I just want you to consider it again, and also for yourself, we wouldn't mind speaking to you to expand on your statement that you gave that day and I don't

RAYNEY: What else - what else do you need?

MCKENZIE: Well, just all the things that we've probably talked about, things, like - now, when you gave the statement, it was like from a missing person point of view. Now the fact that she has been murdered,

RAYNEY: Obviously, like, it was - I never thought realistically that Corryn would have just, you know, wandered off or - or voluntarily left, so it was always foul play.

MCKENZIE: Yeah. But as I say, that probably - I think we're all just looking at it from the focus in which the coppers who spoke to you that day were probably looking at it from a missing person's point of view and I think we just need to expand. I mean, it's just basically sitting down and going through, you know, questions and trying to expand on your statement, just pretty much like we want to do with Caitlyn and Sarah. There's a lot of information that you know about Corryn that we haven't got captured in way of a statement, but I've probably spoken to you on and off and got some bits of information, but we want to probably - in a position where we can all read it and get an idea of what Corryn was all about. So if you want to consider that tomorrow and over the weekend and I'll get back to you next week and we can talk to you about it

RAYNEY: Yeah. Okay.

MCKENZIE: some more.

RAYNEY: As I said, you know, what - as I said previously, my primary concern is the children's interests.

MCKENZIE: Yep. Absolutely.

RAYNEY: And I told you about their reluctance to want to talk about what happened.

MCKENZIE: Look, and I understand that.

RAYNEY: I know they've been interviewed at length for several hours.

MCKENZIE: Yeah. And, look, I understand that. My concern is - and I do support Carlos in this - is that I've got no doubt the girls have got so much information they have that we could glean from them about Corryn and her movements, and, I mean, Caitlyn and Corryn were very close and I think it would just be a great investigative tool to be able to speak to them and hopefully get as much information out of them as possible about Corryn and those type of things. And, you know, just

RAYNEY: All her movements on the day and leading up to are covered in the statement that they've made.

MCKENZIE: Yeah , I know. But the statements, again, were done very quickly and done when she was a missing person. Look

RAYNEY: And there was actually people called in who were from the section that deals with children that took those statements.

MCKENZIE: No, they weren't, no. They were

RAYNEY: Yeah, they were.

MCKENZIE: No, they weren't, they were police officers from Kensington or Cannington. No, the section I'm talking about with the child interview unit are police officers who deal with it under, I think it's 106 of the Evidence Act where

kids can be interviewed and then we don't have to - they don't have to give evidenceinchief. And so what it does, it's just more of a relaxed atmosphere. These are the people who would be doing it and it's more of a fact finding exercise where they sit around a table. It's not like an official interview per se, it's just a relaxed - and these people are trained in talking to kids.

RAYNEY: Yeah, I thought that when

MCKENZIE: So, anyway, that's why we're looking at it, so

RAYNEY: when you raised the matter of video recording the children, you said it wasn't for the purpose of any evidence.

MCKENZIE: No, and this is the thing. This would be the same. It would be the people who do it as their living for an evidence gathering exercise. This would be, like, a getting as much information as we possibly can from the girls about Corryn and their relationship and all the information we need to know that would give us more avenues of inquiry. And all I'm saying is that the girls - the women that we will use are these people who are trained in child interviews.

RAYNEY: Yeah.

MCKENZIE: That's what they do. Their bread and butter is interviewing children.

RAYNEY: All right. I will - of course, I mean, as you know, we all have the same interest in

MCKENZIE: Yeah. Absolutely.

RAYNEY: solving and finding

RAYNEY: what's happened.

MCKENZIE: Yep.

RAYNEY: My - my interests as well, importantly, is to look after the girls and - yeah, so I will - of course I'll take into account what you say and I will

MCKENZIE: Yeah.

RAYNEY: talk to the girls and

MCKENZIE: Yeah.

RAYNEY: see how they

MCKENZIE: And, look, it's one of those things that - and, look, we definitely don't want to cause the girls any grief. I mean, my main priority

RAYNEY: I mean, it's only been four days since their

MCKENZIE: Sorry?

RAYNEY: It's only been four days since their mum was cremated.

MCKENZIE: Absolutely. And, look, it's not a situation that we want it done tomorrow or over the weekend. It's something that, you know, we will do when you're happy for it to be done and when we think it's right for the girls.

RAYNEY: Yeah.

MCKENZIE: But we haven't pushed it prior to Corryn being, you know, put to rest, but we're in a situation where we would just really like to be able to capture as much of the information as we can. And, of course, from you. I mean, you've got a lot of information about Corryn that we would like to capture and that's where, you know, we're just trying to get as much information and soak up as much information as possible, and that gives us more avenues to go and investigate.

RAYNEY: Yeah.

MCKENZIE: We've got so many lines of inquiry we've already had.

RAYNEY: Yeah.

MCKENZIE: We want to keep on creating those lines of inquiry.

RAYNEY: Yeah. So, what, you or Carlos or someone will come around and sit down and I'll go through as much as you want to

MCKENZIE: Yeah. Well

RAYNEY: ask or

MCKENZIE: look, if you want, I'll get back in touch with you - you have a think about it, I'll get in contact with you on Monday.

RAYNEY: Okay.

MCKENZIE: And we will go through, and if that means you want to come into our office or we come to your office or come to your place to go through that statement and - your statement, that is, and meet them out, we will do it.

RAYNEY: Yeah.

MCKENZIE: With the girls, I'll just, again, explain with the girls, if that's done on video, but what happens, it's done, like, in a lounge chairs and a table, very relaxed. The kids aren't - they don't feel that it's a pressurised situation.

RAYNEY: Yeah.

MCKENZIE: So it's

RAYNEY: The impact on them, of having to relive what has happened and talk about it, that - that's my concern because they are

MCKENZIE: Yeah. Yep.

RAYNEY: to want to talk about it or

MCKENZIE: And, look, that's always a concern for us as well. But, from my experience, and I'm always - the girls who do the interview are always aware of that and they do their best to try to take away their pain. And, also - and, look, I'm trying to get - purely out of my experience here, is that the girls do like - a lot of young ladies, girls, boys, do like speaking to an independent person about their feelings. That they might have a lot of frustrations that they - and they want answered, and

RAYNEY: Well, that's a different issue.

MCKENZIE: Yeah. Absolutely.

RAYNEY: That's more counselling, that's not about

MCKENZIE: Yeah. Well

RAYNEY: what you're talking

MCKENZIE: I mean, they might be able to, you know, get those frustrations out, possibly, and I can be aware of those and then I can probably answer them because I'll be made aware of what their frustrations are and I can get them those answers through you and speak to them one on one or with you present. So, anyway, that's for you to consider, mate. That's not for me to throw down your throat. I just want to throw it out there that it's something from

an investigation point of view Carlos definitely wants you to consider.

I'm not there from that point of view, I'm there to look after your wellbeing and I know that we've had a bit of a rocky trot at the last week or so, but that's not my intention. My intention is to look after your girls, yourself, Ernest and Sharon and they are - you guys are the five people that it's all about from my point of view, and I'm just trying to let you know from where the investigation is going and what they need. So if you can consider and if the girls want to speak to me about it, I can run it through them and tell them what it's about.

RAYNEY: Well, I don't want the - because the girls are so sensitive about it and distressed about having to talk or relive what happened, if there are any queries, please come through me, don't speak to the girls directly.

MCKENZIE: No. No. No.

RAYNEY: Yeah.

MCKENZIE: No. No. No. Absolutely. That's why I'm going through you. No one would

RAYNEY: Also, don't put it through Sharon or through anyone else.

MCKENZIE: And I wouldn't speak to the girls like that. It's all

RAYNEY: Yeah.

MCKENZIE: I've got to get your permission and that type of stuff. So

RAYNEY: Yeah.

MCKENZIE: I definitely wouldn't do that. No, that's all right.

RAYNEY: Yeah, and I mean - I mean, don't go through, you know, even with the best intentions, through Sharon or through Rowan or Ernest or Raelene or anyone but, please come and talk to me first.

MCKENZIE: Yeah. No, that's fine.

RAYNEY: Okay. All right.

MCKENZIE: No worries. Okay. Any problems, give me a yell.

RAYNEY: All right.

MCKENZIE: I'm going to York tomorrow because on Saturday morning at 4.30 I've got to get up in a hot air balloon. So

RAYNEY: All right. Well, good luck, I'll talk to you early next week.

MCKENZIE: No worries at all.

RAYNEY: Okay. Bye.

MCKENZIE: Be good. Byebye.[554]

703 DS McKenzie spoke again to Mr Rayney at 9.23 am on 18 September 2007. In the course of that relatively brief conversation, he asked Mr Rayney whether he had considered the position in relation to a reinterview of the girls. Mr Rayney did not respond to the questions saying that he had to go to court and would call DS McKenzie back. There is no evidence that he did call DS McKenzie back about that subject.

704 Mr Rayney said that claims by police that he was preventing them from interviewing his children were untrue. He said that he was willing for the children to be interviewed, but that it could not possibly be done by police who he thought were biased and who appeared to him to have predetermined that he was guilty of Mrs Rayney's murder.[555]

705 The earlier requests by police for a reinterview of Mr Rayney's daughters were, appropriately, made after Mrs Rayney's funeral, and on the basis of a request that Mr Rayney consider the matter having regard to his concerns as to the children's distress. I am satisfied, however, that by the phone discussion on 6 September 2007, the wish of the police to reinterview the daughters was made quite plain by DS McKenzie. It is clear that, thereafter, Mr Rayney did not agree to that request. It may well be that his declining to allow the children to be interviewed was motivated by a concern as to the distress which might be caused by the girls having to recount relevant events. However, in circumstances where DS McKenzie made it clear that skilled child interviewers could be utilised, I accept that Mr Rayney's failure to agree to allow his daughters to be interviewed could reasonably be perceived by police as capable of contributing towards a suspicion against him.

Refusal to permit children to see members of Mrs Rayney's family without his supervision

706 The defendant conceded that there were occasions of unsupervised contact by members of Mrs Rayney's family with Caitlyn and Sarah Rayney after 9 August 2007 but submitted that after Mrs Rayney's body was found the plaintiff refused to permit his children to see them.[556]

707 Mr Da Silva said that he visited the Rayney residence once between 7 and 15 August 2007. He spent most of the time in the back garden talking to the 'girls' (who I take to be Caitlyn and Sarah) and others.[557] He said, however, that he never had a chance to speak to Caitlyn and Sarah about what happened on the night of 7 August 2007 because he did not want to ask them in a public place or where other people were around. He said that on 15 August 2007, he attended a church service for Corryn. He saw the Rayney girls at the end of the church path on their own, and went to talk to them, but before he reached them, Raelene Johnston and her husband moved toward them and were standing next to them when he reached the girls. That evidence is relied upon by the defendant as supporting this particular that Mr Rayney refused to permit the children to speak with members of Mrs Rayney's family.[558] Clearly, that evidence cannot be treated as indicative of any conduct by Mr Rayney. Mr Da Silva also referred to seeing the girls on grandparents' day at their school in November or December 2007 when Mr Rayney's mother was also present.

708 As I have noted earlier in these reasons, Mr Da Silva formed a belief from the time his daughter's body was found that Mr Rayney was responsible for her death. It is quite apparent that the relationship between him and Mr Rayney, and in turn Mr Rayney's daughters, became very strained very quickly. Mr Da Silva was crossexamined about a card which he had his daughter, Ms Coutinho, give to Caitlyn and Sarah at a lunch at a Mexican restaurant in Fremantle at which they, the Coutinhos and Mr Rayney were present, and to which Mr Da Silva had been invited but declined to attend. The card expressed his anger at Mr Rayney for failing to protect his daughter and their mother.[559] The disintegration of the relationship between Caitlyn and Sarah Rayney and their grandfather by reason of his attitude to their father was starkly illustrated by Sarah Rayney's evidence. I do not accept that Mr Da Silva's evidence goes any way towards establishing a refusal on Mr Rayney's part to allow his children contact with Mr Da Silva.

709 Ms Coutinho said that on 9 August 2007, Mr Rayney rang Mr Coutinho and asked him to come and help move things out of the garage at the Rayney residence. That request was apparently made in order to enable Mr Rayney to park his car in the garage away from the press. Mr Rayney told her he wanted to get the car in the garage because he needed to protect the girls.[560] She said that they also dropped into visit his family on 11 August 2007. She attended a press conference with Mr Rayney on 12 August 2007 and although she could not remember the conversation, said that they must have spoken beforehand. After learning that Mrs Rayney's body had been found on 16 August 2007, Mr Rayney rang Ms Coutinho and said that he would go to their place. She said he sounded upset and was teary and emotional, and said that he and the girls would come over.[561] After saying some prayers with the Coutinho's parish priest who was there, Mr Rayney, Ms Coutinho, and Ms Johnston watched the news on TV away from the girls whom Mr Rayney did not want watching the television. The girls were then with Ms Coutinho's sons. On 17 August 2007, the Coutinho's went to the Rayney residence with two other close family friends to see the Rayney girls and Mr Rayney. By that time, Ms Coutinho was 'suspicious of Lloyd'.

710 On 19 August 2007, Ms Coutinho did another press conference on her own by arrangement with the police. Mr Rayney rang her about three times to find out why he was not involved. The same evening, Mr Rayney brought his daughters over for dinner. On 22 August 2007, police rang Ms Coutinho and told her that Mrs Rayney's body would be released and a funeral could be organised. She spoke to Mr Rayney about the funeral and he asked her to organise the funeral director.

711 Ms Coutinho said that she and her husband dropped in at the Rayney residence on 5 September 2007. She said that they were in the kitchen and Caitlyn and Rohan Coutinho were talking in the kitchen. Ms Coutinho joined in the conversation which concerned counselling, and Ms Coutinho said that Caitlyn said that she did not trust counsellors.[562] She said that she asked Mr Rayney whether the girls wanted to go to Kings Park, to which he replied 'the girls want to forget and move on, they don't need counselling as we are a very private family and we talk to each other'.

712 Ms Coutinho said that she and her husband went back to the Rayney residence again on 16 September 2007. They dropped in unannounced. Mr Rayney met them on the porch, shutting the door behind him and said that Sarah was asleep and Caitlyn was out. They were not invited in.

713 In crossexamination, Ms Coutinho agreed that she took the girls shopping on 27 August 2007 in order to buy clothes for the funeral. She agreed that she had 'plenty of access to the girls then' and that she had the opportunity to quiz them about what happened on the night of 7 August but she did not take that opportunity.[563]

714 Mr Coutinho confirmed that he spoke to Caitlyn about counselling on 5 September 2007, and that she responded 'it was nobody else's business'. He said she was very clear she was not going to do it.[564] Mr Coutinho said that he went to the Rayney residence on 18 September 2007 'for one of my weekly visits', but Mr Rayney did not respond to the doorbell and rejected a call to his mobile from Mr Coutinho. Mr Coutinho then rang the phone number and Mr Rayney answered and then came to the door. In the following conversation he said that he and his wife wanted to be part of the girls' life, to which Mr Rayney agreed.

715 Mr Coutinho gave evidence that on 4 October 2007 Mr Rayney brought his daughters to the Coutinho house for what was originally to be a night with just the Coutinho's and the Rayney girls. Mr Rayney said that he and his brotherinlaw Brad Johnston were going to stay. A conversation ensued in which Mr Rayney denied any involvement with his wife's murder and various other topics were discussed.

716 Mr Rayney said that from the time of his wife's disappearance, Mr and Ms Coutinho spoke to him and treated him in a manner which caused him to think that they believed that he had killed his wife. He said that their anger towards him was demonstrated by the manner and tone of what they said to him. He said that he considered that when they came to his home they behaved intrusively, and spoke to Caitlyn in a 'stern tone'. He contrasted that with the approach of Mrs Rayney's cousin from Canada, Jude Da Silva, whom he said spoke in a much kinder and gentler way to Caitlyn and Sarah and on several occasions he took Jude Da Silva out to lunch with the girls. He said that notwithstanding what he sensed to be Mr and Ms Coutinho's suspicion of him, he did not interfere with their interaction with the girls, and continued to take the girls to visit them, although over time, the girls did not want to continue the visits.

717 I am satisfied that, although the relationship between the Coutinhos and Mr Rayney, and in turn the Rayney girls, became quickly strained after the disappearance of Mrs Rayney, there was no refusal on Mr Rayney's part to permit his children to see members of Mrs Rayney's family unsupervised. There were occasions where it was unsupervised in the early weeks, but I am thereafter satisfied that the reduction in contact between the two families was as much the wishes of Mr Rayney's daughters as any action on his part.

Instruction to staff members at children's school

718 This particular was maintained by the defendant save that it conceded that, in addition to the plaintiff's sister, the plaintiff permitted Caitlyn and Sarah to be collected from school by their two babysitters.

719 As noted above, Ms Kerry Jenke was Sarah's classroom teacher in 2007. On Friday 10 August 2007, she saw Mr Rayney in the classroom with Sarah. She took him aside. She said that he asked her that noone ask Sarah any questions about Corryn's disappearance.[565] Ms Jenke said that she was worried about Sarah's wellbeing, and took Mr Rayney's comment to be a statement made to protect Sarah, an approach with which she agreed.[566] She said that Mr Rayney appeared upset while talking to her and that his eyes were red and he lowered and shook his head as he spoke.[567]

720 Ms Kelly Nebel was the head of year for Caitlyn Rayney's year 8 class in 2007. She had also been head of year for the year 7 class in 2006. Ms Melissa Powell was head of middle school in 2007. Ms Nebel and Ms Powell met with Mr Rayney at 8.30 am on 10 August 2007 shortly after Mr Rayney's discussion with Ms Jenke. Ms Nebel said that Mr Rayney wanted to make sure that his girls were looked after, and asked staff not to talk with the girls about the situation. He wanted Caitlyn to be able to access her mobile phone during class, presumably in case there were any developments. Ms Nebel said that from that meeting, she understood that as far as possible Mr Rayney wanted it to be business as usual as school was the most consistent thing for Caitlyn and would give her a reprieve.[568]

721 Mr Graham Rixon was the principal of Penrhos College in 2007. He said that he had a meeting with Mr Rayney on 10 August 2007 at Mr Rayney's request. He said Mr Rayney's concern was the welfare of the girls and how the school might manage the situation. Mr Rixon offered support to the girls, including counselling. Mr Rixon said that Mr Rayney said he wanted the girls to have as normal a life as possible considering the circumstances. He said that the meeting lasted a maximum of ten minutes, and that Mr Rayney wanted to ensure that only his sister, Raelene Johnston, and the two babysitters were able to pick up the girls after school. He said that Mr Rayney was 'very specific that nobody from Corryn's family was to pick the girls up'. That last aspect of his evidence was not included in his statement given to police on 29 May 2008 which referred only to the girls being collected by Ms Johnston or the two babysitters.[569]

722 Mr Rixon was extensively crossexamined in relation to the assertion that he had a conversation on 10 August 2007 in relation to picking up the children. Not surprisingly, Mr Rixon had no written record of the meeting, it having been an unscheduled meeting at Mr Rayney's request. He agreed that if he received such a very specific instruction he would need to implement it and communicate it to staff.[570] He had no record of any follow up, but said that there would be no written record of a critical incident team meeting. He understood that it would have been followed up either by the head of junior school or the head of middle school.

723 There were a series of emails to staff members in relation to Mrs Rayney's disappearance sent. The first was sent by Ms Powell at 9.09 am on 10 August 2007. It reflected what Ms Nebel said was discussed in the meeting which she had with Ms Powell and Mr Rayney earlier that morning. There is no reference to who is to pick up the girls.[571]

724 A further email was sent by Ms Powell on 16 August 2007 following the discovery of Mrs Rayney's body.[572] It does not mention pickup. Later the same day, Mr Rixon sent an email to all staff informing them that Mrs Rayney's body had been found and directing staff to avoid unnecessary speculation and not to discuss the matter with the girls, but keep things as normal as possible. He directed that media were not to be allowed on campus and any media enquiries were to be directed to him. There was no mention of pickup of the girls.[573] A further email from Ms Powell to various school email groups, and copied to Mr Rixon, of 20 August 2007 dealt with Caitlyn's return to school. It made no reference to pickup.[574]

725 On 10 September 2007, Ms Anne Hay, the head of Penrhos junior school, sent an email to Ms Powell saying that Mr Rayney had asked the junior school to be aware of Sarah's security at school and asked that she not be released to anyone other than himself or her babysitters Sarah and Amy. She said he also asked for that message to be passed on to the middle school as the same applies for Caitlyn. Ms Powell responded, with a copy to Mr Rixon, saying that Mr Rayney 'actually spoke to Kelly Nebel sometime ago about the same issue'.[575]

726 The following day, 11 September 2007, Ms Powell sent an email to a number of email groups within Penrhos which read:

> Yesterday, Mr Lloyd Rayney met with Kelly Nebel and requested that the following information be emailed to all staff.
>
> Mr Rayney has indicated that only himself, his sister, and babysitters Amy Price and Sarah Denholm have his permission for contact with his daughters through the College and to collect them. Mr Rayney also requested that a photograph of his sister, Ms Raelene Johnston, be emailed to all staff.[576]

727 Ms Powell followed that email up with a letter to Mr Rayney dated 11 September 2007 referring to his meeting the previous day with Kelly Nebel and confirming that his instructions in relation to pick up were in place.[577]

728 When his attention was directed to those emails, Mr Rixon was asked whether he accepted that the date of his meeting with Mr Rayney was out by a month. He replied that that was possible but that he could not recollect all that detail.[578]

729 On the basis that there is no record of Mr Rixon's meeting with Mr Rayney, and more importantly no evidence of any follow up which Mr Rixon says he would have made, I find that Mr Rayney did not give the instructions concerning the pickup of his children to Mr Rixon on 10 August 2007. Given that Mr Rixon was not called upon to recall these events until some eight to nine months later, it is likely that he was mistaken as to the circumstances in which Mr Rayney gave instructions in relation to the pickup of his daughters. I find that the instruction was given to Ms Nebel on 10 September 2007.

730 It is apparent, as the various email communications referred to above reveal, that Mr Rayney did express concern to the school about discussions with the girls concerning their mother's disappearance and later in relation to their collection from school. It is quite apparent that those involved at the school endorsed the approach requested by Mr Rayney. I am satisfied that approach was motivated out of concern for his daughters' welfare and their security. There is nothing in his approach that warrants treating it as contributing to any suspicion of Mr Rayney.

Refusal to permit children to see counsellors

731 It is the case that the children did not avail themselves of the counselling available through Penrhos College or otherwise. There is no evidence of any refusal by Mr Rayney to permit that to occur. The furthest the evidence goes is that, when the subject was raised with him, Mr Rayney said that the girls did not want to engage in counselling. That is consistent with the evidence of Mr Coutinho who said that he discussed the matter with Caitlyn, and that she adamantly refused to go to counselling, a conversation confirmed by Ms Coutinho.[579] The discussions with Ms Jenke, Ms Powell and Ms Nebel concerning the avoidance of discussions of the situation with the girls appear to relate to general discussion by students and staff. I do not construe the

evidence of any of those witnesses as suggesting that Mr Rayney was referring to counselling. Sarah Rayney said that she was aware that there were counsellors available at school, and that if she wanted to speak to a counsellor she would have felt perfectly comfortable doing so, but did not want to. [580]

732 The particular that Mr Rayney refused to permit his daughters to go to counselling is not made out.

Mowing the lawn on 11 12 August 2007 (Defence [36(xliiia)] Reply [47A.59])

733 The defendant asserts that on the weekend of 11 12 August 2007, the plaintiff, who did not ordinarily mow the lawn, was observed mowing the lawn on the council verge near the driveway of the Rayney residence.

734 The plaintiff denies mowing the lawn.

735 The report to the police in relation to this matter by Mr Christopher Reeve was made after 20 September 2007. The defendant does not, therefore, rely on this particular to support the justification of the suspicion imputation since it was not known to police at the time of the press conference by DSS Lee. It is, however, relied upon as truth of the conduct imputation.[581]

736 The particular relies on the evidence of Mr Christopher Reeve. Mr Reeve lived in Monash Avenue between 1999 and 2009. His house was on the other side of Monash Avenue from the Rayney residence, diagonally opposite those premises. Mr Reeve first met Mr and Mrs Rayney in 2000, and would greet them in the street although he did not know their surname. Mr Reeve said that a day or two after Mrs Rayney went missing, Mr Rayney left a note with his phone number asking Mr or Ms Reeve to contact him. Mr Reeve did not call him. He said that after that, he was walking with his wife down the street when Mr Rayney approached him and asked if he could park his car in front of his house where Mrs Rayney usually parked. Mr Reeve said that he did so for about two days. He said that around lunchtime on the weekend after he parked his vehicle outside the Rayney residence he saw Mr Rayney mowing the lawn on the verge on the Canning Highway side of his driveway, being the other side of his driveway from the side where Mrs Rayney would generally park her car. He identified this as having been on the weekend of 11 or 12 August 2007. He could not recall what Mr Rayney was wearing, but said he was using a four wheel rotary mower which looked old and might have been white. He said he saw Mr Rayney wheel the lawnmower out, start it up and use it to mow the grass around the power pole on the verge near his driveway. He was confident that that was the only area Mr Rayney mowed. He said he then saw Mr Rayney wheel the lawnmower back behind the wall surrounding his property. He said he had never seen Mr Rayney mow the lawn before or since. Mr Reeve said that the lawnmower was later put out for verge side collection but he could not remember how long afterwards it was that he told the police that it was on the verge.

737 Mr Reeve had previously signed a handwritten statement to police on 22 August 2007 concerning a neighbour asking to borrow a spade, but in that statement had said that he had not noticed anything else that was suspicious.[582] In these proceedings, Mr Reeve said that he had not mentioned seeing Mr Rayney mowing the lawn when he first spoke to police because at that stage Mr Rayney was not a suspect.[583] A typed version of the handwritten statement was signed by Mr Reeve on 26 October 2007. DSC Albuquerque attested that statement as a witness at Cloverdale.[584]

738 Mr Rayney said that he never mowed the verge, front lawn or back lawn at Monash Avenue. He said in August 2007 they had a regular gardener, Mr Christopher Bond, who did all the lawn mowing and work in the garden. He said that he had not seen a lawn mower left on his front verge for collection and he did not leave a lawn mower on the front verge.[585]

739 Mr Bond gave evidence that he mowed the lawn at the Rayney residence on Wednesday, 8 August 2007 as part of his regular maintenance of the Rayney's garden. He left just before 2.00 pm that day. Mr Bond's witness statement was tendered by consent.[586]

740 Both Caitlyn and Sarah Rayney said that the lawns at the Rayney residence were mowed by the gardener named Chris and that their father never mowed the lawns. Both said that they had never seen him use a lawn mower and that they had never owned a lawn mower.[587] Neither witness was crossexamined in relation to that evidence.

741 Mr Reeve was crossexamined about his observation. Despite his explanation in evidenceinchief that he had not mentioned the mowing of the lawn when he spoke initially to police because at that stage Mr Rayney was not a suspect, on reflection in crossexamination he said that he may have told DSC Albuquerque, who took his statement in August 2007, but that DSC Albuquerque did not write it down at that point.[588] Despite the fact that DSC Albuquerque wrote that the statement was witnessed in Cloverdale, Mr Reeve said that he could not remember being in Cloverdale on 26 October 2007 and asserted that it would have been signed at Como.[589] Mr Reeve maintained that it was he who told the police that the lawn mower was later put out for verge side collection.[590] He maintained that he told the police that at his home. He was unclear whether that was when the police attended at his home on 31 December 2007 in order to have him sign his second statement concerning the lawn mower but said it was 'around the time they were coming to collect evidence'.[591] That evidence is inconsistent with an entry made in a police running sheet by SC Fogg on 25 March 2008 which recorded that Raelene Reeve (Mr Reeve's then wife) 'called to advise that the white lawn mower referred to in her husband's statement has been put on the road side verge for collection this morning. However it has already been removed. She doesn't know who removed it'.[592] Mr Reeve maintained that he recalled the lawn mower being put out before March 2008.[593]

742 Mr Reeve was asked on two occasions whether he was mistaken in saying that it was Mr Rayney who was mowing the lawn and on both occasions replied 'I'm pretty sure' it was Mr Rayney.[594]

743 There is a clear conflict between the evidence of Mr Reeve and that of Mr Rayney. The latter receives some support from the unchallenged evidence of Caitlyn and Sarah Rayney. It is apparent that Mr Reeve's recollection of some events conflicts with other documented evidence. Mr Reeve's statement as to his observation only became the subject of a police statement on 31 December 2007. It is unclear when the matter was first raised by him with police but it would seem likely that it was no earlier than when he signed his first statement in its typed form on 26 October 2007; it was possibly at some later time closer to 31 December 2007. In those circumstances, I am not satisfied as to the reliability of Mr Reeve's evidence, and I am therefore not satisfied that the defendant has established this particular.

Plaintiff's response to Ms Porter when told of a camera at Ms Porter's front door (Defence [36(xliiib)] Reply [47A.60])
744 The defendant asserts that on 28 August 2007, the plaintiff, after Ms Julie Porter, who resided across the road from the Rayney residence, told the plaintiff that she had a camera at her front door, looked shocked and fearful and only relaxed after Ms Porter explained the cameras were 'not recording'.

745 This particular is denied by the plaintiff.

746 Ms Porter gave evidence that on the Tuesday night before Mrs Rayney's funeral, which would have been 28 August 2007, at Mr Rayney's request she went to his house where Raelene Johnston and Caitlyn Rayney were waiting. Mr Rayney raised the question of rumours circulating about him, and asked

her to provide a copy of all the emails which she had exchanged with Mrs Rayney. Ms Porter said that she agreed to copy them onto a disc because she was 'afraid of Lloyd'. Mr Rayney then told her that he was getting $25,000 worth of security in his house and asked about what security she had. She replied that she had an alarm and a camera at the front door. She said:

> As soon as I said that, his head spun towards me and said, 'what, you have a camera at the front door?'. Lloyd looked startled and his face went white.

747 She said that she then explained that the camera is only for the purpose of showing who was at the front door and did not record, and Mr Rayney appeared to calm down.

748 Ms Porter was crossexamined about this evidence. She rejected the proposition that Mr Rayney might be surprised at the prospect that she might hold vital evidence that might exculpate him and identify the true offender.

749 Mr Rayney said he was unable to recall any discussion about security systems with Ms Porter, although he said if the topic had come up in discussions then he would have done so. He denied having any conversation with her about having a camera at her house during which he was shocked or surprised. He said that Ms Porter's house had been renovated extensively and either because he was told or because he made an assumption, he believed before August 2007 that her house had security cameras.[595]

750 Raelene Johnston gave no evidence about this occasion, and was not asked any questions in crossexamination about it.

751 I have previously made observations about Ms Porter's bias against Mr Rayney. Any significance that might be attributed to Mr Rayney's reaction to a conversation concerning a camera at Ms Porter's house is entirely dependent upon Ms Porter's subjective interpretation of that reaction. Her bias against Mr Rayney was demonstrable from as early as 8 August 2007. I do not consider that evidence as to her subjective interpretation of Mr Rayney's demeanour is a reliable basis upon which to rely. I am not satisfied that this particular is made out.

Cancellation of appointments with police (Defence [36(xliv)] Reply [47A.61])

752 The defendant relies on a contention that the plaintiff repeatedly cancelled appointments with police officers and ultimately declined to make a new appointment to give a further statement to assist Operation Dargan. The appointments referred to were a meeting with police and Mrs Rayney's family planned for 31 August 2007 at Sharon Coutinho's house, a meeting with police scheduled for 14 September 2007 and a cancelled meeting with police scheduled for 18 September 2007.

753 The plaintiff admits not attending an appointment on 31 August 2007. He says he was unable to attend but that the appointment was not to meet police but was an appointment regarding the funeral of Mrs Rayney to be held the next day on 1 September 2007. He pleads that the two meetings in September 2007 with DS McKenzie were cancelled on the advice of a barrister, and that by September 2007, he had made clear to DS McKenzie and DS Correia that he and his children did not want DS McKenzie to be the family liaison officer, but despite those protests, DS McKenzie remained the police officer dealing with the plaintiff.

754 There is no significance, in terms of behaviour giving rise to suspicion, that Mr Rayney did not attend the meeting on 31 August 2007. On 30 August 2007, DS McKenzie rang Mr Rayney. He said that he and DS Correia 'would like to talk with you and Sharon, and possibly Raelene and Ernest, tomorrow afternoon about the funeral and how we can help and our attendance there and that type of stuff'.

755 He continued:

> So if you could ring Sharon, or Sharon is going to ring you about firming that up and we are quite happy to have - if Raelene wants to come along as well or Brad or Ernest, if there's any questions you've got about how we're doing, it's just going to be me and Carlos, Carlos being the boss, and also - it's basically just to say have you got any concerns about the funeral that we may be able to help you with, but also about security regarding ... concerns that your daughters might have.
>
> ... and also if you've got problems with the media and that type of stuff.[596]

756 In a subsequent phone conversation on 6 September 2007, DS McKenzie referred to the meeting the previous Friday in the context of suggesting that Mr Rayney would have received the message that DS McKenzie was to remain as the family liaison officer despite Mr Rayney's protest. Mr Rayney indicated that he had not received that message but observed that he had been told that what that meeting was for was to discuss security at the funeral. DS McKenzie agreed but said that he had suggested that anything else that Mr Rayney wanted to talk about could have been brought up at that meeting. That conversation ended in further expressions of concern by Mr Rayney about DS McKenzie's manner of dealing with him.[597]

757 The following day DS McKenzie and Mr Rayney had a brief phone conversation on mobile phones where interference prevented them continuing. Mr Rayney then rang DS McKenzie again. The latter half of that long conversation is set out above.[598] In that conversation DS McKenzie told Mr Rayney that they would like him to expand on his statement and invited him to 'have a think about it' over the weekend.[599]

758 On 10 September 2007, DS McKenzie left a message on Mr Rayney's answering machine to the effect that he wanted to catch up and see how Mr Rayney and his daughters were going and to talk about what had happened over the past two or three days and also to see if they could organise a catch up to extend or expand Mr Rayney's statement as previously discussed.[600]

759 About an hour later, Mr Rayney phoned DS McKenzie in response to his message. They had a long discussion about various aspects of the investigation with Mr Rayney making enquiries as to whether or not certain matters had been followed up. After some time, the conversation turned to DS McKenzie's request of Mr Rayney to expand on his statement. Mr Rayney indicated that he was 'happy to talk' to DS McKenzie. They discussed the areas that might be covered in a further statement. The discussion concluded with DS McKenzie saying that he would consider further the topics to be covered, and revert to Mr Rayney the following day by email.[601]

760 DS McKenzie followed up with an email on 11 September 2007 outlining six points to be covered in a further interview. The email concluded by suggesting that either DS McKenzie would ring Mr Rayney, or Mr Rayney should ring him, to organise a time to get together for further discussions.[602]

761 DS McKenzie rang Mr Rayney later at 7.53 am on 12 September 2007 but Mr Rayney told DS McKenzie that he was occupied getting his daughters to school and agreed to call him back later. He did so at 9.37 am. They arranged to meet the following Friday at 11.30 am.[603] The meeting was to be in Mr

Rayney's chambers. On 14 September 2007 at 10.38 am, Mr Rayney phoned Mr McKenzie and asked to reschedule the meeting because people were installing security at his home as well as other trades persons. He apologised and they rescheduled the meeting for the following Tuesday at 12.00 pm.

762 On 18 September 2007, Mr Rayney phoned DS McKenzie at 9.16 am, and told him that he was cancelling their appointment for that day and did not want to schedule another one.[604] Mr Rayney gave evidence as to why he took that step. There were objections to parts of that evidence on the basis that it was said to be irrelevant or nonresponsive. I would not uphold those objections. The paragraphs go to Mr Rayney's reasons for cancelling the appointment which are relevant to the assessment of his conduct, although I accept that his uncommunicated reasons are not relevant to the assessment of the grounds for the suspicion imputation. Mr Rayney's explanation was that, by the time of that call, he was deeply troubled by the police conduct and his perception that they were fixated on him and not finding the actual murderer. He was aware of historical Western Australian murder investigations which resulted in innocent people being wrongly convicted. He was concerned for the welfare of his young daughters should he be wrongly convicted. He said he spoke to an experienced lawyer whose judgment he trusted and was advised not to meet with DS McKenzie. He accepted that advice and decided to refuse to be interviewed.

763 I am satisfied that, at least from 7 September 2007, the police made it clear to Mr Rayney that they wished to have him expand on his statement. The tenor of the discussions by phone between Mr Rayney and DS McKenzie, which were recorded and tendered in evidence, demonstrated at least a reticence on Mr Rayney's part to being interviewed, and ultimately a refusal. I find that that reticence and refusal was such as to be capable of contributing to a suspicion against Mr Rayney.

Failure to respond to demands by police officers executing search warrant on 20 September 2007 (Defence [36(xlv)] Reply [47A.62])
764 The defendant asserts that the plaintiff did not respond to loud and repeated demands by Western Australian police officers executing a search warrant at the Rayney residence on 20 September 2007 for entry to the house with the result that it was necessary for the police to force entry to the house.

765 That assertion is denied by the plaintiff.

766 Operational orders for the search of the Rayney residence on 20 September 2007 were prepared some days before the search was carried out.[605] They provided for pretext calls to be made by Mr Pearson early that morning, and for surveillance of Mr Rayney to be in place from early in the morning. They recorded that it was envisaged that Mr Rayney would be present with his daughters at the house, and that he would be an arrested suspect at that point. It was proposed then to convey Mr Rayney to the MCS for a formal interview.[606]

767 The search commenced a few minutes after 9.00 am. In fact, by that time, Mr Rayney's daughters had been taken to school. Mr Rayney was at his home with his mother, Ms Molly Rayney. The search was led by DS Hart who was accompanied by DS Saunders, DC Fogg, DC Pieri and DSC Albuquerque.

768 DS Hart said that the search warrant of 20 September 2007 was different from the first search of the Rayney residence in that it was much more targeted at things coming out of the investigation. He said that when they arrived at the front door, he knocked loudly at the front, side and rear doors and called out 'police' on several occasions. He said that other officers were calling out things like 'police', 'search warrant', and 'open the door'. He said that he and DC Fogg were at the front door, and other officers, including DC Pieri and DSC Albuquerque went around the back of the house knocking loudly.

He said he was shouting and could hear DSC Albuquerque and other officers shouting. He went to the side of the house and tried to force entry without breaking the door. Eventually, DSC Albuquerque forced entry through the French doors at the rear of the house.[607] DC Pieri said that DS Hart knocked at least three times with knocks separated by yelling 'police' 'search warrant'. He said at the time three or four of them were also yelling out those words. He said that when he went to the side of the house he was knocking on the laundry door and the living room windows and yelling out 'police'.[608]

769 DSC Albuquerque gave evidence to the same effect. He said that while he was yelling at the rear French doors, he could hear other police officers yelling at the front of the house. He said that, all up, there would have been at least six police officers calling out similar things. He estimated that it was between five and ten minutes from the time that they arrived that they forced entry.[609] DSC Albuquerque said that when they first arrived at the premises, one of the officers 'vigorously knocked on the front door'. DS Saunders also spoke of officers yelling out, saying that the knocking and shouting by police, including himself, was loud.[610]

770 While the police were endeavouring to get access to the Rayney residence, DS Hart made two phone calls to Mr Rayney's landline. Neither was answered, each went to a voicemail, one of which appears to be the voicemail message on Mr Rayney's mobile, and the other on his landline. There are several records of those phone calls, which give slightly different times of each. It is clear, however, that the first call was made around 9.03 am or 9.04 am[611] and the second around 9.08 am.[612] In the second of those calls, someone, presumably DS Hart, can be heard saying 'the phones engaged'. No shouting or banging can be heard in the background. That would suggest that the shouting and banging was not continuous between the period that the officers first arrived and when they forced entry through the rear doors.

771 Mr Rayney said that his mother's presence at home when the banging on the doors started was a source of stress to him because of her fragility and age and distress about what was occurring. He said his mother came towards him and looked very frightened and that he could see one or possibly two shadowy figures at the front of his house. He described the banging on his door as pounding rather than knocking. He said he was frightened and did not know what to do. Very shortly afterwards there was more banging coming from different parts of the house in a manner which was loud and aggressive. He said at no time did he hear anyone say the word 'police'. He said that he called his sister and asked her to go to the school and look after the children because he wanted to make sure that they were safe. There does not appear to be a record of that call from either the Rayney landline nor Mr Rayney's mobile.[613] Mr Rayney also said that he called a barrister, Ms Gail Archer. There is no record of that call in Mr Rayney's phone records. The video taken of the search shows, however, Ms Archer arriving at the house shortly after the police arrived. That is consistent with Mr Rayney having called her earlier. Mr Rayney said that he was unaware who it was who was outside the house, and speculated that it might have been the media. He said that his mother was quite distressed and was crying. He then made a call to his solicitor, Ms Blackburn, from his home landline. That call was recorded. Before the call was answered, shouts of 'police' and 'don't move' can be heard in the background accompanied by footsteps. While the phone is ringing, Mr Rayney said words which appear to be 'good. I didn't know who you were'. The phone was then answered, and Mr Rayney says:

> Hello. Amanda? It's Lloyd. The police have come into my home. I heard a lot of banging and shouting. I didn't know who they were. They've just broken in. If I knew who they were, I would have let them in.

772 Mr Rayney then asked his solicitor to come to his home and provided his address. She agreed to come.

773 The video taken by police of the search commences with DS Hart saying that the police had been knocking at the door for some five to ten minutes and calling out to identify themselves. Mr Rayney interrupted DS Hart and said that the police had not identified themselves and he had not heard them do so until after they had forced entry. In crossexamination, Mr Rayney maintained that the police were pounding and banging on the door and that he recalled that at one point he heard someone call 'Lloyd' from the side of the house.[614] He maintained that if he had known it was police he would have let them in, because it would be ridiculous for him to hide if he knew the police were banging on his door because he would have known that they would force their way into the house if they were not let in.[615]

774 Ms Molly Rayney said that she was in the family area towards the back of the house and Mr Rayney was in one of the inner rooms when banging started on the outside of the house, initially at the front door. She said she called out for Mr Rayney who came to the passageway next to where she was. She said the doorbell did not ring. She then heard banging which sounded like it was coming from the garage door. She said that no one was saying anything so she did not know what was going on. The banging continued and she thought the glass was going to shatter. She said that it was obvious that there was more than one person because banging was happening on different locations of the house. There were no requests or demands to be let in. She felt intimidated. She realised it was the police when they forced the doors and 'stormed in'.[616]

775 The evidence makes clear that the police adopted an aggressive approach to the execution of the search warrant on 20 September 2007. There is no suggestion in the evidence that the doorbell was rung (notwithstanding numerous references, in the course of the trial, to there being a doorbell at the Rayney residence). The general tenor of the evidence is that the banging on doors and windows was forceful. The police were quick to move from the front door to the side and rear of the house when the initial banging went unanswered. The accounts of the police officers of yelling and shouting accompanied by loud banging on doors and windows paints a picture of an aggressive and threatening entry. I accept that those events were likely to have caused confusion and, in Ms Molly Rayney's case, some degree of fear and anxiety. I find, however, that at some point before the police forced entry, Mr Rayney must have realised that it was the police seeking entry. It is unlikely that, despite the fact that there were people yelling from different directions, Mr Rayney did not at some point hear the word 'police'. That he was in the process of calling his solicitor at the time the police forced entry suggests that, by that time, he had realised it was the police commanding entry. The only reason for calling his solicitor at that point would appear to be that he wanted her to be present when the police spoke to him, a matter he made very clear when the video of the search commenced. I do not, however, find that Mr Rayney's statement to the police as they entered, namely that he did not realise that it was the police, and the statement made to the same effect to his solicitor on the phone, was a fabrication. It is likely that, in the initial confusion, he did not realise that it was the police pounding on his door and shouting to open up. While I find that Mr Rayney had realised that it was the police seeking entry by the time he rang Ms Blackburn, it is uncertain at what point in the seven or eight minutes that the police were there before entering that he came to that realisation.

776 I find, therefore, that Mr Rayney did fail to give access to the police after he realised that it was the police seeking entry, and that failure endured for a matter of minutes. In considering the significance of this issue, it should be noted that there is no suggestion in these proceedings, nor was there any suggestion by any witness, that the delay was used by Mr Rayney to do anything which might interfere with the effect of execution of a search warrant such as concealing or destroying any evidence. Rather, his motivation appears to have been that he was anxious to have the benefit of legal advice when the police executed the search warrant.

Level of cooperation with police officers during interview at Curtin House on 20 September 2007 (Defence [36(xlvi)] Reply [47A.63])

777 The defendant asserts that the plaintiff refused to extend any level of cooperation to police officers who interviewed him at Curtin House on 20 September 2007 after his arrest. In the Reply, Mr Rayney denies that fact and says that he provided fingerprints, a buccal swap, and permitted two photographs to be taken of him as well as answering some questions on a video recorded interview. He pleads that he otherwise maintained his legal right not to answer any questions, particularly in light of the fact that he was denied access to a lawyer.

778 Mr Rayney can fairly be described as having been uncooperative not only at Curtin House after his arrest, but also in relation to the initial stages of the search of his home which the police recorded on video. Mr Rayney's approach generally was to remain silent in respect of most questions put to him. That silence extended to declining to acknowledge his name. In substance, the questions which he answered, both at the initial search of his home, and in the video interview conducted at Curtin House, related to whether he wished to answer questions and in relation to the way he had been treated by police. The position adopted by Mr Rayney appears to be that he was acting on legal advice, which I accept he most likely received, to decline to be interviewed. It is surprising, given Mr Rayney's experience as a prosecutor, that he took that advice as extending to acknowledging almost anything about which the police questioned him, including questions as to his name and whether he understood the caution that the police had administered.

779 In its closing submissions, the defendant acknowledged Mr Rayney's right to decline to answer questions, but says that that refusal is significant because of Mr Rayney's evidence in relation to other particulars of conduct, that he would have provided information to the police if they had sought it. [617] The defendant contends that the exercise of the right to remain silent was suspicious because it told of the plaintiff's continuing unwillingness to assist the police.

780 Mr Rayney's references to assisting the police clearly related to the earlier parts of the investigation into the death of his wife. It is quite apparent that by 20 September 2007, the police were treating Mr Rayney as a suspect in relation to the murder of his wife, and were proposing to charge him in respect to the *Surveillance Devices Act* matter. Mr Rayney's conduct on 20 September 2007 in relation to the police enquiries were undoubtedly affected by the fact, which was clear to Mr Rayney, that he was to be charged in relation to the surveillance device. That was a serious matter for him. Care needs to be taken in assessing his conduct in that context.

781 It is not easy to understand the way that Mr Rayney conducted himself when confronted with the search of his house, and his arrest as a suspect. I do not accept that, to the extent that Mr Rayney was uncooperative, his lack of cooperation can be construed as indicative of the use of experience as a prosecutor to avoid selfincrimination. Refusing to agree to acknowledge his name, or that he understood the cautions that had been extended to him, frankly makes no sense. His identity was not likely to be any issue, and his refusal to answer questions on legal advice simply reflected an understanding of the caution which he had been given.

782 I find that Mr Rayney did fail in some respects to extend cooperation to the police at Curtin House when interviewed on 20 September 2007. He was, however, at that stage confronted with not only suspicion in relation to his wife's disappearance, but also suspicion in relation to the *Surveillance Devices Act* matter in respect of which he was to be charged. By 20 September 2007, Mr Rayney had cause to apprehend that the police were focused upon him as the offender in his wife's murder. His relationship with the police was obviously, at that stage, nonexistent. Any lack of cooperation must be appreciated in that light. I do not consider that his declining to participate in a video record of interview in the sense of declining to answer substantive questions can be treated as a factor contributing to suspicion of involvement in his wife's murder.

Summary of findings on circumstances and conduct

783 The findings that I have made in relation to the particulars of circumstances and conduct pleaded by the parties can be grouped into different categories for the purpose of assessing the contribution that they might make to grounds for suspicion that Mr Rayney killed his wife. There are:

those that are capable of contributing to suspicion;
those that are simply pieces of background information available to police which may or may not have been significant depending on what other information emerged from the investigation;
those that are equivocal; and
those that are inconsistent with his involvement in her death.

784 Two matters that were obviously significant in the eyes of the investigating police were first the relationship between Mr and Mrs Rayney and secondly the suggestion, principally drawn from the finding of Liquidambar pods, diosma and suspected brick dust in Mrs Rayney's hair, car and boots respectively, that the offence may have occurred at the Rayney residence. A number of the particulars relied upon by the defendant relate essentially to the state of the relationship, and thus to the question of motive, rather than being, in any other way, separately capable of pointing to Mr Rayney's guilt or throwing any light on what happened on the night of 7 August and the early hours of 8 August 2007.

Particulars capable of contributing to suspicion

Relationship between Mr and Mrs Rayney

785 There was acrimony in the relationship between Mr and Mrs Rayney, although most of what can be described as acrimony emanated from Mrs Rayney and to a large extent was contained in emails from her to Mr Rayney or on some occasions to others. In particular, I have found that:

While there had been tensions in the Rayney marriage for some years, the relationship between Mr and Mrs Rayney became more strained from the early months of 2007.
Around May or June 2007, Mrs Rayney was becoming increasingly anxious and agitated about financial disclosure by Mr Rayney, leading to Mrs Rayney consulting Ms Anderson.
On 25 June 2007, Mrs Rayney assisted by Ms Porter, moved Mr Rayney's belongings into a spare bedroom at the Rayney residence and thereafter they slept in separate bedrooms. Mr Rayney accepted that without complaint.
It is not accurate to say that Mrs Rayney was 'demanding' that Mr Rayney move out of their home, although she clearly wanted him to do so. It is likely that Mr Rayney had, by the beginning of August 2007 come to the realisation that he would be moving out of the house.
Mrs Rayney was open to her close friends and family about her marital problems, but there were occasions when Mr and Mrs Rayney did things together and portrayed themselves as a normal family.
Each of Mr and Mrs Rayney had engaged family law solicitors and each was apparently accepting and following the advice of those solicitors.

786 An aspect of the relationship was the tensions in relation to financial disclosure. During 2007, Mrs Rayney became increasingly agitated by Mr Rayney's refusal to provide full disclosure of his income. Mr Rayney took steps to at least obscure his income during the first half of 2007.

787 Mr Rayney was saddened by the prospect of divorce, but by August 2007 had come to the realisation that it appeared inevitable.

788 A further issue in the relationship related to Mr Rayney's gambling which had been a concern from time to time since around 2000. Although I am satisfied that Mr Rayney's gambling did not go beyond what he could afford, Mrs Rayney would undoubtedly have been concerned and angry had she known of the level of his gambling in 2007.

789 Mrs Rayney was aware that Mr Rayney had been unfaithful sometime prior to 2003, and saw that as something she could use against Mr Rayney in the context of their impending separation.

790 Mrs Rayney had made an insinuation against Mr Rayney in an email on 13 July 2017 that Mr Rayney found disgusting.

791 Mr Rayney was aware that Mrs Rayney was saying highly critical things about him to friends and was making threats to damage his career. He did not, however, believe that Mrs Rayney was in a position to significantly damage his career. He was concerned about potential embarrassment that his wife's criticisms might cause.

792 I have found that Mr Rayney used a dictaphone to record conversations with Mrs Rayney and did so without her consent. I have also rejected Mr Rayney's explanation for why he did so. It is not easy to understand what reason he had for doing so. The content of the recordings, and the occasions on which they were made (including conversations with the children that do not involve Mrs Rayney and seem entirely innocuous, and normal conversations between Mr and Mrs Rayney concerning arrangements for a holiday), give no hint as to the purpose for which they were made. To the extent that the recordings were of arguments between Mr and Mrs Rayney, they do no more than indicate the state of their relationship. Whatever may have been Mr Rayney's motivation, given the absence of anything in the recorded exchanges between Mr and Mrs Rayney suggestive of any likelihood of violence between them and given that they were made over what appears to be a relatively short duration at least four months before Mrs Rayney's death, I do not consider that Mr Rayney's conduct in making the recordings can be said to be conduct supporting a suspicion that he murdered his wife.

Suggestion that offence occurred at the Rayney residence

793 Mr and Mrs Rayney had arranged to meet after boot scooting after 9.30 pm on 7 August 2007, and both were looking forward to the meeting. That fact suggests that Mrs Rayney is likely to have intended to go straight home after boot scooting, although it obviously does not lead to the conclusion that the intention was realised. In assessing the weight to be given to that factor, it is necessary to bear in mind my findings as to the lack of observations of Mrs Rayney at Monash Avenue. Those findings are:

police conducted a door knock of every residence on Monash Avenue, Como, and residences in nearby streets, and no one saw or heard Mrs Rayney's car arrive at the Rayney residence at 9.30 pm or at any time after that on 7 August 2007;
the driveway to the Rayney residence did not have a gate and was clearly visible to neighbours across the road, pedestrians who walked past and occupants of cars which drove past;
no one saw Mrs Rayney's car in the driveway or near the Rayney residence at any time after 9.30 pm on 7 August 2007;
no one saw or heard Mrs Rayney's car depart the Rayney residence at any time after 9.30 pm on 7 August 2007;
Mr Rayney and Sarah Rayney were at home when Mrs Rayney went to boot scooting until about 7.30 am on 8 August 2007;
Sarah Rayney's bedroom was upstairs and overlooked the driveway;
Caitlyn Rayney was at home from approximately 10.30 pm to 10.45 pm until after 7.30 am on 8 August 2007;
794 • No one (including residents of Monash Avenue in Como) saw Mr Rayney in his driveway or outside his home on the evening of 7 August 2007 or in the early hours of 8 August 2007.

The significance of the Liquidambar pods

795 The finding that Liquidambar pods were found entangled in Mrs Rayney's hair was, as I have noted above, clearly a factor that gave support to the possibility that Mrs Rayney met foul play at the Rayney residence, although it was obviously not conclusive. It can also be observed that the finding puts her possibly in the front garden at some stage, but says nothing about whether she was at any point inside the house.

Lack of cooperation

796 Although, as I have found, there are possible explanations for Mr Rayney's diminishing level of cooperation with the police, it was reasonable for police to view that lack of cooperation, including his cancellation of appointments, with a degree of suspicion. So too, although Mr Rayney's reluctance to have his daughters reinterviewed by police after the request by DS McKenzie on 6 September 2007 may have had an innocent explanation, his failure to accede to the request was capable of being perceived as suspicious. For the reasons discussed above, I do not consider there to be any adverse inference to be drawn from the failure of Mr Rayney to give access to his house when the police attended to execute the search warrant on 20 September 2007. Nor do I accept that much can be made of his lack of cooperation at Curtin House after his arrest in the context of suspicion of involvement in his wife's murder.

Relevant background facts

The location of the coat on Mrs Rayney's bed and her wallet in her car

797 As discussed above, no inference as to whether Mrs Rayney came home after boot scooting can reliably be drawn from the evidence on these matters, either separately or when considered with other evidence. On the basis of the evidence available to police as at 20 September 2007, any inferences based on those matters was entirely speculative.

Occupants of the Rayney residence

798 By itself this particular means nothing. Its significance hangs off the conclusion that Mrs Rayney returned home. That neither daughter nor Ms Russell noticed anything untoward militates against Mr Rayney's involvement, but his occupation of the house is obviously relevant to the question of opportunity if in fact Mrs Rayney did return home.

Finding of the place card and Mr Rayney's attendance at the Bluewater Grill

799 As at 20 September 2007, the origins of the card that had been found by Prof Roberts were not known to police. Even when its origin became known, the circumstances as to how it might have come to be where it was were very much a matter of conjecture. The likelihood that Mr Rayney might have changed out of his pyjamas (which Caitlyn said he was wearing when she arrived home) into whatever he had worn to the dinner function at the Bluewater Grill, or somehow have the card in his possession if he was wearing something else, does not seem strong. An alternative possibility is that Mrs Rayney had the card in her purse or in her car and it was dislodged by whoever emptied the contents of her purse in the car. It is not possible to prefer one possibility over the other. Clearly this was a matter that warranted further investigation but certainly as at 20 September 2007 was no more than that.

Arranging for listening device and listening to call

800 Mr Rayney's conduct in relation to the installation of the listening device at his home was inappropriate and discreditable. It is not apparent, and certainly was not apparent by 20 September 2007, whether it was capable of contributing to suspicion that Mr Rayney killed his wife. It was a factor that threw some further light on the nature of the relationship between Mr and Mrs Rayney. There could be no justification for treating Mr Rayney's conduct in relation to the listening device as indicative of a nature that suggested a propensity to engage in extremely serious unlawful conduct such as homicide.

Plaintiff's instruction to Mr Pearson

801 I have found that Mr Rayney's comment to Mr Pearson in the course of the second phone intercept call was intended to suggest to Mr Pearson that he not mention the installation of the listening device to police. The defendant relies on this fact to suggest, when considered with all the other conduct and circumstances, a basis for suspicion of Mr Rayney. In his reasons in the murder trial, Brian Martin AJ made certain findings adverse to Mr Rayney in relation to lies that he found Mr Rayney to have told in relation to recordings of his conversations with Mrs Rayney. He found that those lies were not necessarily indicative of a consciousness of guilt of murder. He said:

> There are other reasonable explanations. In particular, the accused is likely to have been fearful that his conduct would be seen as discreditable and damaging to him in a professional context. In addition, given the conduct of the police toward the accused and his distrust of the police, the accused would have been less than enthusiastic about assisting the police with material that might be used by the prosecution to advance its case against him. An innocent person in the circumstances of the accused would want [sic] avoid assisting the prosecution equally as much as a guilty person.[618]

802 Although the statements to which Brian Martin AJ was referring were made after 20 September 2007, there is no doubt that Mr Rayney's mistrust of the police was well established by the time of his conversation with Mr Pearson. His Honour's comments are apposite to the suggestion to Mr Pearson made in the second intercept call.

Equivocal particulars

Absence of reports of suspicious behaviour

803 The fact that no one observed anything in Monash Avenue on the night of 7 August or the early morning of 8 August no more suggests involvement of Mr Rayney than involvement of anyone else. It certainly leaves open the possibility that the offence occurred somewhere else.

Other reported sightings

804 The evidence in relation to Constable McLeod's and Mr Ellis' reported sightings relate to different lines of enquiry from that relating to any involvement by Mr Rayney in his wife's death. Although I have found that the reasons for the police rejecting those reports were questionable, the existence of alternative lines of enquiry does not impact on the assessment of the factors that might be used to suggest involvement by Mr Rayney.

The location of Mrs Rayney's car

805 Beyond raising questions as to the possibility of Mr Rayney's involvement having regard to questions of timing of events, the location of Mrs Rayney's car does not point one way or another to Mr Rayney's involvement.

Missing passport

806 The enquiry that led to the discovery that Mrs Rayney's passport was not located where it was usually kept came from DS Robinson. It was Caitlyn Rayney who went to look for it. There was no conduct by Mr Rayney that could be seen as seeking to rely on the missing passport to in any way explain Mrs Rayney's disappearance.

Plaintiff's experience as a lawyer

807 The significance of this fact is that it is said by the defendant to raise a suspicion about aspects of the plaintiff's conduct and particularly his alleged refusal to allow his daughters to be interviewed. I have found the particular made out. Precisely why that experience makes the plaintiff's conduct more suspicious than would otherwise be the case is not readily apparent.

Lack of enquiries as to Mrs Rayney's whereabouts on 7 August 2007

808 In the circumstances discussed above, Mr Rayney's failure to make enquiries of Mrs Rayney's whereabouts does not constitute a basis for suspicion.

Plaintiff's enquiries as to Mrs Rayney's whereabouts on 8 August 2007

809 There is no basis for suspicion arising from the mistaken assumption made by Mr Rayney and his daughters that Mrs Rayney must have gone to work early for the reasons discussed above.

Particulars inconsistent with involvement

Opportunity

810 The timing of Sarah Rayney going to sleep, Caitlyn Rayney and Ms Russell arriving at the Rayney residence after the concert, Caitlyn Rayney completing her homework and reading in bed, when considered with the absence of anything unusual being observed by any of them, and the evidence of Mr Rayney's demeanour and conduct when Caitlyn arrived home, raise significant questions as to the opportunity for Mr Rayney to have killed his wife and then hidden her car and body within the time frame when Sarah went to sleep and Caitlyn arrived home.

Access to a digging implement

811 The only evidence concerning Mr Rayney's access to a digging implement suggests that he did not have any spade or shovel at his home on the night in question. If DSS Lee's theory that the death was an unplanned outcome of an argument were accepted, obtaining a digging implement in the middle of the night would necessarily require more time to complete the disposal of the body than calculated by the defendant, making the timeframe even tighter.

Particulars relied on by the defendant that are not established

812 The particulars of circumstances and conduct relied upon by the defendant, and apparently by at least some of the police involved in the investigation who held the suspicion against Mr Rayney, that are not established are as follows:

that Mr Rayney had concerns as to the effect of divorce on his reputation and his family's reputation;
that the manner of disposal of the body supported suspicion of Mr Rayney's involvement in the death;
that Mrs Rayney was buried in the early hours of 8 August 2007;
that Mr Rayney made a public appeal for help on 12 August 2007;
that the plaintiff did not use the landline at the Rayney residence while the listening device was in place;
that Mr Rayney made inconsistent statements on 8 August 2007 about Mrs Rayney's failure to return home;
that there was anything suspicious about statements made by Mr Rayney to Mr and Ms Coutinho on 8 August 2007;
that Mr Rayney failed to mention an acrimonious separation when making a statement to police;
that the plaintiff failed to provide a truthful answer to DS Robinson's question about the alarm system;
that there is any significance in Mr Rayney's reference to Mr Roberts as a person who may have a grudge against him;

that there is any significance in the plaintiff's request to DS Robinson and DI Prins to wait until his sister completed a phone call before continuing their discussion on 9 August 2007;
that the plaintiff interrupted the interview by police of his daughter Sarah in any way as to provide a basis for suspicion;
that Mr Rayney refused to permit his children to see members of Mrs Rayney's family without his supervision;
that there is any significance in Mr Rayney's request to staff members at Penrhos College concerning collection of his daughters from school;
that Mr Rayney refused to permit his daughters to go to counselling;
that Mr Rayney mowed his lawn on the weekend of 11 12 August 2007; and
that there is any significance in Mr Rayney's reaction to Ms Porter's statement about a security camera at her house.

Circumstances and conduct relied upon by the plaintiff

813 In [47B] of the Reply, the plaintiff pleads over one hundred facts or circumstances that he contends should be brought to account in assessing whether the conduct imputation or the suspicion imputation was true. A significant number of those are matters that concern facts that have been covered in the context of the circumstances and conduct relied upon by the defendant. In summary, the matters pleaded in [47B] of the Reply can be categorised as follows:

(i) matters in which Mr Rayney can be seen to have cooperated with police in their investigation;

(ii) Mr Rayney's good character and the absence of any history of violence;

(iii) the absence of any evidence of Mrs Rayney's movements after leaving boot scooting;

(iv) the absence of any observations of Mrs Rayney in Monash Avenue after the boot scooting class;

(v) the absence of any observations by Caitlyn or Sarah Rayney of any return to Monash Avenue by Mrs Rayney;

(vi) the implausibility of Mr Rayney being involved in Mrs Rayney's murder, including his conduct, appearance and demeanour the following morning;

(vii) the fact that, as at 20 September 2007, police were awaiting results of various forensic tests that may have been significant in any assessment of Mr Rayney's potential involvement in his wife's death;

(viii) matters that might suggest the involvement of others;

(ix) uncertainties as to the precise cause of Mrs Rayney's death; and

(x) the absence, despite extensive police enquiries and surveillance, of any evidence directly implicating Mr Rayney in his wife's murder.

814 A significant number of those particulars refer to matters that were not known to police as at 20 September 2007 and matters that cannot be said to be circumstances that inform the assessment of the plaintiff's conduct. They are thus not relevant for present purposes.

815 Given the conclusion that I set out below as to whether the defendant's pleaded matters establish the truth of either the conduct imputation or the suspicion imputation, it is not necessary that I review the evidence in relation to matters pleaded in [47B] of the Reply beyond the extent that they are dealt with above where they are relevant to the defendant's particulars. It is, however, fair to say that as at 20 September 2007, as subsequent events showed,

the investigation into Mrs Rayney's death was still in its very early stages, and DSS Lee's statement that 'I think we have the evidence' was a long way from the mark.

Conclusion as to truth of the conduct imputation and the suspicion imputation

816 The starting point in assessing the existence of reasonable grounds for either the conduct imputation or the suspicion imputation is to assess the meaning of the word 'suspicion' as used in the conduct imputation (that the plaintiff so conducted himself so as to give rise to a reasonable *suspicion* that he murdered his wife) and 'suspected' as used in the suspicion imputation (that the police *suspected* the plaintiff of having murdered or unlawfully killed his wife and had reasonable grounds for doing so).

817 I have noted above the observations of the Full Court in ***Sands v State of South Australia***[619] that a statement about a person's guilt or a speaker's perception of a person's guilt may be understood as meaning that a person is guilty, or that there are reasonable grounds to suspect that a person is guilty, or that there were grounds for investigating whether a person is guilty.

818 Both the conduct imputation and the suspicion imputation involve the more positive proposition than that there are merely grounds for investigating whether Mr Rayney was guilty of murdering his wife. That necessarily follows from the fact that the words were uttered by a police officer speaking on behalf of the investigating team and in the context of dramatic developments earlier in the day, and the reference to Mr Rayney as the prime and only suspect.

819 It is apparent from the evidence of the police officers who gave evidence as to why they subjectively formed a suspicion against Mr Rayney that they relied on many of the matters that I have found either not to be established, or to be equivocal as to any inference against Mr Rayney. Had I not reached the decision that I have as to the meaning of DSS Lee's words, the question that I would have been required to answer is whether, after all of those unestablished or equivocal matters are shorn away, there remains in the established particulars of circumstances and conduct sufficient to establish the truth of either imputation. In my view, in the circumstances known to police as at 20 September 2007, and in light of the plaintiff's conduct then and subsequently known, it cannot be said that there were reasonable grounds to suspect that the plaintiff murdered his wife or that he had so conducted himself as to give rise to that suspicion. Rather, those matters gave rise to no more than a basis, which clearly did exist, to investigate whether the plaintiff had any involvement in his wife's death. DSS Lee's words went well beyond conveying that meaning, as the defendant clearly acknowledges in its pleading.

820 I base that conclusion on the findings that in substance the police had no more than various indications showing that the relationship between Mr and Mrs Rayney was poor and they were on the point of separation, that Mrs Rayney intended to go home after boot scooting, that the presence of Liquidambar seed pods raised a suspicion (but fell well short of establishing) that Mrs Rayney had returned home on the night in question, and that Mr Rayney had demonstrated a lack of cooperation, although that lack of cooperation occurred after Mr Rayney, rightly or wrongly, developed a mistrust of the police and the police were aware of that dissatisfaction with them. While all those matters justified continuing to investigate any possible involvement by Mr Rayney, they provided no cogent theory as to the events of the night of 7 August 2007, and left unanswered many questions about the feasibility of Mr Rayney having been the offender. The reliance by police on matters that I have found to be equivocal, insignificant or not established in fact were a product of an approach taken by police, and adopted by the defendant in these proceedings, of starting from a presumption of guilt and then looking for circumstances or conduct that might be construed as consistent with guilt. A reasonable listener to DSS Lee's press conference would assume a more objective approach had been taken by police in forming any suspicions.

821 Had I found the words to have conveyed either the conduct imputation or the suspicion imputation, I would not have found the words to have been true.

Damages Republication

822 In some circumstances, where a defendant publishes a defamatory statement to a third party, and the third party then publishes that statement to another or to others, the defendant will be liable for the third party's republication. Each republication of a defamatory statement is a new defamation and if committed by different persons, each one is liable as if the defamatory statement had originated with him.[620]

823 The plaintiff has a choice with respect to how it chooses to pursue redress against the original publishers of defamatory republications. It may sue the defendant both for the original publication and any republications as a separate cause of action, or it may sue the defendant in respect of the original publication only, but seek to recover as a consequence of the original publication the damage suffered by reason of the republications.[621] It is the latter course which the plaintiff has taken in this action.

824 It is not in issue that an original publisher will be liable for republication where:

(i) the republication is authorised, expressly or impliedly;

(ii) the republication is intended;

(iii) the republication is the natural and probable consequence of the original defamation; or

(iv) where there is a duty on the recipient to republish the matter.[622]

825 Where a defendant makes a statement at a press conference, 'it may be taken without doubt that the natural and probable result of his act will be that his statement will be republished in the media, thereby making him responsible for that republication'.[623]

826 It has been held, and I accept, that when one is not concerned with separate causes of action in relation to republication, but is concerned with whether damage flowed from the original publication, even a partial publication of the original can be causative of damage.[624] As Laws LJ said in ***McManus v Beckham***:[625]

> The root question is whether D, who has slandered C, should justly be held responsible for damage which has been occasioned, or directly occasioned, by a further publication by X. I think it plain that there will be cases where that will be entirely just. The observation of Bingham LJ as he then was in ***Slipper v British Broadcasting Corporation*** [1991] 1QB 283, 300 that '[d]efamatory statements are objectionable not least because of their propensity to percolate through underground channels and contaminate hidden springs' states an ancient and persistent truth.

827 Waller LJ in ***McManus v Beckham*** explained:[626]

> What the law is striving to achieve in this area is a just and reasonable result by reference to the position of a reasonable person in the position of the defendant. If a defendant is actually aware (1) that what she says or does is likely to be reported, and (2) that if she slanders someone that slander is likely to be repeated in whole or in part, there is no injustice in her being held responsible for the damage that the slander causes via that publication. I would suggest further that if a jury were to conclude that a reasonable person in the position of the defendant should have appreciated that there was a significant risk that what she said would be repeated in whole or in part in the press and that that would increase the damage caused by the slander, it is not unjust that the defendant should be liable for it.

828 In this case, it is patently obvious, as DSS Lee readily acknowledged, that he knew, and indeed it was his intention, that his comments, and the answers to the questions posed by reporters, would be the subject of news reports.

829 In its pleading, the defendant denies the articles and broadcasts relied upon by the plaintiff constitute republications of the oral utterance or the alternative utterance to the extent that they convey the murder imputation,[627]and does not admit that they carried the conduct imputation.[628] It pleads that DSS Lee expected and intended that the sense and substance of the statements made by him on the four occasions would be reported in a fair and accurate manner in the media.[629] In its closing submissions, the defendant explains that plea as being a plea that the republications would convey the suspicion imputation.[630] In closing submissions, the defendant made clear that it maintained its denial of liability for the pleaded republications 'because the pleaded republications are not capable of bearing the (guilt) imputation or the conduct imputation, just as the oral utterance or the alternative utterance are not capable of bearing those imputations'. It accepts liability for the pleaded republications to the extent that they conveyed the sense and substance of the suspicion imputation.[631]

830 I have reached the conclusion, contrary to the defendant's submissions, that the alternative utterance bore the guilt imputation. That substantially undermines the premise upon which the defendant's position in relation to republication is based. In my view, having regard to the extensive media publicity which was given to DSS Lee's press conference of 20 September 2007, as was entirely to be expected, it effectively conveyed, or at least conveyed part of, the sting of the defamation. It is not necessary to review and analyse each of the pleaded republications. In its closing submissions, the defendant submitted that 'little practically turns on whether the defendant is liable for all or only some of the pleaded republications. Ultimately, given the nature of the pleaded imputations, it is unlikely that liability for the pleaded republications will have a large effect on the quantification of general or special damages'. I agree with that submission.

831 The plaintiff illustrated its contentions in relation to republication by reference to a review of some of the publications which followed DSS Lee's press conference. It is convenient to reproduce that summary which is set out as annexure B to these reasons.

832 I am satisfied that those republications, and others relied upon by the plaintiff carry the whole or part of the sense and substance of the original publication.

833 The defendant accepts that it is liable for the republications of DSS Lee's comments unless the pleaded republications convey a more serious imputation than was conveyed by DSS Lee's words. In view of my conclusion as to the true meaning of the words, the defendant accepts, in my view properly, its liability for republication.[632]

Damages for noneconomic loss

834 Before turning to the issues to be determined in assessing the damages for the noneconomic loss component of an award in the plaintiff's favour, it is convenient to identify some general principles applicable to the award of general damages for defamation.

835 There are three purposes to be served by damages awarded for defamation. They are consolation for the personal distress and hurt caused to the plaintiff by the publication, reparation for the harm done to the plaintiff's personal and, if relevant, business reputation, and vindication of the plaintiff's reputation.[633]

836 The three purposes overlap and ensure that the amount awarded is 'the product of a mixture of inextricable considerations'.[634] The sum awarded must be at least the minimum necessary to signal to the public the vindication of the plaintiff's reputation. The gravity of the libel and the social standing of the parties are relevant to assessing the quantum of damages necessary to effect vindication of the plaintiff.[635]

837 Damages are 'at large' in the sense that they cannot be arrived at through calculation or the application of a formula, and are therefore necessarily imprecise.[636]

838 In ***Wilson v Bauer Media Pty Ltd***,[637] Dixon J, in outlining the relevant principles, noted that:

> In determining the damage done to a plaintiff's reputation, the court should also take into account the 'grapevine' effect arising from the publication of the defamatory material. This phenomenon is no more than the realistic recognition by the law that, by the ordinary function of human nature, the dissemination of defamatory material is rarely confined to those to whom the matter is immediately published. It is precisely because the 'real' damage cannot be ascertained and established that damages are at large. It is often impossible to track the scandal and to know what quarters the poison may reach. The award of damages must be sufficient to ensure that, the damage having spread along the 'grapevine', and being apt to emerge 'from its lurking place at some future date', a bystander will be convinced 'of the baselessness of the charge'. (footnotes omitted)

839 While damages are awarded to vindicate the plaintiff's reputation, they are not awarded as compensation for the loss in value of that reputation as though it were a tangible asset or physical attribute which, once damaged, is worth less than it was before.[638]

840 The compensation by way of general damages includes compensation for the consequences of publication including any diminution in the regard in which the plaintiff is held by others, any isolation produced as a result of the plaintiff being shunned or avoided, and any conduct adverse to the plaintiff engaged in by others because of the publication of the defamatory matter. Damages are also awarded for the plaintiff's injured feelings, including the hurt, anxiety, loss of selfesteem, sense of indignity and sense of outrage felt by the plaintiff.[639]

841 It is well established, and the defendant accepted, that a plaintiff need only show that the relevant defamatory statement was *a* cause of his loss, rather than *the* cause.[640]

842 The question of whether a particular breach of duty caused harm is one of fact to be resolved as a matter of common sense and experience.[641] After making that observation in ***Medlin v State Government Insurance Commission***, Deane, Dawson, Toohey and Gaudron JJ continued:

> And that remains so in a case such as the present where the question of the existence of the requisite causal connection is complicated by the intervention of some act or decision of the plaintiff or a third party which constitutes a more immediate cause of the loss or damage. In such a case, the 'but for' test, while retaining an important role as a negative criterion which will commonly (but not always) exclude causation if not satisfied, is inadequate as a comprehensive positive test. If, in such a case, it can be seen that the necessary causal connection would exist if the intervening act or decision be disregarded, the question of causation may often be conveniently expressed in terms of whether the intrusion of that act or decision has had the effect of breaking the chain of causation which would otherwise have existed between the breach of duty and the particular loss or damage. The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of common sense and experience, properly to be seen as having caused the relevant loss or damage.

843 Section 34 of the *Defamation Act* requires that, in assessing the amount of damages, 'the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded'.

Application for cap on damages for noneconomic loss

844 Section 35(1) of the *Defamation Act* places a monetary limit on the damages for noneconomic loss that may be awarded in defamation proceedings unless the court orders otherwise under subsection (2). The relevant monetary limit is currently $389,500.[642]

845 Section 35(2) provides:

> A court may order a defendant in defamation proceedings to pay damages for noneconomic loss that exceed the maximum damages amount applicable at the time the order is made if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages.

846 The plaintiff pleads the publication of the alternative utterance was improper, unjustifiable or lacking in bona fides in a manner which aggravated the hurt, damage and distress suffered by the plaintiff. The basis for that assertion is particularised in [9.1] [9.10] of the statement of claim which are set out in Annexure C to these reasons.

847 It is not in issue that damages may be aggravated or mitigated by the manner in which the defamatory matter was published and by subsequent conduct of a defendant.[643] Damages may be increased if there is 'a lack of bona fides in the defendant's conduct or it is improper or unjustifiable'.[644] Aggravated damages are compensatory in nature:[645]

> The concept of 'aggravated damages' is not, whether calculated separately or not, a different 'head' of damages. It focuses on the circumstances of the wrongdoing which have made the impact of it worse for the plaintiff. It is not to go beyond compensation for the aggravation of the harm to repute or feelings. It is not a means of punishing a defendant.

848 There is an issue between the parties as to the operation of s 35(2) of the *Defamation Act.* The issue arises because a number of the matters particularised as the basis for the award of aggravated damages are matters or events which postdate the publication complained of, including, for

example, the evidence of DSS Lee in these proceedings. The plaintiff's position is that, once the court determines that aggravated damages are justified on the application of the normal common law test, the cap has no application.

849 The defendant's contention is that the court should undertake the following analysis:[646]

> 3013.1 damages for noneconomic loss, including aggravated damages, should in the first instance be assessed on ordinary common law principles. This means that in determining the availability and amount of aggravated damages, the Court may have regard both to the manner and content of the publication and to the defendant's post publication conduct in so far as any such conduct is improper, unjustifiable or lacking in bona fides and increases the hurt or humiliation of the plaintiff;
>
> 3013.2 if the totality of the compensation so assessed is less than or equal $389,500 then that is the sum awarded;
>
> 3013.3 if the totality of the compensation so assessed is greater than $389,500 then $389,500 only is awarded unless the Court 'is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages';
>
> 3013.4 the 'circumstances of the publication' means the circumstances directly related to the relevant publication, that is the content and manner of the publication. The term does not encompass the defendant's postpublication conduct.

850 The effect of the defendant's approach was illustrated by the following example in its closing submissions:[647]

> By way of example, if the total damages are assessed at $360,000 plus $40,000 for aggravated damages arising from the 'circumstances of the publication', the amount awarded will be $400,000. However, if the total damages are assessed at $400,000 plus $40,000 attributable to aggravated damages arising from the 'circumstances of the publication', the amount awarded will be $389,500 plus $40,000, ie $429,500. (footnote omitted)

851 For the reasons that follow, the plaintiff's construction is to be preferred.

852 In ***Forrest v Askew***,[648] Newnes J considered the operation of s 35. After referring to s 35 and s 6(2), which provides that the *Defamation Act* does not affect the operation of the general law in relation to the tort of defamation except to the extent that the Act expressly or by necessary implication provides otherwise, his Honour concluded that the effect of s 35 of the Act was not to limit the circumstances to which the court may have regard in

considering a claim for aggravated damages to those which are contemporaneous with the publication. He concluded that to find otherwise would be to reverse longstanding and wellestablished principles of the common law in relation to aggravated damages which, if intended, would be expected to appear clearly from the Act. There is nothing in Newnes J's reasoning that suggests that that conclusion was confined to the assessment of the proper amount of noneconomic loss for the purposes of s 35(1), but not applicable to s 35(2).

853 In ***Cripps v Vakras***,[649] Kyrou J considered a submission by counsel for the plaintiff in that matter that the effect of s 35(2) of the *Defamation Act 2005* (Vic), which is identical to s 35(2) of the *Defamation Act*, is to divide aggravating conduct of a defendant into two classes, being conduct forming part of the circumstances of publication, which can permit the court to award damages in excess of the statutory cap, and conduct in the postpublication period, which can justify a court in awarding damages near the top of the maximum amount prescribed. After referring to ***Forrest v Askew***, his Honour concluded that there was nothing in that case, or in the Act or any other authority to which his Honour had had regard, which supported the plaintiff's submission that aggravating conduct must be divided into conduct which occurs at the time of publication and conduct which occurs after publication.

854 In ***Wilson v Bauer Media Pty Ltd***, Dixon J concluded that the plaintiff's entitlement to general damages for noneconomic loss was freed from the statutory cap by the aggravating conduct of the defendant.[650] Having reached that conclusion, his Honour had regard to circumstances of aggravation found in the defendant's conduct from the commission of the tort up until the date of judgment.[651] He assessed general damages, including aggravated damages, in a single sum of $650,000.

855 It is wellestablished that aggravated damage is not a separate head of damages in defamation. Rather, it is an aspect of compensatory damages. Although on occasions courts may separately identify the amount by which damages are increased by reason of aggravation, it is not necessary that they do so.[652] In many cases, the aggravated component of a damages award will comprise an element of the 'inextricable considerations' that make up the total amount awarded. To require the court, as the defendant suggests, not only to assess and separately quantify two components of aggravated damage, being the component attributable to circumstances occurring at any time and the component attributable to aggravating circumstances existing at the time of publication, would be to create a level of artificiality that the legislature cannot have intended, and which the words of the section do not require.

856 In my view, the circumstances of the publication of the defamatory matter to which regard may be had for the purposes of s 35(2) are not limited to circumstances existing as at the date of publication. The words used do not imply some temporal limitation of the circumstances to be considered. Rather, as Newnes J concluded in ***Forrest v Askew***, the reference to 'circumstances of the publication of the defamatory matter ... such as to warrant an award of aggravated damages' is a reference to circumstances which, at common law, aggravated damages might be awarded, whether those circumstances exist at the time of publication or arise after publication.

The effect of the defamation

857 Mr Rayney gave evidence of his reaction to DSS Lee's comments. Unsurprisingly, that evidence was not the subject of any crossexamination and I accept it.

858 Mr Rayney said he was mortified when he was told by DS Hart that DSS Lee had identified him in the media as a suspect in Mrs Rayney's murder, and even more mortified when he watched the press conference and saw himself described as the prime and only suspect. He said he believed that when the public saw or read that description of him they would believe that he had murdered Mrs Rayney and that from that moment his life, and that of his

daughters, would never be the same. He said he felt sick, distressed and scared. People who previously expressed sympathy towards him no longer did so. People whom he knew avoided him.

859 Mr Rayney told of an example where he called a taxi the day after the press conference. The radio was playing in the taxi and a news report came on. The news report said that DSS Lee announced that Mr Rayney was the prime and only suspect in Mrs Rayney's murder which prompted the taxi driver to say 'ahh, the husband did it'. Mr Rayney said he lowered his head so that the driver could not see his face and was extremely embarrassed.

860 Mr Rayney described how he wanted to live in isolation and that, whilst he was innocent of involvement in his wife's death, he felt shame and humiliated. Living in isolation was not possible because of his obligation to look after and raise his daughters which required him to be seen in public and to attend school events with them. He recalled attending his workplace on 21 September 2007 and finding, in two photocopying rooms at Francis Burt Chambers, copies of *The West Australian* newspaper, on the front page of which was a report of DSS Lee's press conference and a photograph of him with the caption 'Prime Suspect'. He found that experience extremely embarrassing.

861 Mr Rayney said that he withdrew from almost all social events other than those where he needed to go because it was part of the girls' routine for school or their social activities. He tried to avoid being in public or where members of the public could see him. He said that he had trouble sleeping, lost his appetite and went through periods where he felt depressed. He did not attend social events, even some events held in private, because he did not want to cause embarrassment to others by his presence.

862 After the media conference, Mr Rayney said his work dried up and he stopped receiving new briefs. He described the impact of what DSS Lee said as immediate and crushing, and that his life thereafter became a nightmare.

863 Mr Rayney was distressed to read that police were standing by DSS Lee, and that senior members of the police force, including the Commissioner of Police, the Attorney General and Shadow Attorney General publicly announced their support for DSS Lee's comments and the police investigation.

864 In the context of his evidence as to the effect on him of DSS Lee's words, Mr Rayney gave evidence in relation to the disruption caused by the search which continued for three days during which he was unable to return home. That evidence was the subject of an objection as to relevance which I would uphold. That inconvenience resulted from the search which was part of the police investigation which was unrelated to any effect of DSS Lee's press conference. Accordingly, I do not take into account any of that evidence.[653]

865 Mr Rayney said that, following DSS Lee's media conference, people who were supportive of him before that conference then treated him very differently. That was the case not only with friends he had in Perth, but also friends and work associates outside of Western Australia, including in other states of Australia and in Bermuda, who ceased to have contact with him. He developed a sense of isolation because of the way he was shunned. Friends and acquaintances who were parents of children in Mr Rayney's children's school classes distanced themselves from him. When he attended school functions, he often found himself alone in crowded rooms full of parents and teachers because he perceived that no one wished to talk with him or be seen with him. When he went to his daughters' netball games, people would stare at him and point him out to their friends. He said he often found himself watching Sarah's games in isolation as other parents would tend to move away from him. That was something he had not experienced before DSS Lee's press conference. The same type of behaviour occurred towards him when he took Caitlyn to her soccer training. Caitlyn and Sarah Rayney both spoke of their observations, which I accept, as to the way their father was scorned by friends and school parents after DSS Lee's press conference of 20 September 2007.

866 Even when he visited his daughters in England in June 2016, a person on the underground recognised him and asked whether his name was Rayney. He denied that was his name because he was embarrassed on the crowded train and did not want his daughters embarrassed. The man did not accept his denials and to avoid the situation Mr Rayney and his daughters left the train at the next station.

867 After DSS Lee's media conference, some solicitors asked him to cease acting for their clients, and would not return phone calls when Mr Rayney enquired as to the reason for returning the briefs.

868 Mr Rayney was distressed about the effect which DSS Lee's comments had on his daughters. He was frightened at how complete strangers treated him and felt vulnerable to all forms of verbal abuse in public, sometimes in the presence of his children. He encouraged his daughters to study away from Perth after completion of their schooling.

869 Prior to September 2007, Mr Rayney regularly gave talks at the Bar Readers Course run by the WA Bar Association and was a regular contributor and teacher of forensic advocacy for many years in courses and seminars run by the Law Society. In the mid1990s, he taught forensic advocacy at the University of Western Australia with other experienced counsel and a sitting judge. He was appointed a visiting fellow at UWA for his teaching of advocacy. From about the mid2000s, he taught forensic advocacy at Murdoch University. After the media conference on 20 September 2007, Mr Rayney was no longer invited to teach forensic advocacy at any university. When he attended a course organised by the Law Society in 2008 at a large Perth hotel with many attendees, he remembered being the first to be seated at a round table of 12 but nobody else joined him until eventually a practitioner sat next to him and said to him that she was not embarrassed to sit next to him. He felt shunned by that experience.

870 After the events of 20 September 2007, Mr Rayney had less contact with his friends, even his close friends.

871 Mr Rayney gave evidence of indications of public contempt or abuse which he experienced after DSS Lee's press conference. He told of an elderly couple walking towards him on a city street shortly after DSS Lee's press conference. As they approached him, the lady looked at him with 'a look of absolute horror', clutched her husband's right arm very tightly and moved away from him as they walked past.

872 He bought a copy of *The West Australian* newspaper bearing his photograph after DSS Lee's comments. Underneath the photograph someone had written the word 'killer'.

873 At the Royal Show in early October 2007, whilst he was with his children, he saw a woman some distance away staring at him before calling her husband and others and pointing to him.

874 As he was waiting in the office of his solicitor in late 2007, two men aged in their twenties saw him through the glass windows and commenced to abuse him and swear at him, saying that they knew he killed his wife. They were aggressive and staff from the solicitor's office had to intervene.

875 In 2008, as Mr Rayney walked across Hay Street in Perth, he saw a man about his age crossing the road from the opposite direction. As the man walked past, he said the word 'murderer' to him in a slow and deliberate manner.

876 When holding a birthday party at his home in mid2008 for his daughter, at which a number of children attended, Mr Rayney was made aware of a neighbour in the street who was standing outside and angrily shouting words to the effect 'you're celebrating her death. You're celebrating her death'. Parents and children arriving at the party saw and heard the woman and some remained outside the gate out of concern.

877 In October 2008, whilst in a department store in Perth, Mr Rayney was approached by a group of teenagers who came up behind him before one of them loudly shouted 'murderer' in his ear. Other customers and staff saw and heard what occurred but no one did anything to assist before the group left the store, some of them laughing. That incident was reported in the newspaper. Approximately two days after the newspaper report, a group of young persons stopped outside the Rayney residence, and some of the passengers alighted from the car and loudly shouted 'murderer' and 'killer' towards the home. Mr Rayney and his children were at home. After initially driving away, the car returned and some of the passengers shouted the same words from the car.

878 After the press conference, Mr Rayney received many abusive emails sent anonymously to his email address at Francis Burt Chambers.

879 On an occasion in 2009, whilst Mr Rayney walked from the direction of the Supreme Court to his solicitor's office, a neatly dressed man walked up beside him saying 'you're that lawyer aren't you? You're that lawyer who murdered his wife?'. Mr Rayney kept walking but the man walked with him. In order to avoid a scene, Mr Rayney answered 'I am a lawyer but I didn't murder my wife'. The man responded 'but the police and the papers say that you did. You should be ashamed of what you did. You should be ashamed'. The man then threatened to take a photograph of Mr Rayney to send to *The Sunday Times* newspaper.

880 On another occasion in 2009, after a photograph of Mr Rayney was published in a newspaper, he was in a lift by himself when the doors opened. A woman began to enter the lift but then recognised Mr Rayney and immediately left the lift.

881 Mr Rayney gave evidence of numerous other incidents of members of the public confronting him or shunning him at different times through 2011, 2013, 2014 and 2015. Objection was taken to that evidence on the basis that it was irrelevant because there was no basis for concluding that there was a connection between these events and the press conference of 20 September 2007, the events occurring after Mr Rayney had been charged. I do not uphold that objection. There are two reasons for that. First, in relation to events which occurred between the time Mr Rayney was charged, and the time that he was acquitted on 1 November 2012, it is open to conclude that the incidents of contempt and abuse to which Mr Rayney was subject were at least, in part, the result of DSS Lee's defamatory remarks. Second, the defendant contends that general damages should be reduced as a result of vindication resulting from the plaintiff's acquittal and the failure of the State appeal. The events which occurred after the acquittal are relevant to consideration of the extent to which vindication was afforded by those events, a matter I deal with below.

882 Those later events include:

An incident in August 2011 at a shopping centre where a woman began shouting 'that's the fellow that killed his wife. What's his name? Rayney. That's his name. That's the fellow that killed his wife'. Those words were said loudly enough for others in the vicinity to hear her.
An incident in August 2011 outside a cinema where males called out to Mr Rayney in a loud voice asking him whether he killed his wife, and then laughed.
An incident in August 2011 in a shop in Cottesloe where an elderly man was heard to loudly say words to the effect that 'that's Rayney ... murdered his wife. Murdered his wife. Murdered his wife', causing Mr Rayney to leave the shop.
An incident in January 2013 at a bar in Lathlain where a woman approached Mr Rayney and threw the contents of a sanitary bin filled with water over him and his companion, screaming 'get out'.
Various anonymous letters containing vitriolic abuse received in July and August 2014 and June 2015.
On numerous occasions since 2013, Mr Rayney finding dead crows deposited on the driveway to his home which he took to be related to the collective noun for a group of crows being a 'murder'.

An attack on his home when eggs were thrown at the house in late 2015.
Being confronted in early 2015 by a woman in a lift in a city hotel who repeatedly accused Mr Rayney of killing his wife.
From early 2014, some unknown person subscribing him to the magazine '*Time*' (time being a colloquial term for a prison sentence) with the magazines addressed to his home address and to 'Mr Lloyd Murdah', and later to 'Mr Lloyd Killa'. In addition, his mother received *Time* magazines addressed to her home address, also addressed to 'Mr Lloyd Killa'.
On New Year's Day in 2016, a car pulled into the driveway of the Rayney residence and the occupant screamed out 'murderer', loud enough for Mr Rayney to be able to hear it at the back of his house.
Numerous other incidents in the city where members of the public pointed him out and sometimes called him 'murderer'.
A woman following Mr Rayney in a city street and raising a hand to strike him as she got closer before being told by a lawyer passing by to leave him alone.
An incident in May 2016 in the city where a man passing Mr Rayney in the street made a gesture of a gun with his fingers and then pointed it at Mr Rayney's head and saying something like 'you're dead'.
An incident in June 2016 where two men accosted Mr Rayney in a city street loudly asking whether he killed his wife and suggesting that he did.
An incident in October 2016 when a young man undertook an improvised rap song as Mr Rayney spoke to two lawyers on the footpath of a city street. One of the sentences in the song referred to Mr Rayney being a murderer, causing significant embarrassment to Mr Rayney and to those with whom he was talking.
An incident on 19 October 2016 when a man loudly spoke his name and said 'he's the one who killed his wife. He killed her in Kings Park'. There were others around who appeared to hear what was being said.
Several other incidents in late 2016 in different locations in Perth, including both inside and outside court buildings where members of the public have made offensive and accusatorial comments to Mr Rayney.
883 The effect of DSS Lee's press conference on Mr Rayney's confidence and selfesteem, and the extent to which he was shunned by others, was also the subject of evidence from his daughters and his sister, all of which I accept.

884 Commonly, in defamation cases there is little evidence available as to damage of the plaintiff's reputation. Hurt, distress and damage to reputation are assumed to flow from a defamatory publication.[654] In this case, perhaps unsurprisingly given the nature of the defamation and Mr Rayney's prominent professional position, the evidence establishes actual events which demonstrate the extraordinary level of odium and contempt felt towards Mr Rayney and the correlative hurt and distress suffered by him since 20 September 2007. This is not a case where one must rely on the realistic recognition of the likely 'grapevine' effect of the defamation. This is a case where the effect of the defamation surfaced regularly and forcefully.

885 It is necessary to consider the extent to which those matters flow from DSS Lee's defamatory statements, and the extent to which it can be said that Mr Rayney's reputation was vindicated by his acquittal and the dismissal of the State's appeal.

Vindication

886 As noted above, one of the three purposes of an award of damages for noneconomic loss is vindication of the plaintiff's reputation.[655] Vindication is not a separate head of damages, but is one of the elements to be considered in determining the amount of an award.[656] In ***John Fairfax & Sons Ltd v Kelly***, Samuels JA said:[657]

> But damages as vindication must be differently regarded. They are scarcely compensation at all, taking compensation to mean the action of making up for, or making amends for, or as being equivalent to recompense. Nor do they seem to me to represent a means of solace or consolation since the reason for their award does not involve the alleviation of prior distress. They are not intended to relieve the consequences of the libel but to constitute a demonstrative mark of vindication. And the element of vindication is to be reflected in an award of damages although the plaintiff is of such stoical temperament, or so convinced of the invulnerability of his own reputation, that the libel occasions him no actual distress at all. He is still entitled to be vindicated by the amount of the damages.

887 The defendant contends that if the guilt imputation is conveyed, the acquittal of the plaintiff in respect of the murder charges has already demonstrated to the public that the plaintiff did not murder his wife. Thus, it argues, damages for a finding that the comments carried the guilt imputation would not vindicate the plaintiff as he had already been vindicated by the acquittal.

888 The plaintiff submits that no reduction should be made by reason of any vindication flowing from the acquittal or dismissal of the appeal. He points to the requirements placed on prosecutors and the requirement for proof of criminal charges beyond reasonable doubt, matters which he contends are understood by the general public. He argues that the unfavourable impression of the plaintiff created by the defamatory publications would leave people sceptical about the circumstances of Mr Rayney's acquittal and the upholding of that acquittal on appeal. He submits, and I accept, that the general public would not be taken to have read in detail the trial judge's decision in the murder trial, or the decision on appeal. More fundamentally, he argues that the evidence as to the way he is treated even to this day, and the reaction of the police and others to the outcome of the trial and appeal, including the continued assertion by DSS Lee and DS Correia in their evidence in this trial as to their ongoing suspicion of Mr Rayney, demonstrates that the acquittal did not have any vindicatory effect.

889 The evidence supports a conclusion that at least some significant component of the public does not view Mr Rayney's acquittal and the dismissal of the appeal as vindicating his reputation. I am of the view that the proper assessment of damages for noneconomic loss should take account of the requirement that the amount should signal to the public the vindication of the plaintiff's reputation. I do not consider that Mr Rayney's acquittal or the dismissal of the appeal against that acquittal can, in light of the evidence of incidents occurring after that time, be said to have vindicated his reputation.

Causation

890 Mr Rayney was crossexamined as to whether he agreed that various proceedings taken against him were, in effect, more likely to cause damage to his reputation than what was said at DSS Lee's press conference. Those events included:

His being charged with wilful murder on 8 December 2010 and subsequently tried on that charge in 2012.
A finding by Brian Martin AJ in his reasons in the murder trial that Mr Rayney had engaged in discreditable conduct, including knowingly arranging for illegal phone interception, making a false declaration and deliberately giving false evidence to a court while on oath.[658]
A finding by Brian Martin AJ that in an effort to obtain information, Mr Rayney was prepared to engage in unlawful activity, 'which was the antithesis of the ethical conduct expected of a legal practitioner and which, if discovered, would jeopardise his legal career'.[659]
Observations by the Court of Appeal on the legal professional privilege claim to the effect that evidence before Magistrate Flynn could properly be characterised as concluding that Mr Rayney committed an offence against the *Surveillance Devices Act 1998*.[660]

891 Mr Rayney agreed that those matters would, in ordinary circumstances, be such as to cause people to fairly conclude based upon those findings that he would not be a fit person to be a lawyer.[661] When it was put to Mr Rayney that those criticisms were such as to have a devastating effect on his prospects of practising law, Mr Rayney replied:

> No, I disagree because my reputation had been well and truly, as a practitioner, destroyed before that time. It's like this. I'm not trying to trivialise it, Mr Tobin. A man is dead. Someone comes along and shoots a bullet into them. It doesn't matter. The man is dead.

892 Mr Rayney accepted that he had continued to practise for some time after 20 September 2007, and again after the dismissal of the appeal against his conviction, but the work he attracted after that time, and the type of clients, were not in the same category as before. He maintained that, after 20 September 2007, his reputation was 'dead'. In relation to his position after he regained his practice certificate following the Court of Appeal decision, he said:[662]

> When I knew I was getting my practising certificate back, I had been to the hearing, I had seen what happened at SAT, I believed I was going to win, in advance of that I spoke to - it was embarrassing but I did it, I spoke to as many practitioners, some friends, some just acquaintances. I had 1000 business cards printed. I gave them out to people. I did what barristers shouldn't have to embarrass themselves to do. I went and sought work. And in the people I spoke to those that were brave enough to tell me didn't say you're not going to get work, Lloyd, because of judgments of the Court of Appeal. They all referred back to the - to people believe you killed your wife. It all related back to that conference. That's the event that changed my life and my practice, Mr Tobin. The other events, of course they were terrible to read and to hear about, but it was that Lee conference that killed my reputation. That's what people spoke to me about.

893 It is, of course, impossible to identify the extent to which expressions of odium and contempt to Mr Rayney after he was charged and tried for his wife's murder, or after other adverse findings or comments were made in the judgment of Magistrate Flynn in relation to legal professional privilege in December 2009, or after the Court of Appeal's decision in relation to that matter published in August 2010, were attributable to those matters or to DSS Lee's defamatory statements. I am confident in concluding, however, that the effect of the defamatory imputation on Mr Rayney's reputation is more likely than not to have continued to be an operative factor in the assessment by members of the public of Mr Rayney's character. In other words, both Mr Rayney's hurt and distress, and the incidents referred to above which occurred after charges were laid in December 2010, were causally linked to DSS Lee's media conference of 20 September 2007, even if not solely caused by that press conference.

894 Different considerations apply in relation to Mr Rayney's claim for economic loss, a matter I deal with below.

Aggravated damages

895 I have reached the view that the circumstances of the publication of the defamatory matter are such as to warrant an award of aggravated damages, thus making the statutory cap on noneconomic loss inapplicable. The particulars relied upon by the plaintiff as supporting the proposition that the alternative utterance was improper, unjustifiable or lacking in bona fides, which are set out in annexure C to these reasons, can be broadly grouped into four categories. The first is that the things said at the press conference went beyond what was necessary to fulfil any proper purpose and contained inaccuracies damaging to the plaintiff.[663] The second is an alleged failure to apologise and statements made by other members of the police force endorsing and supporting DSS Lee's words.[664] The third is DSS Lee's evidence in these proceedings in which he made a gratuitous attack on the

plaintiff's reputation and asserted a present belief in the plaintiff's guilt.[665] The fourth category is maintenance in these proceedings of the pleas of qualified privilege in circumstances where that was unreasonable.[666]

896 In my view, the matters pleaded in [9.1] of the statement of claim are made out, and lead to the conclusion that DSS Lee's conduct was unjustifiable. I have noted above the observations of Brian Martin AJ criticising DSS Lee's conduct at the press conference, criticisms with which I agree. I have also noted that a number of the things said by DSS Lee were false, and that his conduct at the press conference failed to comply with police media guidelines. Given the circumstances in which the media conference was being conducted, and the inevitability that what was said would receive very extensive media coverage, DSS Lee's inaccuracies and careless choice of language was bound to increase the hurt and distress felt by Mr Rayney, and cause significant damage to his reputation.

897 It is agreed between the parties on the pleadings that DSS Lee and the defendant have not apologised to the plaintiff in relation to the assertion that the oral utterance bore the guilt imputation.

898 It is also admitted on the pleadings that on 8 January 2008, Acting Commissioner for Police, Christopher Dawson, wrote to the plaintiff's solicitors, DG Price & Co, saying, amongst other things, that 'the fact that [the plaintiff] was named as a suspect does not mean that the WA Police believe or intended to convey that he is guilty' and that he 'was happy for you to release this letter if it will assist [the plaintiff] to clarify the situation'.[667]

899 That letter was written in response to a letter to the Commissioner for Police from DG Price & Co dated 31 October 2007 complaining generally about the police treatment of Mr Rayney including an expression of concern that the police had chosen to publicly describe Mr Rayney as the prime and sole suspect. The acting Commissioner's response appears to have been sent after several followup reminders.[668] The original letter of 31 October 2007 and the followup letters were the subject of a relevance objection by the defendant. I would dismiss that objection on the basis that the letters provide a context in which the pleaded letter of 8 January 2008 was sent. That letter contains acknowledgments that DSS Lee's description of Mr Rayney as 'prime suspect' was not planned, and refers to what is described as the 'unfortunate' and 'regrettable' subsequent publication of DSS Lee's comments. It does not appear that the content of the letter was made public.

900 It is also admitted on the pleadings that on 22 September 2008, the State Solicitor's Office wrote to the plaintiff's then solicitors denying that the statements made at the media conference on 20 September 2007 carried the imputation that the plaintiff murdered his wife and suggesting that the statements merely conveyed that the plaintiff was no longer ruled out as a suspect, but was the subject of particular police attention and that it was not asserted that Mr Rayney had murdered his wife. The State Solicitor advised that there was no objection to the letter being made public.

901 References to that letter were published in *The West Australian* on 10 October 2008.[669] The letter was reported as having been written in the context of Mr Rayney hoping he could settle his defamation case without the need for a trial and the rejection by the defendant of his offer to settle.

902 I accept that the offers by Acting Commissioner Dawson and by the State Solicitor's Office to have the contents of their letters published, and in particular the disavow of any assertion that DSS Lee intended to convey the imputation which I have found was conveyed, is capable of having a mitigatory effect on the amount of damages to be awarded. On the other hand, there were a number of statements by police officers following DSS Lee's press conference expressing support for DSS Lee and for his comments.[670] The offers to permit publication of the letters of 8 January 2008 and 22 September 2008 came well after DSS Lee's comments had been separately published and Mr Rayney's reputation was effectively destroyed.

903 Acting Commissioner Dawson's letter of 8 January 2008 to DG Price & Co recognises that the reporting of DSS Lee's comments was 'regrettable' and 'unfortunate'. That must have been obvious to senior police immediately after the media reports of the press conference surfaced. The immediate reaction to support DSS Lee's comments in the days after they were made undoubtedly aggravated the hurt and damage suffered by Mr Rayney.

904 So too did DSS Lee's statements under crossexamination when he volunteered a present view as to the plaintiff's guilt. That, of course, formed no part of the defendant's case and was extremely regrettable given, as DSS Lee no doubt well appreciated, the high level of media interest in the evidence at the trial. That evidence, and publication of it, undoubtedly served to increase the distress and humiliation of the original defamation.

905 The final circumstance of aggravation relied upon by the plaintiff is the maintenance of the defences of qualified privilege in light of DSS Lee's acceptance of the criticisms of his conduct by Brian Martin AJ. I do not accept that contention. Whilst I have found that the defences of qualified privilege are not made out, it was not unreasonable for the defendant to maintain those defences. Precisely what DSS Lee 'accepted' about the findings of Brian Martin AJ is somewhat unclear. The fact that he acknowledged those findings in the course of crossexamination was not, in my view, a factor which should have caused the defendant to immediately abandon those defences.

Adverse findings in these proceedings

906 The defendant contends that evidence led in support of its defence of justification can be relied upon by way of mitigation of damages.[671] It submits that adverse findings as to the plaintiff's conduct in respect of the dictaphone or phone recording, or as to his credibility should mitigate the damages awarded to him. I have not accepted the plaintiff's evidence in relation to some matters including rejecting his evidence that he had Mrs Rayney's consent to recording her conversations by dictaphone, and have found that his conduct in relation to the recording of phone conversations was discreditable and inappropriate. While they are matters which might undoubtedly affect Mr Rayney's general reputation, they pale into virtual insignificance when viewed against the imputation conveyed by DSS Lee that he murdered his wife. The undoubtedly devastating effect of DSS Lee's press conference so far outweighs any damage to Mr Rayney's reputation which might be thought to result from any other inappropriate conduct identified in these proceeding that I consider any mitigatory effect of those matters on damages for noneconomic loss to be minimal.

Plaintiff's conduct in these proceedings

907 I have discussed above in the context of considering Mr Rayney's credibility the defendant's complaint as to Mr Rayney's conduct of the proceedings which it says was designed to denigrate others.[672] Having regard to the considerations there discussed, and to the overall conduct of these proceedings and the nature of the allegations made by the defendant against Mr Rayney in these proceedings, I do not consider that questions of Mr Rayney's conduct of the proceedings should have any influence on the assessment of damages for noneconomic loss.

The amount of noneconomic loss

908 Being satisfied that the cap on noneconomic loss provided for in s 35(1) of the *Defamation Act* is not applicable, it is necessary to determine an appropriate amount of compensatory damages. In doing so, I am mindful that there is an aspect sometimes present in consideration of the component of damages resulting from aggravation which is not present in this case. That is the concern sometimes found in actions against commercial media organisations, that where damages for noneconomic loss are capped, media outlets may merely make a commercial assessment of the risks associated with publication and may elect to absorb the costs of defamation litigation as part of their business costs. That was an element which was present in the recent award of damages in ***Wilson v Bauer Media Pty Ltd***. It is not present in this case.

909 The task is to determine an amount which sufficiently compensates the plaintiff for the personal distress and hurt caused to him, for reparation of the harm done to his reputation, vindication of that reputation, and compensation for the aggravating circumstances of the publication.

910 The defamatory imputation that Mr Rayney was guilty of murdering his wife is obviously at the high end of the range of seriousness of defamatory imputations. It undoubtedly had a devastating effect on the plaintiff's life. It was attended by circumstances of aggravation. Despite his acquittal on the charge of murder, the defamatory comments undoubtedly caused a substantial reduction in the extent to which that acquittal vindicated his reputation.

911 I have determined that, by way of damages for noneconomic loss, the plaintiff should be awarded the sum of $600,000.

Setoff for damages received in other proceedings

912 Section 38(1) of the *Defamation Act* provides:

> (1) Evidence is admissible on behalf of the defendant, in mitigation of damages for the publication of defamatory matter, that -
>
> (a) the defendant has made an apology to the plaintiff about the publication of the defamatory matter;
>
> (b) the defendant has published a correction of the defamatory matter;
>
> (c) the plaintiff has already recovered damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter;
>
> (d) the plaintiff has brought proceedings for damages for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter; or
>
> (e) the plaintiff has received or agreed to receive compensation for defamation in relation to any other publication of matter having the same meaning or effect as the defamatory matter.

913 The defendant pleads that the plaintiff has already recovered damages in an action brought by him in this court against Pan MacMillan Australia Pty Ltd and Ms Estelle Blackburn (Pan MacMillan action) in respect of imputations alleged to have been conveyed by a chapter dealing with Mrs Rayney's murder in a book entitled '*Mad, Bad and Mysterious: Murder, Rape and Pillage in Australia*', the imputations being that Mr Rayney murdered his wife, that

he procured a person or persons to murder her, or alternatively, that he so conducted himself as to give rise to a reasonable suspicion that he murdered his wife.

914 The defendant also pleads that the plaintiff has brought legal proceedings against Mr Mark Reynolds, a senior investigating forensic officer with the police, in respect of imputations alleged to have been conveyed by comments made by him at an Australian and New Zealand Forensic Science Society WA branch meeting in July 2014. It also pleads that the plaintiff issued a notice of concerns against members of Mrs Rayney's family alleging defamation in respect of comments made by them on 23 September 2013 after the delivery of the Court of Appeal's decision rejecting the State's appeal against his acquittal.[673] The family members referred to are Mr and Ms Coutinho. The defendant pleads that those matters should be brought to account in assessing any damages which are awarded to Mr Rayney.

915 Mr Rayney admits that he has recovered damages in the Pan MacMillan action. He pleads that the proceedings against Mr Reynolds were served on the defendant on 12 August 2016 pursuant to substituted service orders made on 11 August 2016. No specific plea is made in relation to the issue of a notice of concerns to members of Mrs Rayney's family, other than the general denial of the relevant paragraph of the Defence.

916 In its closing submissions, the defendant submits that the Pan MacMillan action was settled on 15 January 2015 on the basis that the defendants agreed to pay $150,000, apportioned as to $75,000 for damages and $75,000 for costs, with the action to be discontinued.[674] The submissions do not identify the evidence relied upon for that assertion. I have not been able to locate in the vast volume of material produced at trial the evidentiary basis upon which the amount paid in settlement is said to be proved. No amount is referred to in the pleadings. The court record shows only that an order for discontinuance of the action with no order for costs was made on 15 January 2015.

917 In his closing submissions, Mr Rayney submits that there should be no setoff of damages on account of other claims, and that none of the actions or threatened actions went to a hearing or resulted in an award, and they were all compromised with amounts that contained a component for legal costs. It is not apparent whether the plaintiff accepts that the amounts referred to in the defendant's closing submissions are correct. The position is, therefore, that the plaintiff admits on the pleadings that he did recover damages in the Pan MacMillan action, but the amount of the damages recovered is not established on the evidence.

918 As to the notice of concerns issued to Mr and Ms Coutinho, the evidence which they gave was that, as they left the Court of Appeal after the delivery of the decision, they made comments to the waiting media, expressing their disappointment at the outcome. They later received a letter from Mr Rayney's lawyers alleging the comments that they made outside the court were defamatory. They engaged a lawyer, and the matter was resolved by the payment by them of an amount of $6,384.

919 Mr Rayney gave evidence that he was concerned as to the reports of comments made by Mr and Ms Coutinho after the delivery of the Court of Appeal decision, and instructed his solicitors to write a letter designed to prevent them from continuing to publicly state their belief, either directly or indirectly, that he had murdered Mrs Rayney. The matter was eventually resolved by the payment 'of approximately $6,000' which was paid to his solicitors in payment of his costs. He said that he did not receive any part of that payment. I accept that evidence. The payment by Mr and Ms Coutinho was thus not a payment of compensation or damages for the alleged defamatory comments and is not a relevant consideration in relation to questions of mitigation of damage in this action.

920 It appears that the action against Mr Reynolds remained unresolved at the hearing of this action. The proceedings were the subject of decisions in July and August 2016 initially extending the validity of the writ[675] and then allowing substituted service.[676] A search of the court records suggests that the action has not been progressed since that time. In those circumstances, the proceedings against Mr Reynolds do not provide any basis to reduce the damages that might otherwise be awarded to Mr Rayney.

921 In the circumstances, I do not consider it appropriate to bring to account mitigation of damage by reason of the factors identified in s 38(1)(c), (d) or (e) of the *Defamation Act*. Only the Pan MacMillan action might provide a basis for some mitigation. Given the absence of evidence as to the terms of settlement of those proceedings, it is not possible to identify any amount by which the damages might be said to be mitigated. To the extent that any settlement involved contribution to the costs of the action, I would not, in any event, bring that component of the settlement to account for the purposes of mitigation. Section 38 does not, of course, oblige the court to setoff the amount of damages recovered in any other action from the amount of damages to be awarded in the present action. Section 38 merely renders evidence in relation to the matters enumerated admissible. The extent to which those matters operate in mitigation of the damages for the publication of the defamatory matter under consideration necessarily is to be determined in the light of the facts of each particular case. The particular circumstances of a case will inform the extent to which other awards of damages or compensation might have the effect of mitigating the amount of damages to be awarded. In this case, the extent of publication of DSS Lee's defamatory statements compared to the relatively limited publication by way of a chapter in a book, and the fact that the book was published years after DSS Lee's statements, lead to the conclusion that, even if the settlement were in the amounts suggested in the defendant's closing submissions, that would have little effect on the amount of damages which I consider appropriate for noneconomic loss in this case.

Damages for economic loss

922 The plaintiff claims to have suffered economic loss as a result of damage to his professional reputation flowing from DSS Lee's press conference of 20 September 2007. The loss claimed falls into three categories. The first category is an amount of $77,000 which the plaintiff said he was required to writeoff when clients terminated his retainer shortly after 20 September 2007 and refused to pay fees for work previously done by him. The second relates to the period between 20 September 2007 and 17 December 2012 being the date on which Mr Rayney provided an undertaking to the Legal Practice Board (LPB) that he would cease engaging in legal practice without first giving 42 days notice in writing to the LPB. The third period is from 10 February 2016, when the plaintiff was released from his undertaking not to engage in legal practice by reason of the decision of SAT in ***Rayney and Legal Practice Board of Western Australia***,[677] until his anticipated date of retirement from the practice of law being when he attains 67 years of age.

Mr Rayney's evidence in relation to his income since September 2007

923 Mr Rayney practised as a barrister from Francis Burt Chambers from about June 2005 until 16 May 2011. His chargeout rate in 2005 was $250 per hour, in 2006 $300 per hour, and in 2007 $375 per hour. He said that during that time he worked about 10 hours a day, although accepted that not all of that work was necessarily 'billable' work. His income for the financial year ending 30 June 2006 was $219,664 and for the year ending 30 June 2007 it was $428,868. From June 2005 until July 2007, he billed about 154 hours per month and generated about $41,740 in gross monthly revenue.

924 Mr Rayney said that after his wife's disappearance on 7 August 2007, his ability to give his work the care and attention it required reduced and he reduced his work in order to deal with his own grief and with caring for his daughters. He did endeavour, however, to maintain some level of income to meet the bills and expenses he faced whilst caring for his daughters. He said that he surrendered the brief for Superintendent Brandham in the Mallard Inquiry because he did not feel he could discharge his professional obligations in all the circumstances.

925 In October 2007, Mr Rayney issued three separate, though related, client tax invoices for legal work he had carried out in relation to actions in the Supreme Court of Western Australia prior to that time. The three invoices totalled $118,800. However, following DSS Lee's press conference, the client had terminated his services and refused to pay his invoices. After some negotiations, he agreed to accept a payment of $41,800 in order to settle the dispute, meaning he was required to writeoff $77,000, including GST, of his legal fees.

926 Mr Rayney said that from October 2007 until the end of that year, he did not receive any briefs from solicitors and did not generate any revenue. From 2008 until December 2010, he endeavoured to maintain a practice as a barrister. On 8 December 2010 Mr Rayney was arrested and charged with wilful murder of his wife.

927 Mr Rayney's taxable income for the year ending 30 June 2008 was $67,337; for the year ending 30 June 2009, $2,717; for the year ending 30 June 2010, $16,771; for the year ending 30 June 2011, $136,766; and for the year ending 30 June 2012, $104,062.

928 Upon being charged with wilful murder, Mr Rayney notified the LPB of Western Australia of the charge. After exchanges of correspondence during February 2011, Mr Rayney agreed to a proposal by the Professional Affairs Committee of the LPB that a condition be imposed on his local practising certificate until the wilful murder charge had been determined. Accordingly, on 18 March 2011, the LPB wrote to Mr Rayney confirming his agreement to the imposition of a condition that he not appear as counsel in any jury trial in the District Court of Western Australia, or the Supreme Court of Western Australia whether by prerecorded video or in person, until the murder charge against him had been determined.[678] Thereafter, Mr Rayney undertook a small amount of work as a solicitor prior to the condition ceasing to apply upon his acquittal in November 2012. The murder trial had commenced on 16 July 2012 and plainly Mr Rayney had no capacity to earn income from the practice of law while the trial was in progress.

929 However, on 16 November 2012, Mr Rayney received a letter from the LPB advising him of the LPB's intention to cancel his practising certificate. The reason for that, Mr Rayney was told, was because of the various findings made by Brian Martin AJ in his reasons in the murder trial. Correspondence then ensued between the LPB and Mr Rayney's solicitors.

930 Mr Rayney said that he considered that the condition only took effect on 16 May 2011 when he received an amended practising certificate showing the condition.[679] However, it is more likely that it took effect under s 47(7) of the *Legal Profession Act 2008* (WA) on receipt of the LPB's letter of 18 March 2011.

931 On 22 November 2012, the State lodged an appeal against the decision of Brian Martin AJ and for that reason Mr Rayney voluntarily undertook not to practice until such time as a detailed submission could be made to the LPB. A submission was subsequently made on 10 December 2012. By letter dated 13 December 2012, the LPB advised that the Professional Affairs Committee had resolved to request that he provide a written undertaking that he had ceased engaging in legal practice and would not recommence without first giving the LPB 42 days notice. An undertaking by Mr Rayney in those terms was then provided to the LPB on 17 December 2012. Although Mr Rayney did not practice, he maintained a practising certificate.

932 On 16 July 2015, the LPB cancelled Mr Rayney's local practising certificate with effect from 21 July 2015. That decision was subsequently set aside by SAT on 10 February 2016, with the Tribunal ordering the LPB to issue Mr Rayney with a local practising certificate.

933 It was in those circumstances that Mr Rayney makes no claim that he suffered any loss of income as a result of DSS Lee's defamatory remarks during the period when he provided his undertaking to the LPB on 17 December 2012 until February 2016.

934 Since February 2016, Mr Rayney has undertaken a small amount of legal work each month. However, in October 2015, the Legal Profession Complaints Committee (LPCC) filed an application with SAT under s 428 of the *Legal Profession Act* complaining of alleged unprofessional conduct in relation to adverse findings that had been made in court proceedings against Mr Rayney. After the judgment in his favour by SAT in February 2016 in relation to cancellation of his local practising certificate, Mr Rayney made an application in April 2016 for an order pursuant to s 47(2) of the *State Administrative Tribunal Act 2004* (WA) that the proceedings by the LPCC be dismissed or struck out.

935 On 19 December 2016, SAT delivered a decision dismissing the LPCC proceedings.[680] In January 2017, the LPCC filed an appeal against that decision, which appeal was heard and allowed on 22 February 2017, shortly before the hearing of this action commenced. The Court of Appeal allowed the appeal, set aside the decision of SAT dismissing the LPCC's proceedings, dismissed Mr Rayney's application for dismissal of those proceedings, and remitted the matter back to the Tribunal, differently constituted, for substantive hearing and determination of the LPCC's application.[681] I was advised from the bar table that those proceedings are presently listed to be heard in early December this year, but it is not known when a decision will be delivered.

936 There was no real contest that Mr Rayney's work substantively dried up after 20 September 2007 as he asserted. That was supported by the evidence of solicitors who instructed Mr Rayney in the past. Mr Paul Meyer said that after DSS Lee's statement, he had wanted to brief Mr Rayney on three matters but once he approached his clients and told them he was considering briefing Mr Rayney, they instructed him not to do so.[682] Mr Richard Lawson who regularly briefed Mr Rayney said that, although he continued to brief Mr Rayney, a few clients requested alternate counsel due to the adverse media coverage of the criminal investigation conducted by DSS Lee. He said that to his knowledge no criminal defence lawyer briefed Mr Rayney after 20 September 2007 except him.[683] Ms Black, a fellow barrister and friend of Mr Rayney, said that after DSS Lee's press conference, Mr Rayney's work 'appeared to dry up literally overnight'.[684]

937 It is against that background that Mr Rayney's claim for economic loss is to be viewed.

Economic loss after 10 February 2016

938 The defendant's case is that, save for the period between the media conference on 20 September 2007 and the murder charge against the plaintiff on 8 December 2010, the plaintiff is not in a different position than he would have been in had the 20 September 2007 media conference not occurred or had it occurred in a more cautious manner. I accept that submission. While I consider that DSS Lee's defamatory remarks continued to be productive of damage to Mr Rayney's personal reputation even after his acquittal and the rejection of the appeal against conviction, I am not satisfied that the residual effect of DSS Lee's remarks was productive of economic loss for Mr Rayney after he regained his practising certificate in 2016, some 8½ years later. In other words, DSS Lee's defamatory statements were not a cause of economic loss after that time.

939 At the time Mr Rayney regained his practising certificate, there remained outstanding proceedings against him by the LPCC alleging serious unprofessional conduct. He had been away from the practice of law for a number of years. In those intervening years, he had been the subject of criminal proceedings in relation to both murder and the phone intercept charges. Although acquitted on all of those charges, the mere fact of the charges and the publicity surrounding the evidence adduced in relation to them was bound to have resulted in a disinclination on the part of solicitors to brief Mr Rayney. In addition, he had been the subject of adverse comment by Brian Martin AJ and by Magistrate Flynn rejecting aspects of Mr Rayney's evidence in the proceedings before him, and had been unsuccessful in the appeals in relation to Magistrate Flynn's orders. Those matters all raised questions as to Mr Rayney's fitness to practice, and prompted the LPCC to take proceedings, which have received much publicity, for disciplinary action in relation to them.

Mr Rayney accepted that the findings against him would, in ordinary circumstances, be such as to lead people to conclude that he would not be a fit person to be a lawyer.[685] I am satisfied that, to the extent that Mr Rayney has had difficulty in reestablishing his practice since February 2016, it cannot be said that DSS Lee's comments at the press conference in 2007 have been causative of those difficulties, or can be said to have deprived Mr Rayney of income which he would have made had DSS Lee not defamed him in 2007.

940 Accordingly, in relation to the third period in respect to which Mr Rayney seeks damages for economic loss, I would make no award.

Fees written off

941 I do not understand there to have been a challenge to the proposition that Mr Rayney was forced to writeoff a total amount of $77,000 by reason of his clients' withdrawal of instructions as a result of DSS Lee's press conference comments. There is no reason to reject Mr Rayney's evidence as to the fact that the fees were written off, nor as to the reason that that occurred. The amount written off included GST so the actual loss to Mr Rayney is $70,000. I would allow recovery of that sum.

Loss of income from 20 September 2007 to December 2010

942 I accept the evidence that the effect of DSS Lee's statements on 20 September 2007 was to severely damage Mr Rayney's practice over the next three years. After he was charged in December 2010, a matter which itself would undoubtedly severely impact on his practice, the LPB took steps to limit Mr Rayney's practice by imposing a condition on his practising certificate. It was that limitation which resulted in Mr Rayney undertaking 'a small amount of work as a solicitor after May 2011' because his work was 'very limited'.[686] I am satisfied that, from the time that Mr Rayney was charged with murder, the defamatory remarks by DSS Lee ceased to be a cause of economic loss. He then became a man facing a charge of, and a trial for, wilful murder and his continued practice as a barrister while that situation persisted was effectively untenable. The operative cause of his reduced work after December 2010 was the fact he was charged with murder and shortly afterwards subjected to a very restrictive condition on his practice certificate. That event broke the chain of causation between the defamatory statements and the reduction in Mr Rayney's capacity to earn income as a barrister.

943 It is necessary to turn to the assessment of the quantum of the loss which Mr Rayney did suffer that was attributable to the defamatory statements during the period between the making of the statements and Mr Rayney's arrest.

944 Each party briefed an expert to make that assessment. Mr Rayney instructed Mr Dennis Barton, an actuary, and the defendant called Mr Martin Langridge, a forensic accountant. Mr Barton and Mr Langridge conferred in advance of the hearing and prepared a joint report, helpfully identifying the matters upon which they agreed, and those on which they disagreed. They gave their evidence concurrently. Most of the differences between them flowed from the assumptions which they were either instructed to make or adopted for the purposes of their calculations.

945 The experts agreed that past losses should be calculated on an aftertax basis as the difference between putative past income and actual past income and that interest should be applied to past losses at the rate of 6% per annum. I took the parties to have agreed that approach for the purposes of the assessment of any economic loss that Mr Rayney is entitled to recover.

946 Having each reviewed financial records related to Mr Rayney's practice, the experts agreed that the applicable annual expenses for Mr Rayney to be adopted for a past loss period was $104,000 at the values applicable for the financial year ending 30 June 2008 (FY08). They also agreed the appropriate base hourly chargeout rate for the plaintiff for FY08 is $375, that being the plaintiff's then applicable chargeout rate.

947 The experts disagreed as to the number of billable hours that the plaintiff would have been able to achieve in the past loss period and the annual progression of hourly chargeout rates from the base figure of $375 for FY08. They also disagreed as to whether it is appropriate to apply any indexation to the annual expenses which had been agreed. Finally, they disagreed as to whether it is appropriate to apply any adjustment to the putative past income in respect of the vicissitudes of life. It is necessary to resolve each of those differences. I otherwise accept that the components of the calculation that the experts agreed are appropriate to be used in calculating the plaintiff's past loss.

948 Mr Barton was initially instructed to assume that Mr Rayney would have achieved 2,400 billable hours per year for the purposes of calculating putative past income. However, Mr Barton chose to make an assumption of 2,300 billable hours per year on the basis that that represented 230 days per year at 10 hours per day, which he considered preferable having regard to usual requirements for leave, sick leave and public holidays.

949 As noted above, Mr Rayney gave evidence that he billed about 154 billable hours per month from June 2005 to July 2007. That represents 1,848 hours over a 12 month period. Both experts acknowledged that, Mr Rayney having only commenced practice as an independent barrister in 2005, it could be expected that he would have a 'startup period' when billable hours were lower than would be achieved as the practice gained momentum. On the other hand, a chart of billable hours plotted by Mr Barton in his original report[687] shows fairly constant average monthly billable hours throughout that whole period. Mr Barton also plotted a trend line which showed an increasing trend which he described as 'not statistically significant'.

950 Mr Langridge undertook a detailed analysis of invoices rendered by Mr Rayney in FY06 and FY07, and the hours billed in those periods. From that analysis he concluded that in FY06 a total of 1,911 billable hours are recorded, and for FY07, 1,972 billable hours are recorded. He also noted that over the two year period, 61% of all billable hours related to a single client.[688]

951 Mr Langridge took the view that the achievement of 10 billable hours per day over 230 days of the year did not adequately take account of the time spent on administrative tasks, nonbillable probono or reduced fee work, professional development, and gaps between assignments, and thus could not be assumed to be achievable. He considered that, for the purpose of assessing both past and future losses for Mr Rayney, a preferable assumption was 2,000 hours per year.

952 In my view, the appropriate assumption for the purpose of assessing Mr Rayney's putative past loss of income in the period up to December 2010 is an assumption that he would have achieved 2,000 hours of billable time per year. That figure is higher than he had achieved prior to that time as a barrister. There is force in Mr Langridge's concerns that a higher figure would fail to take into account nonbillable time spent at work. I accept that barristers might be expected to work long days and, from time to time, to work over weekends so that the number of days in which billable hours are worked might be longer than the assumed 230 days upon which Mr Barton based his calculations. In Mr Rayney's particular case, however, it is necessary to bear in mind his own evidence that his capacity to work in the aftermath of his wife's disappearance and murder was reduced by both his grief and the need to attend to the care of his children. That parental responsibility, which I am satisfied Mr Rayney was acutely aware of and anxious to fulfil, undoubtedly would have affected his capacity or inclination to work extended hours including on weekends, a position that would have continued through to the end of 2010. In addition, the fact that Mr Rayney had been charged with the telecommunication offence would most likely have created some reticence to brief him and thus limited the extent to which he would have been able to increase his billable hours beyond those he achieved in the period leading up to 20 September 2007.

953 As noted above, Mr Langridge's analysis of Mr Rayney's billable hours in FY06 and FY07, demonstrated that a significant proportion of Mr Rayney's work throughout the whole of his period at the bar from July 2005 to May 2007 was undertaken for one particular client. During 2007, only 25% of his work was done for other clients. Working for a single client would undoubtedly enhance Mr Rayney's capacity to maximise billable hours on many days, since time is not lost moving from work on one matter to work on another during the course of the day. That analysis also leads me to doubt that Mr Rayney's billable hours would have increased on an annual basis to the extent suggested by Mr Barton.

954 In the circumstances, I am satisfied that, for the purpose of assessing putative past income, the calculation should be based on 2,000 hours per year being billable.

955 The second issue upon which the experts disagreed was as to the rate of increase in the base hourly rate of $375 per hour which should be applied to years subsequent to FY08. Mr Langridge assumed, for the purposes of his calculations, that the plaintiff would have been able to increase his hourly rate by $25 at the end of each financial year up to a maximum of $500. Given my conclusions as to the period during which DSS Lee's defamatory statements were causative of economic loss, the imposition of a maximum rate of $500 per hour is irrelevant to the calculations.

956 Mr Barton was instructed to assume that the plaintiff's hourly charge out rate of $375 in FY08 would increase to $450 in FY09 and $500 in FY10. He explained the underlying basis for those assumptions to be that as time passed, Mr Rayney would become better known at the bar, receive more briefs and be able to increase his fee to reflect that.[689] Mr Barton then applied an index rate based upon the published Average Weekly Ordinary Time Earnings index (AWOTE) to take account of the fact that the rates assumed were based upon FY09 values.

957 There is little support for the assumptions made by either expert in the evidence. Mr Rayney gave no evidence of his actual charge out rate after 2007. A review of the invoices relating to the period between September 2007 and December 2010 contained in the financial bundle tendered by the parties does not enable an analysis of the actual charge out rate being applied. Invoices are generally simply lump sum bills, not uncommonly containing reductions in fees, on some occasions apparently in order to meet an agreed fee amount.

958 It is appropriate to assume that Mr Rayney's charge out rate would have increased with time, but I do not consider it reasonable to assume that it would have increased at the rate assumed by Mr Barton, especially having regard to the likelihood reflected in Mr Rayney's invoices and undoubtedly common amongst barristers, that all chargeable time could not be billed by reason of agreed fees on some briefs. I am also mindful of the fact that Mr Rayney was during this period, facing charges in relation to the phone interceptions. As already noted, that can reasonably be thought to be likely to affect the progress of development of his practice and the extent to which he might need to curtail fee increases in order to maintain his level of work.

959 In the circumstances, I consider that it is appropriate in order to assess fair compensation for Mr Rayney's loss, to adopt the assumption made by Mr Langridge of an annual increase of $25 per hour during the period between FY08 and FY11.

960 I do not accept that an index by reference to AWOTE should be applied to the resultant hourly rates. I think it unlikely, as a matter of fact, that barristers would increase their hourly rate by reference to a diminution in the present value of their existing rate. Rather, the likelihood is that increases in hourly rates are made by reason of increasing seniority of the barrister, possibly demand for the barrister's services increasing over time, and having regard to any increase in cost of practice. My adoption of an increased hourly rate of $25 per hour each year assumes those considerations, and also reflects that, as noted below, no indexation is to be applied to the agreed costs of practice.

961 It follows that, for the purposes of calculating Mr Rayney's putative past losses, I am of the view that the average hourly rate to be assumed is $375 per hour for FY08, $400 per hour for FY09, $425 per hour for FY10 and $450 per hour for FY11.

962 The experts were agreed that if AWOTE indexation was to be applied to charge out rates, then it should also be applied to the FY08 annual expense base figure of $104,000. On the other hand, they agreed that if AWOTE indexation was not applied to annual average charge out rates, then it should not be applied to the base expense amount. I agree with the experts in that respect. It follows that, for the purpose of assessing past loss, there should be no indexation of the annual expense figure of $104,000.

963 A further matter of disagreement between the experts was as to whether it is appropriate to apply any adjustment to the putative past lost income in respect of the vicissitudes of life. Mr Barton was of the view that, the period having passed, and the vicissitudes not having come to pass, no allowance should be made.

964 Mr Langridge's opinion was that it was appropriate to reduce the gross income of the plaintiff by a factor to allow for any period when the plaintiff may not have been able to work for reasons such as personal illness or accident, caring for family members, bereavement or other life incidents that may have prevented him from earning income as a barrister in the past loss period. He was of the opinion that a discount of 10% should be applied, and that it should be applied to the gross income rather than income after expenses on the basis that the expenses of operating the plaintiff's practice are substantially fixed in nature and would not vary significantly as a result of short term absences from work.

965 On the other hand, Mr Barton considered that vicissitudes adjustments are an allowance for low probability high impact events such as total or permanent disablement and retrenchment and not for sporadic illness or grieving.

966 I agree with Mr Barton. There is no evidence of there having been any impediments (putting aside the effect of DSS Lee's press conference) to Mr Rayney's capacity to earn income in the period between September 2007 and December 2010. I have noted that Mr Rayney's parental duties would have impacted upon his capacity to work to some degree. I have, however, taken that into account in rejecting the assumption that he could work 2,300 billable hours per year. In effect, the type of vicissitude which Mr Langridge sought to bring to account have been taken into account by me for the purpose of settling upon the billable hours allowance for putative past income. I would not allow any further deduction for vicissitudes in relation to past loss.

967 A further issue between the parties related to interest on past losses. There was an agreement between the experts, and it appears between the parties, that the interest rate to be applied to past losses is 6% per annum. The issue between them was whether interest should be calculated on a simple basis as Mr Langridge contended, or on a compound basis as Mr Barton contended. The plaintiff's claim for interest is made pursuant to s 32 of the *Supreme Court Act 1935* (WA). The interest awarded under that section is invariably simple interest. There is no reason to depart from that approach. I would award interest at the rate of 6% from 8 December 2010 to the date of judgment.

968 It was common ground in the proceedings that the putative past income should be calculated on an after tax basis, and each of the experts undertook calculations of the losses on that basis. During the course of the concurrent evidence of the witnesses, it was suggested that once the disputes as to the matters in issue between the experts were resolved by the court, it would be a relatively simple matter for the parties, if necessary in consultation with their experts, to undertake the precise calculations as to the amount of the plaintiff's past loss having regard to the effects of taxation and the Medicare levy and any other relevant factors. It is appropriate for that course to be taken, and I will invite the parties to confer with a view to providing a minute as to the final quantum of damages to be awarded for past loss of income on the basis of these reasons.

Conclusion

969 For these reasons, the plaintiff is entitled to judgment against the defendant for damages for defamation. The amount of those damages for noneconomic loss is $600,000. The amount of the damages in respect of economic loss is to be determined following conferral between the parties, and in the absence of agreement, to be determined on further submissions.

Annexure A

Media conference held on 16 August 2007

DSS Lee:

I can confirm that the human remains found in Kings Park this afternoon are those of Corryn Rayney. This now becomes a homicide investigation.

I emphasise this is where the investigation starts, not finishes.

There's a number of side tracks off this main road. There's some bollards which protect those tracks from members of the public going through. It appears that the vehicle was driven over one of those bollards and sustained some damage underneath and that's how the oil leaked out of the gearbox and that's how we were able to track the car back to this scene.

It's an extraordinary amount of good luck yes. Had the oil run out sooner than it did we may never have linked the two scenes.

We haven't completed our examination of the scene. It's a painstaking forensic process, we expect we will still be here tomorrow. We have a number of important scenes being examined forensically and we are getting good results. Site testing needs to be done, we need to examine avenues into and out of the scene.

We sent off some swabs on Wednesday from the vehicle and there has been a lot more coming out. But we are looking for microscopic material. We are looking for DNA, we are looking for hairs, for fibres. It takes a long time. It is a process where we remove and sift each layer of soil, inch by inch and that could be a very long process. Recruits from the (police) Academy are searching the whole park.

We can't just assume that this is where everything occurred. This may be the end result but there may be other sites and we need to identify those. We are just being very cautious.

We don't know what sort of injuries she's got. This is way too early for those sorts of questions.

We have a very, very professional forensic team, who are pulling out all stops for this. If the killer left any evidence behind whatsoever, it will be located. If the killer left any evidence, we will find it.

I think she clearly did meet with someone [after her boot scooting class at Bentley on the night of Tuesday, August 7] and that person was her killer. We believe the person involved in this murder was at the scene for some time. That gives the public quite a significant time frame where they may have seen something. Anyone passing through this particular area of Kings Park in the late evening of last Tuesday or the early hours of Wednesday, if they saw anything, any vehicle, any sighting at all we would ask them to come forward.

What happened in this murder is known to the killer. Police have an idea as to what occurred - but I can't release information in relation to the way the event was committed.

I can't say if she was killed inside the car, or outside the car ... She may have been alive but bleeding in the car.

We pulled out all stops in relation to this. If the killer left any evidence whatsoever, it will be located. It may well be that this has occurred and it wasn't intended. If that's the case then this person really should come forward to police and get this sorted. He should be concerned. We are coming.

We are talking of a substantial gravesite, it wasn't dug by hand, there was an implement ... We don't have that implement at the moment ... It is one of the many reasons we are conducting searches in Kings Park. Was it dug before? I don't know. Did the person kill Corryn and then go and get a shovel or something and go and dig it after? I don't know. To start speculating as to whether it was premeditated doesn't really help us.

What we are confident of is that if there is anything in the car of at Kings Park we will locate it.

So if this guy is out there and reading the paper and watching the news he should come and talk to us.

She may have gone somewhere else, she may have gone for a cup of coffee, she may have met someone that way. But the information we have to hand has not changed since we started this inquiry, and that was she intended to travel directly home at 9.30pm last Thursday. Clearly something has occurred. There was some intervention by some person and that's what we need to find out.

That gives the public a significant timeframe where they might have seen something. We are asking anyone who has any information on this case to come forward and contact Crime Stoppers on 1800 333 000 or local police.

We are particularly interested in Mrs Rayney's movements last Tuesday evening after 9.30pm - any information whatsoever, not

limited to Bentley or Kings Park; any sightings of Mrs Rayney or her vehicle.

If anyone saw someone leaving the Kershaw street address (where Mrs Rayney's car was found on Tuesday night), early Wednesday morning or during Wednesday, please pass on the information to us.

Media conference held on 22 August 2007:

DSS Lee: We're executing a search warrant today at the Rayney home. This is a process of elimination which is a normal line of inquiry. Mr Rayney has fully cooperated with the police in this investigation. I wish to emphasise that Mr Rayney is not a suspect, and any further speculation regarding his involvement in this offence may be detrimental to the investigation. Thank you. I'm not taking questions.

Media conference held on 29 August 2007:

MEDIA: Jack, the killer is still out there is the community at risk?

DSS LEE: Oh look I think the community is always at risk while we have an unsolved crime like this. We are working extremely hard to try and resolve this matter. I don't think the community should be overly concerned from what we do understand. The Commissioner has previously made a statement, in the vast majority of these types of offences the offender is known to the victim. That should allay some community concerns.

MEDIA: What have the post mortem results shown you?

DSS LEE: I am not prepared to discuss the post mortem results.

MEDIA: Do you know..... that you have received them?

DSS LEE: Yes we have received them.

MEDIA: Do you know Corryn Rayney died?

DSS LEE: Yes I do.

MEDIA: Can you tell us?

DSS LEE: No.

MEDIA: Do you know where she died?

DSS LEE: No I don't. No.

MEDIA: Is it a possibility of more than 1 killer?

DSS LEE: Look that is a possibility. I don't want to speculate. I keep telling everyone else not to speculate.

MEDIA: What about the idea that this was planned? Do you believe this was planned?

DSS LEE: Again I wouldn't speculate.

MEDIA: .....

DSS LEE: Yeah. Sorry.

MEDIA: Why aren't the results being released?

DSS LEE: Look the results of the post mortem are known to the police and the killer. And we need to keep it that way. I think it's in the community's best interest that we do maintain a level of confidentiality within the investigation and that will assist us when we come to speak to the person responsible.

MEDIA: Have you completely eliminated Lloyd Rayney from your investigation?

DSS LEE: No. Mr Rayney is a person of interest as are many other people in this investigation.

MEDIA: Last week you've ruled him out as a suspect though? He not a suspect though that hasn't changed?

DSS LEE: A suspect indicates that there is some level of evidence against a person having committed a crime. There is no evidence against Mr Rayney having committed any crime, he is not a suspect in this matter.

MEDIA: What about his movements that night? We just want to establish a bit of a timeline. Was he at home with the kids all night?

DSS LEE: As best we can understand yes that's correct he was.

MEDIA: Have you got any evidence against any other people?

DSS LEE: We have a vast amount of information coming in. Both physical evidence and also documentary evidence. Statements of witnesses. That gives us a number of persons of interests. None of it's conclusive. If we had conclusive evidence against someone we would take someone into custody.

MEDIA: Are you any closer to establishing what exactly happened to Mrs Rayney between leaving that bootscooting class and arriving at Kings Park later that night?

DSS LEE: No that's the real void and that is something that what we want to continually put out through the media. We do not have any confirmed sightings of Mrs Rayney after boot scooting. Her movements, the movements of her vehicle are extremely important to us. The public have been very very helpful and a lot of information coming in but there are still some big gaps where she was on that evening.

MEDIA: Are you confident that you are going to make an arrest soon?

DSS LEE: Oh look you can be confident in that we have a very good team on this. We have all the resources available to the police are being utilised and we have done everything right. We have collected the evidence available. My belief is that all crimes are solvable if you take the right approach to them, using the technology and methodology available to us today. Yes I am very confident we will resolve this.

MEDIA: How long is that going to take?

DSS LEE: How long is a piece of string!

MEDIA: .....

DSS LEE: Pardon.

MEDIA: .....

DSS LEE: We are still in the evidence collect phase. It takes a long time to completely collect all the evidence that may be available. As late as yesterday we were conducting searches in King Park, that will continue. We have spoken to a number of persons of

interest, some have been eliminated and some will require further investigation. We've conducted searches of person's houses in relation to this. But I am not prepared to go into specifics.

MEDIA: .....Mr and Mrs Rayney.

DSS LEE: I am not going to go into specifics sorry.

MEDIA: Have you recovered any murder weapon or any implement used to dig the grave?

DSS LEE: I am not going to discuss any implement that may have been used in the offence. We've had a number of shovels and spades that have been handed in none of those to date have been the one we're looking for. So, again I take that opportunity to ask members of the public, if you have found a digging implement be it a shovel or spade. We would like to hear from you we will come out and collect it and take your statement and at the end of the day if it's not the one we are seeking, we will return it to you.

MEDIA: You haven't revealed and you won't reveal how Corryn Rayney died. Can you reveal if it was particularly violent or if she was raped.

DSS LEE: No, I'm not prepared to discuss that at all.

MEDIA: How long will it take to get all the DNA evidence compiled and those results through?

DSS LEE: There are many many DNA swabs that are being processed. We rely on our Forensic staff, Chemistry Centre staff and the Path Centre staff to identify to us what are priorities and that is based on their experience from past investigations. What is the most likelihood of recovering the offenders DNA and where those swabs come from. We are processing all of those DNA exhibits on a priority basis. But we have many thousands of exhibits to go through and there are many other investigations that being investigated at the same time.

MEDIA: Just how long will it take? How quickly can they process that and give you some of the data back?

DSS LEE: DNA is not visible to the human eye so you can process many exhibits and not recover DNA at all. Which particular piece of which particular swab that has got the DNA that we are seeking on it. That's a very hard question. All we can do is go on our experience and say this is the most likely area or the least likely and prioritise those exhibits in that regard.

MEDIA: Is this case priority for those labs?

DSS LEE: All homicide investigations are a priority. I understand where you are going. We do prioritise all of our exhibits within an investigation. And we prioritise investigations against each other. We are aware there is a public concern, we're aware of the public interest in this case, but there are other offences that we have to look too.

MEDIA: Jack, are you frustrated that this investigation has been going for several weeks?

DSS LEE: No, not at all. The Major Crime Squad is set up to investigate protracted investigations such as this. To take on a board the harder to resolved homicides that's why we have the people we have seconded there. That's why they have the level of expertise and training that they do have.

MEDIA: Do you need more people?

DSS LEE: No, absolutely not. It has been made very clear to me that whatever resources I need will be made available. I have a very competent team that is working on this. I am very comfortable with the resource level.

MEDIA: You previously talked..... inaudible

MEDIA: How many officers are working on the case at the moment?

DSS LEE: That is not something I am prepared to discuss. The only reason for that it can be later put at as Operation Dargan had ex amount and operation such and such had ex amount, why is there a difference. Sometimes people without the inside knowledge of what is required in the investigation can make inappropriate inferences as to the level of resourcing. We resource our investigations to the needs level of that investigation. And they are quite fluid. If we suddenly decide that there is a much greater need within an investigation we will tip more investigators into it.

MEDIA: .....

DSS LEE: No, I'm not. As I said I think the standard of the investigation, the people we've got working on it, the level of forensic support we've had. No, I am very confident if this can be resolved, we will resolve it. I don't believe in unresolved cases, I think the standard at Major Crime certainly in my time has been second to none. We're resolved all our cases recently and I am very very confident we will resolve this one.

MEDIA: Do you know where Corryn Rayney died? Was she killed in the car do you know?

DSS LEE: No, we don't know that.

MEDIA: Is it possible based on what you know about how she died..... have some insight into the personality.....

DSS LEE: Yeah, we do look at personalities of people involved in these things, it is very speculative can and has been shown in the past to be totally wrong. We ask other people not to speculate we don't speculate ourselves.

MEDIA: Profilers.

DSS LEE: We use profiles absolutely. It's human nature certain things are expected.....pause.....I don't really want to go down because you'll be surprised once you start mentioning profilers and clairvoyants it blocks our phones. I rather not.

MEDIA: Jack, you spoke about this investigation being like a puzzle apart from catching the killer themselves what is the most important piece that you don't have at the moment is it finding out what Corryn Rayney did after the class, finding the shovel what is the most important piece of the puzzle you don't have?

DSS LEE: Look you've hit the nail on the head. The key to this is her movements when she left Boot scooting on Tuesday the 7th of August she met up with her killer. Whoever that person may be. The movements of Corryn Rayney on that night are absolutely

crucial to this investigation. If someone out there has that bit of information that will go a long way to resolving this. That is what we need. There are other things like the shovel which will assist us and so forth but the key piece where she did go.

MEDIA: Jack, can you determine this isn't a random attack then?

DSS LEE: No, I don't want to speculate on that.

MEDIA: Jack, you say you need the publics help but this is the first time you've spoken publicly for about a week I believe, any reason for that relative silence?

DSS LEE: Yeah, look it's,... the support from the media has been brilliant we've had a lot of media out there we've been the first story on the news for a long period of time we've had so much information come in that we've collected and that's been volunteered. We've actually had to sit back and try to collate that and go through it. We've had a number of people whom by their status and association with the deceased became automatic POI's that we've had to exclude. So there has been a lot of work done. All we are saying today is nothing really has changed relation to the information we seek from the public. We still need to know were Corryn Rayney went on Tuesday the 7th of August, we don't have that piece of information and that is a key for us.

MEDIA: How do you describe these emails that have spoken about in the media? Were they threatening, are you concerned by them, have you been investigating them, are there emails?

DSS LEE: Look we have seized all the Rayney computers, we have access to all of the emails. I've read the emails and there is nothing threatening in the emails.

MEDIA: Have your determined..... was in an intimate relationship with Corryn Rayney other than her husband?

DSS LEE: Her kids are going to watch this so I don't want to go there.

MEDIA: How are the kids?

DSS LEE: I don't know. I haven't spoken to them personally, we have a Liaison Officer who deals with the family and he speaks with them 3-4 times a day and visits them at least once a day.

MEDIA: And is this taking a toll on those two officers?

DSS LEE: The Family Liaison Officer role is probably the most difficult in the investigation. You tend to take on board the emotions of the family. For that reason we put a very experienced officer in that role. Detective Sergeant Mark McKenzie is our family Liaison Officer. He has a crucial role in the investigation both in reassuring the family we are doing everything we can and obtaining information from the family about the victims lifestyle, which is crucial in establishing how she became a victim.

Annexure B

M0271 Ten News Broadcast of 20 September 2007:

166. This broadcast contained the following references:

n into custody'

:e have arrested her husband Lloyd Rayney and have declared her husband a prime suspect in her murder'

:e actually believe that Corryn Rayney was killed in the family home'

:e today named Lloyd Rayney, her husband, as the prime suspect in the case and charged him under the surveillance devices act'

allege that he bugged his wife's phone conversations'

:e arrested Mr Rayney this morning'
:ctives smashing their way through the back door after Mr Rayney refused to let them in.'
:e believe that Mrs Rayney was murdered at the Monash Avenue house while the couples young daughters were home'
ged with bugging his wife's phone, no charges have been laid'
as been interviewed for over 4 hours'

167. It also contained the following direct quotes of Inspector Jack Lee:

very likely that Mrs Rayney was murdered at her Monash street home' [with a screen grab of Jack Lee]
vere aware Mr Rayney was inside the house and he didn't answer the door, after knocking several times, we forced entry.' [with screen grab
‹ Lee]
as not cooperated with police today that was why he was arrested at the scene' [with screen grab of Jack Lee]
s now a suspect in the murder of his wife" [with screen grab of Jack Lee]
would like to interview the children, we spoke to them early in the investigation, we would like to interview them again' [with screen grab of
ee]

M0272 Seven News Broadcast 20 September 2007:

168. This broadcast contained the following:

:e have named her husband, prominent Perth lawyer, Lloyd Rayney as the prime suspect.'
hours later, the head of task force Dargan... delivered this stunning development'
pent most of the day being questioned by detectives'
:e forced their way into Mr Rayney's Tudorstyle Monash Avenue home this morning'
ctives say Mr Rayney refused to open the door'
:e believe Corryn Rayney was murdered at home'
:e believe that Mr Rayney and his two daughters were at home the night she died'
:e need parental consent of Mr Rayney before they can interview them [the girls]'
as been accused of phone tapping'
about 5 hours of questioning'
ning device was found on his wife's phone'
:e forced their way in through the back door'
did raid Lloyd Rayney's office in the city'

169. The broadcast also contained the following direct quotes from Inspector Jack Lee:

result of further investigations this morning including the interview of Mr Rayney, he is now a suspect in the murder of his wife' [with screen f Jack Lee] (played twice)

our prime suspect because our evidence at this time leads us to believe that the offence occurred at that house.' [with screen grab of Jack

ongoing investigation and forensic evidence lead us to believe that it is very likely that she was murdered at her Monash street home' [with grab of Jack Lee]

elieve that she was murdered prior to being placed in the vehicle' [with screen grab of Jack Lee]

we believe that it was most likely that she was murdered at that house' [with screen grab of Jack Lee]

elieve it was most likely happened that night and from the information we have we believe that the girls were at home for most of that night' creen grab of Jack Lee]

would like to interview the children' [with a screen grab of Jack Lee]

ave evidence that he coordinated the installation of the device, as to the reasons why, that's why we are interviewing him' [with screen grab k Lee]

e has not cooperated with police today that is why he was arrested at the scene and that was why we forced entry' [with screen grab of ee]

M0274 ABC News Broadcast 20 September 2007:

170. This news broadcast contained the following:

d Rayney the prime suspect in the murder of his wife Corryn'

d Rayney has been named a prime suspect in the murder of his estranged wife'

sted and charged with bugging his wife's phone'

stioned for several hours'

e today elevated their interest in the high profile barrister'

e forced their way into his Como home this morning smashing in a back door to search the house for a second time'

searching his office in the city'

s where investigators now believe that Mrs Rayney was murdered'

stioned by major crime squad detectives throughout the afternoon'

e said today they were also eager to speak to the two daughters about the events of that night, but say the girls' father has so far refused to s permission'

171. It also contained the following direct quotes of Inspector Jack Lee:

result of further investigation this morning including the interview of Lloyd Rayney he is now a suspect in the murder of his wife' [with screen
f Jack Lee]
understanding was that we demanded entry and we tried to contact the house we were aware that Mr Rayney was inside the house and he
t answer the door after knocking several times we forced entry' [with screen grab of Jack Lee]
believe the offence occurred at the house yeah it is probably not appropriate for me to go into details as to how much of the offence
ed there. It has always been our belief that Mrs Rayney was conveyed to Kings Park after she was assaulted and possibly murdered' [with
grab of Jack Lee]

M0288 The Australian Newspaper 'Rayney now suspect in wife's murder' of 21 September 2007

172. This contained the following passages:
w the prime suspect in the murder of his wife, Corryn... revealed that she was killed at the family home while the couple's daughters were in
use.'
night using his knowledge of West Australian law to refuse police permission to interview the two girls...'
Rayney has been charged with illegally using a listening device to monitor his wife's telephone calls under the Surveillance Devices Act.'
knocked several times but, they say, Mr Rayney refused to let them in Detectives then kicked in the back door.'
Rayney's daughters remained the key to the investigation.'

173. It also contained the following direct quotes of Inspector Jack Lee:
demanded entry, we tried to contact the house, we were aware Mr Rayney was inside the house. After knocking several times, we forced

s our prime suspect because our evidence at this time leads us to believe the offence occurred at that house, and he is the occupant of that
'

are interviewing Mr Rayney in relation to the murder of his wife.'
not suggesting the phone tap link shim to the murder. I'm simply saying that as a result of our investigations, we've uncovered an illegal
e and we are prosecuting in relation to that.'
ved their hand'
still need the consent of a parent to interview a child. We're constricted by rules.'

M0289 The West Australian 'Prime Suspect' 21 September 2007

174. This article which ran on the front page with a prominent headline and photo contained the following:
e yesterday took the extraordinary step of pointing the finger squarely at her husband Lloyd by naming him as the prime suspect.'
Lee broke his two-week silence on the inquiry by calling a press conference to reveal that Mr Rayney was the prime and only suspect.'

said police also believed Mrs Rayney had been killed in the family's Como home ...'
also revealed the couple's young daughters were probably in the house at the time their mother was murdered.'
Rayney was refusing to co-operate with the police.... Had refused to allow police to interview his children...'
e broke into Mr Rayney' s Monash Avenue home and raided it after he refused to let them in.'
Rayney was now the prime suspect, but only because forensic evidence suggested Mrs Rayney had been murdered in the family home.'
Rayney refused to let them in for several minutes before police knocked down the back door.'
lice had evidence that Mr Rayney had coordinated the bugging of his home telephone. But other people would be charged, he said'

175. It also contained the following direct quotes of Inspector Jack Lee:

t we are saying is we believe that the offence occurred at Monash Avenue. That makes Mr Rayney a significant person of interest or a
ct in this matter.'
s our only suspect at this time. We do have a number of persons of interest. Some persons of interest have been excluded from this
gation. Some remain. And I have no doubt some will be injected into the investigation in the future. At this time he is the primary person of
t, or the suspect.'
not suggesting the phone tap links him to the murder. As a result of our investigations we have discovered an illegal practice and we are
uting in relation to that. He is our prime suspect because our evidence at this time leads us to believe the offence occurred at this house
is the occupant of the house.'
do believe that that's the most likely place where she was killed.'
can't say definitively, but we believe that's the most likely. There are many forensic results that have come back which gives us that
ion. We cannot exclude at this time that it happened elsewhere. But we believe that it's most likely that it happened at that house.'
understanding is that we demanded entry.'
ried to contact the house. We were all there. Mr Rayney was inside the house and he didn't answer the door. After knocking several times
ced entry. It's not explainable (why he didn't answer).'
ay we are substantially further than we were'
there is still a long way to go. I think we have the evidence. It's a matter of working out where it all fits together.'

M0291 The West Australian 'Prime Suspect' 21 September 2007

176. This article in the West Australian contained the following:

alling a press conference to reveal that Mr Rayney was the prime and only suspect.'
said policed also believed Mrs Rayney was killed in the family's Como home...'
o revealed the couple's young daughters were probably in the house at the time their mother was murdered.'
Rayney was refusing to cooperate with the police... and had refused to allow police to interview his children...'

lice broke into Mr Rayney's Monash Avenue home and raided it after he refused to let them in.'
claimed Mr Rayney refused to cooperate with police while they were in the house, so they arrested him and took him to the offices of the crime squad in Northbridge.'
said Mr Rayney was now the prime suspect, but only because forensic evidence suggested Mrs Rayney had been murdered at the family

177. It also contained the following direct quotes of Inspector Jack Lee:
t we are saying is we believe that the offence occurred at Monash Avenue. That makes Mr Rayney a significant person of interest or a ct in this matter.'
s our only suspect at this time. We do have a number of persons of interest. Some persons of interest have been excluded from this gation. Some remain. And I have no doubt some will be injected into the investigation in the future. At this time he is the primary person of t, or the suspect.'
ıot suggesting the phone tap links him to the murder. As a result of our investigations we have discovered an illegal practice and we are uting in relation to that. He is our prime suspect because our evidence at this time leads us to believe the offence occurred at this house is the occupant of the house.'
do believe that that's the most likely place where she was killed.'
can't say definitively, but we believe that's the most likely. There are many forensic results that have come back which gives us that ion. We cannot exclude at this time that it happened elsewhere. But we believe that it's most likely that it happened at that house.'

M0322 Transcript of ABC Radio The World Today- Police name Rayney as suspect in wife's murder 21 September 2007

178. This contained statements as follows:
e have named the former DPP (Director of Public Prosecutions) prosecutor as the prime suspect in the murder, and today returned to the y home after forcing their way in yesterday and taking Mr Rayney away for questioning.
D WEBER: Well Eleanor, he has been charged with an offence under the Surveillance Devices Act, relating to the installation of a phone tap home phone. Now, Lloyd and Corryn Rayney were living in the same house, although they were estranged.
NOR HALL: Have police said why they're now naming Lloyd Rayney as the prime suspect in the murder of his wife?
police believe on the night of the 7th of August, she was murdered in the family home. Forensic evidence has led them to believe that. They e other people of interest, persons of interest in the case, who police say will be brought in at a later stage. They wouldn't be any more c than that, but police say Lloyd Rayney is the prime and only suspect.
s of Lee from an ABC radio interview on 21.09.2007 with Geoff Hutchison are played.
that Lloyd Rayney has been named as a chief suspect, if he was ever to be charged, then you would think those concerns would have been ened.

M0324 Nine News at 18:00 21 September 2007

179. This contained such content as:

esting follows the revelation that the home is where police now believe Corryn Rayney was killed before her body was buried at Kings Park.
l Rayney has told police he was at the house with his daughters the night his wife vanished
e taking the unusual move yesterday of naming him as their main and only suspect.

Annexure C

9. Publication of the Oral Utterance, alternatively the Alternative Utterance, was improper, unjustifiable and lacking in bona fides, in a manner which has aggravated the hurt, damage and distress suffered by the plaintiff in that:

9.1 publication of the Oral Utterance, alternatively the Alternative Utterance, was:

9.1.1 gratuitous and contained information beyond that which was necessary to update the public in relation to Operation Dargan;

9.1.2 naming the plaintiff as the prime suspect and only suspect was a serious departure from the proper standards of conduct expected of investigating officers;

9.1.2 recorded by media representatives with the use of video, photographic and audio equipment;

9.1.3 conducted in circumstances where media representatives were permitted to ask questions of DSS Lee;

9.1.3 included false, prejudicial and inaccurate statements;

Particulars

(i) As at the date of the media conference the plaintiff was not the only suspect in the murder of Corryn Rayney;

(ii) As at the date of the media conference there was no 'forensic evidence' which had led the police to 'believe' that it was 'very likely' that Corryn Rayney was murdered at the Rayney Premises;

(iii) The plaintiff had not denied access to his house earlier that morning;

(iv) The plaintiff had not stopped the police from interviewing his children;

(v) The plaintiff did cooperate with police on 20 September 2007;

(vi) The plaintiff was not arrested at his house because he was not cooperating with police;

9.2 DSS Lee deliberately elected to hold the Media Conferences and publish the Oral Utterance, alternatively the Alternative Utterance, to the media thereby utilising the wide extent and mode of publication of all forms of media, including via the World Wide Web, so as to maximise the extent of the distribution of the Oral Utterance, or its gist, alternatively the Alternative Utterance, or its gist, to as wide an audience as possible;

9.3 DSS Lee, the Western Australian Police Force and the defendant have not apologised to the plaintiff, despite an apology being selfevidently called for;

9.4 statements published by DSS Lee and other serving members of the Western Australian Police Force and the defendant to the media made after publication of the Oral Utterance, alternatively the Alternative Utterance, endorsed and supported publication of the Oral Utterance, alternatively the Alternative Utterance;

9.5 none of DSS Lee, serving members of the Western Australian Police Force or the defendant issued any statements after publication of the Oral Utterance, alternatively the Alternative Utterance, to clarify or correct any aspect of the republication, by the media or listeners/recipients and reporting of DSS Lee's publication of the Oral Utterance, alternatively the Alternative Utterance;

9.6 statements published by DSS Lee, other serving members of the Western Australian Police Force and the defendant to the media after publication of the Oral Utterance, alternatively the Alternative Utterance, provided additional support to the defamatory matter conveyed by the Oral Utterance, alternatively the Alternative Utterance;

9.7 DSS Lee, the Western Australian Police Force and the defendant have failed to apologise to the plaintiff and retract the allegations contained within the Oral Utterance, alternatively the Alternative Utterance despite:

9.7.1 on 1 November 2012, the Supreme Court finding the plaintiff not guilty of both wilful murder and the alternative charge of manslaughter in ***Western Australia v Rayney (No 3)*** [2012] WASC 404 (Decision at First Instance); and

9.7.2 on 23 September 2013, the Court of Appeal dismissing the defendant's appeal against the judgment of acquittal in ***The State of Western Australia v Rayney*** [2013] WASCA 219;

9.8 DSS Lee, the Western Australian Police Force and the defendant have failed to apologise to the plaintiff and retract the allegations contained within the Oral Utterance, alternatively the Alternative Utterance despite the following comments and determinations by the Honourable Acting Justice Brian Martin in the Decision at First Instance (which comments and determination were upheld by the Court of Appeal) that:

9.8.1 Paragraphs 683 686:

29 August 2007 press conference - person of interest/suspect

[683] On 29 August 2007 Mr Lee gave a press conference in which he described the accused as a 'person of interest' who was helping police with their inquiries. He said the accused was one of many persons of interest and drew a distinction between a person of interest and a suspect in the following terms:

> A suspect indicates that there is some level of evidence against the person having committed the crime. There is no evidence against Mr Rayney having committed any crime. He is not a suspect in this matter.

[684] Mr Lee should not have given the press conference or, if there was another reason for giving the press conference, he should not have nominated the accused as a 'person of interest'.

[685] In evidence, Mr Lee said that the accused was not suspect as at 29 August 2007. He was only a person of interest. I reject that evidence. The totality of the material before me plainly establishes that by 27 August 2007, if not earlier, the accused was a suspect. It was on 27 August 2007 that police obtained warrants to permit the interception of the accused's home and mobile telephone numbers. On 28 August 2007 investigators met with a Dr Saatoff, a visiting American 'profiler'. In the critical decisions log, Mr Correia recorded:

> Meeting with Dr Saatoff cemented our thoughts and perception of person of interest Lloyd Rayney (ts 3783).

[686] Notwithstanding the use of the expression 'person of interest' in the log, during crossexamination Mr Correia agreed that by 28 August 2007 the accused was 'clearly a suspect' and, having discussed various matters with Dr Saatoff, the accused's 'level of ... being a suspect' was 'raised'.

9.8.2 Paragraphs 690 699:

20 September 2007 press conference

[690] Moving to 20 September 2007, the police planned a number of activities that day. They intended to arrest the accused for breaches of the *Surveillance Devices Act 1998* (WA) and to execute search warrants at Como and at the accused's chambers. They intended to interview the accused's friend, Ms O'Brien, in Bunbury. The search warrants were executed and a large media contingent was present a Como. The accused was arrested at Como. It was in this context that Mr Lee gave the press conference. The audiovisual record and transcript are ex 307.

[691] It is unnecessary to discuss the content of the press conference in detail. Mr Lee announced the execution of the warrants and said that the ongoing investigations and forensic evidence had led police to believe that it was 'very likely' that the deceased was murdered at Como. He spoke about executing forced entry into the home and said that as a result of further investigations that morning, including the interview of the accused, the police regarded the accused as a 'suspect' in the murder of the deceased. In substance Mr Lee nominated

the accused as the 'prime' and 'only' suspect. He advised that the accused had been charged with an offence under the *Surveillance Devices Act*.

[692] To put the position at its lowest, Mr Lee was gravely in error in identifying the accused as a 'suspect' in the murder of the deceased and in conveying a police view that the accused was the prime and only suspect. Similarly, he should not have informed the media that police investigations and 'forensic evidence' had led the police to 'believe' that it was 'very likely' that the deceased was murdered at Como. Given the presence of the media, Mr Lee probably had no choice but to confirm that police had executed a search warrant at the premises, but he should not have said that police had executed a forced entry after 'access was denied' and there was no need to mention the execution of a search warrant at the accused's business premises. It would have been sufficient to explain to the media that police had executed a search warrant in furtherance of their investigations and that the accused had been charged with an offence under the *Surveillance Devices Act*.

[693] Mr Lee's lack of judgment was compounded by allowing the media to continue to ask questions and by giving a number of utterly inappropriate responses. In particular, notwithstanding his statement that police did not possess any evidence to suggest that the accused was 'in fact guilty of or is in fact responsible for' the murder of the deceased, naming the accused as a suspect and the prime or only suspect was a serious departure from the proper standards of conduct expected of investigating officers. What occurred on 20 September 2007 in the press conference highlights the dangers associated with such conferences and the undesirability of police giving such openended conferences or interviews concerning ongoing investigations.

[694] Mr Lee remained in his position with the Major Crime Squad until the end of 2007 when he was transferred. There is no suggestion in the evidence that he played any active role in the investigation between 20 September 2007 and the date of his transfer.

[695] Not surprisingly, the press conference on 20 September 2007 was followed by extensive and prominent publicity identifying the accused as the prime and only suspect in the murder of the deceased. The West Australian carried a headline on the front page 'Prime suspect' under which was a large photograph of the accused in the rear of a vehicle alongside a male person in a suit. The image plainly suggested that the person was a police officer. Under the photograph appeared the following headings:

Husband the only suspect in Corryn Rayney murder: police.
Detectives say she was probably killed in family home.
Police break into house after Rayney refuses them access.
[696] The Australian newspaper also carried the story prominently under a heading 'Rayney now suspect in wife's murder'. Under the headline was a photograph of the accused being escorted by police into the family home at Como.

[697] Notwithstanding that he was the officer in charge of the investigation, Mr Correia said he had no idea in advance that Mr Lee was going to say anything like what he said. However, under crossexamination Mr Correia initially agreed that he and the other officers involved

in the investigation held the view that the accused was the 'prime and only suspect'. Shortly after giving that evidence, asked whether anyone else became a suspect as opposed to a person of interest, Mr Correia said he wanted to correct his previous answer. He said the accused was 'certainly a suspect', but he 'certainly wasn't the prime and only' suspect. Mr Correia said that as 20 September 2007 they were looking at other persons he considered were suspects.

[698] At no time did the Western Australian Police correct any impression that had been conveyed by Mr Lee during the press conference. Questioned about police relying on information from the public and the failure to correct what Mr Lee had said, Mr Correia gave the following evidence:

> Well, the position was that Lloyd Rayney was a suspect. It wasn't the position that we, as operationally myself, wanted that out in the general public. Now, when it was it certainly didn't stop the public coming forward with information. In fact, I would say it escalated it because we got a lot more information coming out through Crime Stoppers and through other means, which was clearly investigated all the way through (ts 3788).

[699] Given the inappropriate conduct of Mr Lee at the press conference of 20 September 2007, the question must be asked whether, as suggested by counsel for the accused, the police were 'locked in' to endeavouring to prove that the accused committed the crime. There can be no doubt that the primary focus of the investigation was aimed at gathering evidence which might implicate the accused and there were aspects of the police conduct which, to say the least, were inappropriate and unacceptable. However, during the trial counsel for the accused expressly disavowed any attempt to mount a case that the police had failed to investigate adequately other persons of interest and the fact that the investigation focussed on the accused does not of itself lead to a conclusion that any particular aspect of the evidence is unreliable. A narrow focus does not deflect from the central question as to whether the evidence presented to the court proves guilt or otherwise.

9.9 When called to give evidence for the defendant, Inspector (formerly Detective Sergeant) Lee:

9.9.1 made a gratuitous attack on the plaintiff's reputation (T2980);

9.9.2 asserted he held a present belief as to the plaintiff being guilty of murdering his wife despite the plaintiff being acquitted of the charge of murder and an appeal by the defendant being dismissed and further stating 'I believe that there was more information than was ever presented in court because a lot of hearsay evidence was inadmissible' (T2980).

9.10 The maintenance by the defendant of the pleas of qualified privilege in paragraphs 37 and 38 of its defence was unreasonable in circumstances where:

9.10.1 Inspector Lee said on oath as part of his evidence that he accepted the criticisms of his conduct at the press conference by the Honourable Justice Brian Martin in ***State of Western Australia v Rayney [No.3]*** [2012] WASC 404 at [690] [697] (T31523153) and in particular:

9.10.1.1 that it would have been sufficient in the discharge of any duty in the circumstances to explain to the media that police have executed a search warrant in furtherance of their investigations and that Mr Rayney had been charged with an offence under the *Surveillance Devices Act* [para 692];

9.10.1.2 that he (Inspector Lee) had not consulted the officer in charge of the investigation, Detective Correia prior to the media conference [para 697];

9.10.1.3 there was no operational imperative for the disclosure of information by Inspector Lee at the press conference [697] beyond the information referred to in paragraphs 9.10.1.1 hereof;

9.10.2 maintenance of the pleas required the defendant to lead evidence as to reasonableness and the purported basis for the duty to publish;

9.10.3 in view of the matters referred to in paragraph 9.10.1 hereof, there could be no basis for contending that the conduct of Inspector Lee was reasonable as required by section 301(1)(c) of the *Defamation Act 2005*;

9.10.4 in view of the matters referred to in paragraph 9.10.1 hereof, the publication of the additional material beyond that identified by Justice Martin referred to in paragraph 9.10.1.1 hereof could not be the subject of any claim for privilege;

9.10.5 accordingly, the maintenance of the pleas was unreasonable and not bona fide.

in all forms of media, including via the World Wide Webb, the plaintiff has suffered.

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[1] Since the relevant events happened when he held that office, I will refer to him in these reasons as DSS Lee notwithstanding that he has now been promoted to the rank of Inspector. I will also refer to other police officers using the following abbreviations: DSS - Detective Senior Sergeant; DS - Detective Sergeant; DSC - Detective Senior Constable; DC - Detective Constable; SC - Senior Constable; DI - Detective Inspector.

[2] Brian Martin AJ was a former Chief Justice of the Northern Territory and was commissioned to hear the murder trial in view of Mrs Rayney's connection to the Court. Brian Martin AJ is not to be confused with Martin CJ, the Chief Justice of Western Australia, who is mentioned at times in these reasons.

[3] DST0090, page 207.

[4] ***Mallard v The Queen*** [2005] HCA 68; (2005) 224 CLR 125.

[5] Witness statement Ian Moore, exhibit 38 [78] [80].

[6] Witness statement Ian Moore, exhibit 38 [82] [85].

[7] ***Slim v Daily Telegraph Ltd*** [1968] 2 QB 157, 172 (Diplock LJ); ***Reader's Digest Services Pty Ltd v Lamb*** [1982] HCA 4; (1982) 150 CLR 500, 506 (Brennan J) (Gibbs CJ, Stephen, Murphy & Wilson JJ agreeing).

[8] ***Lewis v Daily Telegraph Ltd*** [1964] AC 234, 258; [1963] 2 All ER 151, 154.

[9] ***Morgan v Odhams Press Ltd*** [1971] 1 WLR 1239, 1245.

[10] ***John Fairfax Publications Pty Ltd v Rivkin*** [2003] HCA 50 [25]; [2003] HCA 50; (2003) 77 ALJR 1657, 1661.

[11] ***John Fairfax Publications Pty Ltd v Rivkin*** [26].

[12] ***Griffith v John Fairfax Publications Pty Ltd*** [2004] NSWCA 300 [19].

[13] ***Lewis v Daily Telegraph*** (285).

[14] ***Favell v Queensland Newspapers Pty Ltd*** [2005] HCA 52; (2005) 221 ALR 186 [11] [12].

[15] ***Chakravarti v Advertiser Newspapers Ltd*** (1998) 193 CLR 519 [134].

[16] ***Mirror Newspapers Ltd v Harrison*** [1982] HCA 50; (1982) 149 CLR 293, 300 301.

[17] ***John Fairfax Publications Pty Ltd v Rivkin*** (1666 1667).

[18] ***Sands v State of South Australia*** [2015] SASCFC 36; (2015) 122 SASR 195 [238].

[19] ***Sands v State of South Australia*** [2015] SASCFC 36; (2015) 122 SASR 195 [240].

[20] Witness statement Jack Lee, exhibit 96 [101].

[21] Witness statement Jack Lee, exhibit 96 [106].

[22] Trial Bundle (TB) vol 3, G0094, page 823.

[23] ts 3158, 7 April 2017.

[24] Witness statement Peter Hatch, exhibit 181 [218].

[25] ts 1345, 16 March 2017.

[26] Witness statement Carolyn Monaghan, exhibit 114 [88] [89].

[27] ts 1370, 16 March 2017.

[28] ts 3139, 7 April 2017.

[29] ts 4295 4296, 9 May 2017

[30] ts 1358, 16 March 2017.

[31] ts 3459, 19 April 2017.

[32] Media bundle M0078 page 217 224, M0079 page 225, M0088A page 235 237, M0090 page 243, M0093 page 246.

[33] Media bundle M0130 page 306, M0132 page 308, M0136 page 314, M0140 page 320, M0141 page 321, M0142 page 323, M0143 page 327, M0145 page 333, M0149 page 338, M0151 page 340, M0152 page 341, M0153 page 342, M0157 page 350, M0164 page 360, M0165 page 364, M0166 page 369, M0167 page 370, M0169 page 372, M0170 page 373, M0173 page 377.

[34] Media bundle M0203 page 425, M0204 page 428, M0208 page 434, M0208 page 435, M0209 page 436.

[35] M0254 page 496 (Perth now Jim Kelly), M0256 page 502 (Sydney Morning Herald), M0257 page 504 (The West online), M0260 page 508 (AAP), M0262 page 510 (AAP), M0263 page 511 (AAP), M0264 page 512 (AAP Liza Kappelle, Nicolas Perpitch & Andrea Hayward), M0265 page 513 (New Zealand Press Association), M0266 page 514 (Organisation of Asia Pacific News Agencies), M0267 page 515 525 (Transcript of 20 September), M0267B page 527 530 (10 News Jane Bootle reporting), M0268 page 531 536 (7 News Reece Whitby reporting), M0270 page 539 541 (ABC News Alicia Gorey/Sue Short reporting), M0276 page 549 (The Advertiser), M0278 page 551 (The Daily Telegraph), M0281 page 554 (AAP), M0285 page 558 (Hobart Mercury),M0286 page 559 (Herald Sun), M0287 page 560 (Canberra Times (Liza Kappelle, Nicolas Perpitch & Andrea Haward), M0288 page 561 (The Australian Alana Buckley Carr & Paige Taylor), M0289 page 562 (The West Australian Sean Cowan, Ronan O'Connell & Luke Elliot), M0290 page 564 (The Australian Alana BuckleyCarr & Paige Taylor), M0291 page 565 (Sean Cowan, Ronan O'Connell & Luke Eliot), M0294 page 568 (news.com.au Alana BuckleyCarr & Paige Taylor), M0295 page 572 (ABC News), M0297 page 574 (Networked Knowledge edited by Robert Moles), M0298 page 575 (Networked Knowledge edited by Robert Moles), M0299 page 577 (Networked Knowledge edited by Robert Moles), M0300 page 579 (The West online Rachel Donkin & Peta Rule), M0301 page 582 (Networked Knowledge edited by Robert Moles), M0302 page 583 (The West online), M0303 page 585 (The Advertiser), M0304 page 586 (Herald Sun),

M0305 page 587 (The Daily Telegraph), M0307 page 589 (AAP), M0308 page 590 (AAP), M0309 page 591 (AAP Liza Kappelle & Andrea Hayward), M0310 page 592 (AAP), M0311 page 593 (The West Australian Sean Cowan), M0313 page 595 (The Daily Telegraph), M0314 page 596 (The Mercury Tasmania), M0316 page 598 (AAP), M0318 page 600 (AAP Liza Kappelle & Andrea Hayward), M0319 page 601 (AAP Liza Kappelle & Andrea Hayward), M0320 page 602 (New Zealand Press Association), M0322 page 604 (ABC Online David Weber), M0323 page 606 (9 News Grant Taylor reporting), M0325 page 611 (ABC Online), M0326 page 612 (Perthnow Jim Kelly & Nicole Cox), M0327 page 615 (Weekend Australian Alana BuckleyCarr), M0328 page 616 (Subiaco Post Fiona RossEdwards), M0329 page 618 (The West Australian Sean Cowan & Ronan O'Connell), M0330 page 620 (Weekend Australian Alana BuckleyCarr), M0331 page 621 (The West Australian Sean Cowan), M0333 M0334 page 623 624 (Cambridge Post Fiona RossEdwards), M0335 page 625 (The Royal Gazette (Bermuda) Elizabeth Roberts), M0337 page 629 (Northern Territory News / Sunday Territorian), M0338 page 630 (The Canberra Times), M0339 page 631 (AAP),M0340 page 632 (The Advertiser), M0341 page 633 (The Mercury), M0342 Page 634 (The Gold Coast Bulletin), M0343 page 635 (The West Australian Sean Cowan & Ronan O'Connell), M0345 page 637 (10 News Natasha Belling reporting), M0346 page 639 (7 News Geof Parry reporting), M0347 page 642 (7 News Louise Momber), M0353 p 653 (The Sunday Time Colleen Egan), M0357 page 657 (Sunday Canberra Times), M0358 page 658 (ABC News online), M0359 page659 (ABC News online), M0360 page 660 (Networked Knowledge edited by Robert Moles), M0361 page 662 (news.com.au Nicolas Perpitch & Colleen Egan), M0362 page 667 (AAP), M0363 page 668 (AAP Nicolas Perpitch), M0364 page 669 (AAP), M0365 page 670 (AAP Nicolas Perpitch), M0366 page 371 (AAP Nicolas Perpitch), M0367 page 672 (ABC News online), M0369 page 675 (Hobart Mercury Nicolas Perpitch), M0370 page 376 (Canberra Times), M0371 page 677 (The West Australian Sean Cowan, Luke Eliot & Ronan O'Connell), M0374 page 682 (Kalgoorlie Miner), M0375 page 683 (Australian Alana BuckleyCarr), M0376 page 684 (Western Suburbs Weekly), M0377 page 685 (Northern Territory News), M0378 page 686 (Perthnow Nicolas Perpitch), M0379 page 688 (Networked Knowledge edited by Robert Moles), M0382 page 692 (The Royal Gazette (Bermuda) Elizabeth Roberts), M0383 page 693 (The Advertiser), M0384 page 694 (The Australian Janine MacDonald), M0385 page 695 (The Courier Mail), M0386 page 696 (The Hobart Mercury), M0387 page 697 (AAP Nicolas Perpitch), M0388 page 698 (AAP), M0389 page 699 (The Gold Coast Bulletin), M0390 page 700 (9 News Dixie Marshall), M0391 page 704 (7 Today Tonight Monika Kos), M0394 page 710 (Courier Mail (Brisbane) Nicolas Perpitch), M0394A page 711 (The West Australian Sean Cowan), M0395 page 712 (Guardian Express Louise Bettison), M0396 page 713 (Southern Gazette), M0397 page 714 (Western Suburbs Weekly), M0398 page 715 (The Australian Alana BuckleyCarr), M0400 page 717 (The West Australian Paul Murray) M0401 page 718 (Hawke's Bay Today), M0402 page 719 (ABC News online), M0403 page 720 (ABC News online), M0404 page 721 (ABC News online), M0405 page 722 (Sydney Morning Herald), M0406 page 724 (The Australian), M0407 page 725 (Organisation of Asia-Pacific News Agencies), M0408 page 26 (The Courier Mail Nicolas Perpitch), M0409 page 727 (AAP), M0410 page 728 (AAP), M0411 page 729 (AAP), M0412 page 730 (The West Australian Sean Cowan) M0414 page 732 (Guardian Express), M0415 page 733 (New Zealand Press Association), M0416 page 734 (The West Australian letter to the editor), M0417 page 735 (9 NewsSonia Vinci), M0418 page 736 (10 News Charmaine Dragun), M0419 page 738 (9 News Grant Taylor), M0425 page 746 (Northern Territory News), M0426 page 747 (The West Australian Sean Cowan, Ryan Pedler & Amanda Banks), M0427 page 748 (The Australian Alana BuckleyCarr), M0428 page 749 (Kalgoorlie Miner), M0429 page 750 (The Australian Alana BuckleyCarr), M0431 page 752 (The West Australian letters to the editor), M0432 page 753 (Networked Knowledge edited by Robert Moles), M0433 page 755 (The Royal Gazette (Bermuda) Elizabeth Roberts), M0434 page 756 (Northern Territory News / Sunday Territorian), M0436 page 758 (Perthnow Jim Kelly), M0439 page 761 (AAP),M0440 page 762 (7 News Gary Adshead), M0441 page 764 (ABC News Alicia Gorey), M0444 page 767 (The Weekend Australian Matt Price), M0446 page 769 (The West Australian Sean Cowan), M0447 page 770 (Weekend Australian Alana BuckleyCarr), M0452 page 777 (The Age Sean Cowan), M0453 page 780 (Sydney Morning Herald Sean Cowan), M0454 page 783 (Sunday Times), M0455 page 784 (Sunday Age Sean Cowan), M0456 page 787 (Perthnow Colleen Egan), M0457 page 815 (The Sunday Times Colleen Egan).

[36] Plaintiff's closing submissions [47].

[37] ***Burrows v Knightley*** (1987) 10 NSWLR 651, 657.

[38] TB G0217, page 2222.

[39] ts 4319, 9 May 2017.

[40] ***Lewis v Daily Telegraph***.

[41] ***John Fairfax Publications Pty Ltd v Rivkin***.

[42] ***John Fairfax Publications Pty Ltd v Rivkin***.

[43] ***John Fairfax Publications Pty Ltd v Rivkin***.

[44] ***John Fairfax Publications Pty Ltd v Rivkin*** [26]; ***Charleston v News Group Newspapers Ltd*** [1995] UKHL 6; [1995] 2 AC 65, 70.

[45] ***Morgan v Odhams Press Ltd*** (1245).

[46] ***Chakravarti v Advertised Newspapers Pty Ltd*** [134].

[47] ***Favell v Queensland Newspapers Pty Ltd***.

[48] ***Griffith v John Fairfax Publications***; ***Malcolm v Nationwide News Pty Ltd*** [2007] NSWCA 254 [14].

[49] ***Chase v News Group Newspapers Ltd*** [2002] EWCA Civ 1772 [45]; ***Flood v Times Newspapers Ltd*** [2012] UKSC 11; [2012] 2 AC 273; [2012] 4 All ER 913.

[50] ***Sands v State of South Australia*** [2015] SASCFC 36; (2015) 122 SASR 195 [240].

[51] ***Sands v Channel Seven Adelaide Pty Ltd*** [2010] SASC 202 [121].

[52] ***Mirror Newspapers v Harrison***; ***John Fairfax Publications Pty Ltd v Rivkin***.

[53] ***Chakravarti v Advertiser Newspapers Pty Ltd*** [134].

[54] ***Favell v Queensland Newspapers Pty Ltd*** [11].

[55] TB 0667, page 4086.

[56] ts 3113, 6 April 2017.

[57] ts 2917, 5 April 2017.

[58] ts 3109, 6 April 2107.

[59] ts 2889, 5 April 2017.

[60] ***Sands v State of South Australia*** [2013] SASC 44 [173].

[61] ***Sands v State of South Australia*** [2015] SASCFC 36; (2015) 122 SASR 195 [204].

[62] ***Chakravarti v Advertiser Newspapers Ltd*** [134(1)].

[63] ***Mirror Newspapers v Harrison*** (295 296).

[64] As Ms Marshall's phone call to DSS Lee starkly illustrates.

[65] ***Mirror Newspapers v Harrison*** (300 301).

[66] ts 1360 1361, 16 March 2017.

[67] ts 1364, 16 March 2017.

[68] ts 1368, 16 March 2017.

[69] ts 1398, 17 March 2017.

[70] ts 1399, 17 March 2017.

[71] ts 1402, 17 March 2017.

[72] ts 1411, 17 March 2017.

[73] ts 1340, 16 March 2017.

[74] ***Austin v Mirror Newspapers Ltd*** (1985) 3 NSWLR 354, 358 359.

[75] ***Morosi v Mirror Newspapers*** [1977] 2 NSWLR 749, 797.

[76] Defence [38(b)].

[77] ***Wright v Australian Broadcasting Commission*** [1977] 1 NSWLR 697.

[78] ***Rogers v Nationwide News Pty Ltd*** [2003] HCA 52; (2003) 216 CLR 327 [30] (Gleeson CJ, Gummow J).

[79] ***Morgan v John Fairfax & Sons Ltd*** (1991) 23 NSWLR 374, 387 388.

[80] This passage was cited with approval by Gleeson CJ and Gummow J in ***Rogers v Nationwide News Pty Ltd*** [30], subject to the comment that reasonableness is not a concept that can be subjected to inflexible categorisation.

[81] TB G0244, page 2459.

[82] TB G0122, pages 1480 and 1488.

[83] ts 2895, 5 April 2017.

[84] Witness statement Peter Hatch, exhibit 181 [212]; ts 4288, 9 May 2017.

[85] ts 3807, 26 April 2017.

[86] ***The State of Western Australia v Rayney [No 3]*** [2012] WASC 404 [692] [693].

[87] ***Aktas v Westpac Banking Corporation Ltd*** [2010] HCA 25; (2010) 241 CLR 79 [14].

[88] ***Theophanous v Herald & Weekly Times Ltd*** [1994] HCA 46; (1994) 182 CLR 104, 133; ***Nationwide News Ltd v Weise*** (1990) 4 WAR 263, 267 (Wallace J), 268 (Kennedy J).

[89] ***Sands v State of South Australia*** [2013] SASC 44 [211].

[90] ***Sands v State of South Australia*** [2015] SASCFC 36; (2015) 122 SASR 195.

[91] Defence [38].

[92] Witness statement Jack Lee, exhibit 96 [165].

[93] ***Cush v Dillon*** [2011] HCA 30 [18] [19]; [2011] HCA 30; (2011) 243 CLR 298, 308.

[94] Referring to ***Bashford v Information Australia (Newsletters) Pty Ltd*** [2004] HCA 5; (2004) 218 CLR 366, 415 [135] (Gummow J).

[95] ***Cush v Dillon*** [18] [19].

[96] ***Sands v State of South Australia*** [2013] SASC 44.

[97] The particulars set out in [36(xxxiii)] and [36(xliiia)] are not relied upon in relation to the suspicion imputation.

[98] For example, see ***Jackson v John Fairfax & Sons Ltd*** [1981] 1 NSWLR 36, 41 (Hunt J).

[99] ***Shah v Standard Chartered Bank*** [1998] EWCA Civ 612; [1999] QB 241; [1998] 4 All ER 155.

[100] ***Channel Seven Adelaide Pty Ltd v S, DJ*** [2007] SASC 117 [35] [40].

[101] ***Chase v News Group Newspapers Ltd*** [50] [51]; ***Musa King v Telegraph Group Ltd*** [2003] EWHC 1312 (QB) [32].

[102] ***Forrest v Australian Securities and Investments Commission*** [2012] HCA 39; (2012) 247 CLR 486 [27] (French CJ, Gummow, Hayne & Kiefel JJ).

[103] Directions hearing 16 September 2016 [14(g)].

[104] Plaintiff's closing submissions [274].

[105] See, for example, the evidence of Janine Taylor, ts 3382, 3386 3391.

[106] See, for example, witness statement Linda Black, exhibit 13, and Linda Black's statement to police TB G1371, page 9802; witness statement Shana

Russell, exhibit 8 [6], [12], [13], [14] which are identical to her statement to police 24 August 2007 [3], [12], [13], [15]; TB G1202, pages 8770 8779. Other paragraphs of Ms Russell's witness statement clearly reflect the previous police statement.

[107] ***Chase v News Group Newspapers Ltd*** [55]; see also ***Musa King v Telegraph Group Ltd*** [32.7].

[108] ***Sands v State of South Australia*** [2013] SASC 44 [233].

[109] ***Musa King v Telegraph Group Ltd*** [32.9].

[110] ***Sands v State of South Australia*** [2015] SASCFC 36; (2015) 122 SASR 195 [246]; ***Shah v Standard Chartered Bank*** (170) (Hirst LJ, with whom May & Neill LJJ agreed).

[111] ***Musa King v Telegraph Group Ltd*** [32.8].

[112] ***Beamish v The Queen*** [2005] WASCA 62 [159].

[113] ts 4655 4656, 18 July 2017.

[114] Exhibit 233.

[115] TB G2182, page 16865.

[116] Defence [36(xxxiv)] Reply [47A.47].

[117] See [612] [618] below.

[118] Witness statement Lloyd Rayney, exhibit 1 [274] [275].

[119] ts 656, 8 March 2017.

[120] ts 1142 1143, 14 March 2017.

[121] ts 2800, 4 April 2017.

[122] See below at [376] [386].

[123] Witness statement Neil Barlow, exhibit 166, annexure B, NTB09, pages 187 204.

[124] ts 913, 10 March 2017.

[125] ts 627, 7 March 2017.

[126] TB G0656, page 4006.

[127] ts 787, 9 March 2017.

[128] ts 2293 - 2294, 28 March 2017.

[129] ts 2330, 29 March 2007.

[130] ts 3387, 11 April 2017.

[131] ts 2283, 28 March 2017.

[132] ts 3271, 10 April 2017.

[133] ts 2511, 30 March 2017.

[134] ts 3158 3159, 7 April 2017.

[135] ts 2291, 28 March 2017.

[136] Exhibit 69 [335] [336].

[137] Exhibit 69 [337] [338].

[138] ts 2310, 29 March 2017.

[139] ***Browne v Dunn*** (1894) 6 R 67; ***Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation (Cth)*** [1983] 1 NSWLR 1, 15 16.

[140] ts 2957, 2969, 2976, 5 April 2017.

[141] Exhibit 96 [170] [181].

[142] TB G1266, page 9216.

[143] TB G1250, pages 9085 9086.

[144] ts 2037, 24 March 2017; ts 3009, 6 April 2017.

[145] TB G1228, page 8948.

[146] ts 3032, 6 April 2017.

[147] ts 3012 3013, 6 April 2017.

[148] ts 3014, 6 April 2017.

[149] Defence [36(xiii)].

[150] TB G1197, page 8751 [75], [76].

[151] TB G1161, page 8527.

[152] TB G1169, page 8582.

[153] Exhibit 73 [83].

[154] ts 3022, 6 April 2017.

[155] ts 3024, 6 April 2017.

[156] ts 3000 3001, 6 April 2017.

[157] ts 3031, 6 April 2017.

[158] ts 3032, 6 April 2017.

[159] ts 3036, 6 April 2017.

[160] ts 3052, 6 April 2017.

[161] TB G0228, page 2328.

[162] ts 3298, 10 April 2017.

[163] ts 3302, 10 April 2017.

[164] Witness statement Keith Williams, exhibit 51.

[165] TB G0855, page 4717.

[166] TB G1302, page 9436 [61].

[167] TB G1155, page 8472.

[168] ts 1986, 24 March 2017.

[169] TB G1173, pages 8616 8624.

[170] TB G1173, page 8619, 8620 [30] [33].

[171] TB G1202, page 8773 [25].

[172] Witness statement Shana Russell, exhibit 8 [29].

[173] TB G1617, page 13392.

[174] ts 1986, 24 March 2017.

[175] ts 1982, 24 March 2017.

[176] TB G1188, page 8697.

[177] TB G1165, page 8553 [47] [49].

[178] TB G2021, pages 15517 15518.

[179] ts 2017, 24 March 2017.

[180] ts 2018, 24 March 2017.

[181] TB G1155, page 8486.

[182] ts 2032, 24 March 2017.

[183] ts 2032, 24 March 2017.

[184] TB G0855, page 4723.

[185] ts 2048, 24 March 2017.

[186] ts 3805, 26 April 2017.

[187] ts 3807, 26 April 2017.

[188] ts 3866, 27 April 2017.

[189] ***The State of Western Australia v Rayney [No 3]*** [659] [665].

[190] In an objective assessment as to whether circumstances and conduct of Mr Rayney support a suspicion of guilt, it is appropriate to exercise the caution to which Brian Martin AJ spoke.

[191] For example, see TB G0264, page 2856 to TB G0292, page 2901.

[192] Witness statement Margaret Howkins, exhibit 31 [16] [29].

[193] Witness statement Lloyd Rayney, exhibit 1 [305], [306]. West Coast Eagles is an Australian Football League team.

[194] Witness statement Sharon Coutinho, exhibit 69 [90].

[195] ts 1878, 23 March 2017.

[196] ts 1880, 23 March 2017.

[197] ts 1911 1912, 23 March 2017.

[198] ts 1881, 23 March 2017.

[199] ts 1912, 23 March 2017.

[200] TB G0254, pages 2681 2682.

[201] TB G0254, pages 2678 2680.

[202] TB G0254, pages 2649 2651.

[203] TB G0254, page 2615.

[204] TB G0254, page 2610.

[205] TB G1615A, page 13390.

[206] TB G1617, page 13392.

[207] Witness statement Rohan Coutinho, exhibit 65 [17].

[208] Witness statement Rohan Coutinho, exhibit 65 [29].

[209] ts 2250, 28 March 2017.

[210] ts 2329, 29 March 2017.

[211] Witness statement Sharon Coutinho, exhibit 69 [44].

[212] ts 2377, 29 March 2017.

[213] ts 825 826, 9 March 2017.

[214] Media bundle vol 3 document M0607 (1035).

[215] Responsive witness statement Lloyd Rayney, exhibit 2 [103].

[216] Macquarie Dictionary, 4th ed, Acrimonious is defined as 'caustic, stinging, bitter, virulent'.

[217] Responsive witness statement Lloyd Rayney, exhibit 2 [185].

[218] Responsive witness statement Lloyd Rayney, exhibit 2 [243] [251].

[219] Witness statement Rohan Coutinho, exhibit 65 [30] [33].

[220] Witness statement Ernest Da Silva, exhibit 63 [26] [27].

[221] ts 2252, 28 March 2017.

[222] DST0106 page 231; ts 578 580, 7 March 2017.

[223] ts 581, 7 March 2017.

[224] TB G2050, pages 15674 15697.

[225] ts 577, 7 March 2017.

[226] Witness statement Neil Barlow, exhibit 166, annexure B [39]; ts 4085, 8 May 2017.

[227] Witness statement Neil Barlow, exhibit 166, annexure B [166]; ts 4086, 8 May 2017.

[228] Witness statement Shana Russell, exhibit 8 [19].

[229] Witness statement Sharon Coutinho, exhibit 69 [66].

[230] Witness statement Julie Porter, exhibit 73 [59].

[231] TB G1169, page 8576 [24].

[232] Witness statement Elizabeth Woods, exhibit 52 [37] [40].

[233] Witness statement Michael Hall, exhibit 41 [45].

[234] ts 1727, 22 March 2017.

[235] Reply [47A.9(iv)].

[236] ts 603, 7 May 2017.

[237] Responsive witness statement Lloyd Rayney, exhibit 2 [239].

[238] TB G1173 page 8617.

[239] Witness statement Maria Soares, exhibit 85 [52] [58].

[240] TB G1130, page 7641.

[241] TB G1137, page 7770.

[242] TB G1137, page 7771.

[243] TB G0414, page 3191.

[244]TB G0370, page 3100.

[245] ts 613, 625, 7 March 2017.

[246] Responsive witness statement Lloyd Rayney, exhibit 2 [224].

[247] Witness statement Lloyd Rayney, exhibit 1 [1662] [1665].

[248] TB G1173, page 8623 [58].

[249] ts 1241, 15 March 2017.

[250] TB G0287, page 2896.

[251] Responsive witness statement Lloyd Rayney, exhibit 2 [223].

[252] ts 597, 7 March 2017.

[253] ts 602, 7 March 2017.

[254] See above [269] [275**]**.

[255] TB G1617, page 13392.

[256] ts 2404, 29 March 2017.

[257] Witness statement Ernest Da Silva, exhibit 63 [83]; ts 2271, 28 March 2017.

[258] Witness statement Shana Russell, exhibit 8 [28], [29].

[259] Witness statement Dianne Miller, exhibit 208 [30].

[260] Witness statement Kerry Jenke, exhibit 107 [24].

[261] Witness statement Lloyd Rayney, exhibit 1 [324] [327]. This is consistent with what he told police on 8 August 2007 - TB G1155 page 8472.

[262] TB G1173, page 8619 8620 [28] [32].

[263] Reply [47B.9].

[264] Witness statement Glen Dale, exhibit 194 [39] [42].

[265] TB G1212, page 8859 [24] [28].

[266] Witness statement Hildegard Kennedy, exhibit 197 [18] [19].

[267] TB G1266, pages 9217 9218 [35] [39].

[268] TB G1270, page 9232 [37].

[269] TB 1228, pages 8949 8950 [41] [44].

[270] PST 182, pages 5250 5251.

[271] ts 3879, 27 April 2017.

[272] Reply [47B.13].

[273] Reply [47B.19].

[274] Reply [47B.20].

[275] Reply [47B.21].

[276] Reply [47B.27].

[277] Reply [47B.30].

[278] Reply [47B.33].

[279] Reply [47B.40].

[280] Responsive witness statement Lloyd Rayney, exhibit 2 [94].

[281] Witness statement Caitlyn Rayney, exhibit 3 [112].

[282] Reply [47B.16].

[283] Responsive witness statement Lloyd Rayney, exhibit 2 [95].

[284] Witness statement Caitlyn Rayney, exhibit 3 [113], [125] [127].

[285] Responsive witness statement Lloyd Rayney, exhibit 2 [96].

[286] TB G1234, page 8978 [11].

[287] Reply [47B.18]; TB G1234, page 8978 [27] [28].

[288] Reply [47B.22].

[289] Reply [47B.23].

[290] Witness statement Caitlyn Rayney, exhibit 3 [107] [108].

[291] ts 813 814, 9 March 2017.

[292] Witness statement Lloyd Rayney, exhibit 1 [342].

[293] Witness statement Shana Russell, exhibit 8 [55].

[294] TB G1158, page 8502.

[295] TB G1202, page 8770.

[296] ts 1181, 15 March 2017.

[297] ts 1187, 15 March 2017.

[298] Reply [47B.24].

[299] Witness statement Caitlyn Rayney, exhibit 3 [74] [84].

[300] Witness statement Lloyd Rayney, exhibit 1 [309] [311].

[301] Defendant's closing submissions [1240].

[302] Reply [47B.25].

[303] Witness statement Lloyd Rayney [343] [344].

[304] Witness statement Caitlyn Rayney, exhibit 3 [114] [117].

[305] Witness statement Shana Russell, exhibit 8 [66], [71], [75].

[306] ts 1180, 15 March 2017.

[307] ts 1178 1179, 15 March 2017.

[308] ts 1180, 15 March 2017.

[309] Witness statement Shana Russell, exhibit 8 [74].

[310] Witness statement Shana Russell, exhibit 8 [53] [54], [76] [77].

[311] TB G1202, pages 8775 8776.

[312] Reply [47B.28] [47B.31].

[313] Witness statement Sarah Rayney, exhibit 4 [37] [49].

[314] TB G1162, pages 8530 8536.

[315] ts 845, 9 March 2017.

[316] ts 846, 9 March 2017.

[317] Defendant's closing submissions [1278].

[318] Reply [47B.34] [47B.36], [47B.38] [47B.39].

[319] Witness statement Caitlyn Rayney, exhibit 3 [118] [134].

[320] Witness statement Timothy Hoey, exhibit 206.

[321] The crossexamination on this point is found at ts 821 823, 9 March 2017.

[322] See **[**262**]** above.

[323] Defendant's closing submissions [944].

[324] PST198, page 5336 [5] [8].

[325] See **[**262] [264] above.

[326] PST191, page 5307.

[327] Defendant's closing submissions [948].

[328] PST209, page 5395.

[329] PST212, page 5409.

[330] PST213, page 5411.

[331] Plaintiff's closing submissions [687].

[332] Witness statement Ian Moore, exhibit 38 [149]; witness statement Natasha Rogers, exhibit 186 [26].

[333] Witness statement Ian Moore, exhibit 38 [382]; ts 1711, 21 March 2017.

[334] Witness statement Jack Lee, exhibit 96 [175.10].

[335] Witness statement Sanjeev Albuquerque, exhibit 113 [91.7(a)].

[336] ts 3049 3050, 6 April 2017.

[337] ts 3052, 3057 and 3087, 6 April 2017.

[338] ts 3038, 6 April 2017.

[339] Defendant's closing submissions [1012].

[340] Witness statement Kaylene Durrant, exhibit 37 [38].

[341] ts 1500, 20 March 2017.

[342] TB G0900, page 6401.

[343] TB G0708, page 4141.

[344] The plaintiff pleads that 'the spade or shovel ... had cut through tree roots': Reply [47B.55].

[345] ts 1080, 14 March 2017.

[346] Witness statement Michael Halls, exhibit 41 [65] [71].

[347] TB G1155, page 8473.

[348] Defendant's closing submissions [1113].

[349] TB G2147, page 16463; witness statement Brett McCance, exhibit 209 [34] [35].

[350] ts 4554, 4557; TB G2147, page 16469.

[351] Exhibit 184E, page 5.

[352] TB G2182A, page 16926.

[353] TB G0681, page 4114.

[354] TB G2182A, page 16933.

[355] Exhibit 227, photograph 6.

[356] TB G2182A, page 16934.

[357] Exhibit 226, photographs 1 and 2 respectively.

[358] Witness statement Deborah Freegard, exhibit 184 [22J] [22R].

[359] ts 4376, 12 May 2017.

[360] ts 4379, 12 May 2017.

[361] See, for example, TB G0681, page 4114; G0683, page 4116; G0684, page 4117; exhibit 227, photographs 3, 4, 5, 6, 7, 8 and 9.

[362] G6802, page 4115.

[363] TB G0887, page 6279.

[364] TB G0176, page 1962.

[365] Witness statement Siobhan O'Loughlin, exhibit 212 [68].

[366] Witness statement Siobhan O'Loughlin, exhibit 212 [76] [79].

[367] TB G0709, page 4142, G0710, page 4143.

[368] Exhibit 118, 118A, TG G2182A, page 16892.

[369] ts 4637, 18 July 2017.

[370] Forensic exhibit GH175.

[371] Forensic exhibit GH176.

[372] Witness statement Brett McCance, exhibit 209 [81] [86].

[373] Defendant's closing submissions [1166].

[374] ts 1025, 13 March 2017.

[375] ts 824, 9 March 2017.

[376] Witness statement Paul Robinson, exhibit 169 [74] [75].

[377] ts 3358, 11 April 2017.

[378] ts 3918, 27 April 2017.

[379] Witness statement John Roberts, exhibit 201, annexure A.

[380] ts 1089 1090, 14 March 2017.

[381] Witness statement Kornelis Prins, exhibit 224 [35], [36].

[382] Responsive witness statement Lloyd Rayney, exhibit 2 [682] [683].

[383] Witness statement Lloyd Rayney, exhibit 1 [48].

[384] Plaintiff's closing submissions [764].

[385] Witness statement Lloyd Rayney, exhibit 1 [443] [445].

[386] Witness statement Lloyd Rayney, exhibit 1 [518] [549].

[387] Witness statement Paul Robinson, exhibit 169 [254] [256].

[388] TB G0228, page 2311.

[389] See above at [23].

[390] Defendant's closing submissions [1206], [1208].

[391] Witness statement Paul Robinson, exhibit 169 [91], [92].

[392] ts 1032, 13 March 2017.

[393] TB G1326, page 9554 [28].

[394] TB G1326, page 9552 [14].

[395] Witness statement Jack Lee, exhibit 96 [88] [89].

[396] ts 3182, 7 April 2017.

[397] ts 3180 3181, 7 April 2017; TB G0873, page 5180.

[398] Defendant's closing submissions [2096].

[399] Defendant's closing submissions [1211].

[400] Witness statement Paul Bevilacqua, exhibit 191.

[401] Defendant's closing submissions [1565].

[402] Witness statement Kerry Jenke, exhibit 107 [14] [16].

[403] ts 2791 2792, 4 April 2017.

[404] ts 2712, 3 April 2017.

[405] TB G0361, pages 3074 3078.

[406] ts 2718, 3 April 2017; TB G0528, page 3584.

[407] ts 2720, 3 April 2017.

[408] ts 2740, 3 April 2017.

[409] ts 2746, 3 April 2017.

[410] ts 2746 2747, 3 April 2017.

[411] ts 2749, 3 April 2017.

[412] ts 2750, 3 April 2017.

[413] ts 2751, 3 April 2017.

[414] ts 2752, 3 April 2017.

[415] ts 2754, 3 April 2017.

[416] TB G1209, pages 8815 8839.

[417] TB G0145, page 1614.

[418] Exhibit 146, entry for 23 July 2007.

[419] ts 1003, 13 March 2017.

[420] Exhibit 146.

[421] TB G1141, page 8144.

[422] TB G1130, pages 7640 7641.

[423] TB G1138, page 7884.

[424] Consolidated chronology 3 March 2017, page 3.

[425] TB G0129, page 1549.

[426] ts 2801, 4 April 2017.

[427] ts 2812, 4 April 2017.

[428] TB G0129, pages 1549 1551.

[429] ts 2748, 3 April 2017.

[430] ts 2810, 4 April 2017.

[431] ts 2813 2814, 4 April 2017.

[432] TB G1209, page 8833 [144].

[433] TB G1137, page 7781.

[434] TB G1137, pages 7781 7783.

[435] Witness statement Jaya Krishnan, exhibit 95 [20].

[436] Exhibit 1 [271] [275].

[437] ts 934 935, 10 March 2017.

[438] ts 938, 10 March 2017.

[439] ts 943, 10 March 2017.

[440] ts 992, 13 March 2017.

[441] ts 998, 13 March 2017.

[442] ts 1001, 13 March 2017.

[443] ts 1010, 13 March 2017.

[444] ts 2102, 27 March 2017.

[445] ts 2091, 27 March 2017.

[446] Supplementary witness statement Rodney McKemmish, exhibit 205 [14].

[447] TB 1209, page 8828 [112].

[448] ts 2815, 4 April 2017.

[449] ts 2798, 4 April 2017.

[450] Defendant's supplementary bundle DST 0168, page 401.

[451] Defendant's closing submissions [1858].

[452] Witness statement Lloyd Rayney, exhibit 1 [244].

[453] Witness statement Lloyd Rayney, exhibit 1 [244]; ts 764, 9 March 2017.

[454] ts 765, 9 March 2017.

[455] Witness statement Lloyd Rayney, exhibit 1 [256]; ts 619, 7 March 2017.

[456] ts 619 620, 7 March 2017; ts 766, 9 March 2017.

[457] ts 614, 7 March 2017.

[458] In particular, ID 1 and ID 9.

[459] DST0001 [13] [16].

[460] Exhibit 146, calendar April 2007.

[461] ID 3, ID 4, ID 5 and ID 9.

[462] ID 6, ID 7 and ID 8.

[463] ts 1070, 14 March 2017.

[464] ts 1073, 14 March 2017.

[465] ts 2814, 4 April 2017.

[466] ts 1072, 1 March 2017.

[467] See [226] above.

[468] Defendant's closing submissions [1584].

[469] Witness statement Lloyd Rayney, exhibit 1 [346] [352].

[470] Responsive witness statement Lloyd Rayney, exhibit 2 [3] [4].

[471] Defendant's closing submissions [1934].

[472] Witness statement Ernest Da Silva, exhibit 63 [61].

[473] ts 2276, 28 March 2017.

[474] Witness statement Rohan Coutinho, exhibit 65 [97] [98].

[475] ts 2342, 29 March 2017.

[476] TB G0288, page 2897.

[477] PST 58, page 4481.

[478] PST 22, page 4425.

[479] PST 27, page 4432.

[480] PST 28, page 4433.

[481] Witness statement Lloyd Rayney, exhibit 1 [353].

[482] TB G1137, page 7785.

[483] Witness statement Lloyd Rayney, exhibit 1 [362].

[484] TB G1141, page 8164.

[485] TB G1138, page 7900.

[486] Witness statement Narelle Morris, exhibit 198 [45].

[487] Witness statement Janine Taylor, exhibit 111 [70] [72].

[488] Witness statement Janine Taylor, exhibit 111 [81].

[489] TB G0401, page 3160.

[490] Witness statement Shari Paradise, exhibit 18 [11].

[491] Witness statement Linda Black, exhibit 13 [12] [15].

[492] Witness statement Sharon Coutinho, exhibit 69 [176] [180].

[493] Witness statement Narelle Morris, exhibit 198 [33] 36].

[494] Witness statement Caitlyn Rayney, exhibit 3 [138].

[495] Witness statement Sarah Rayney, exhibit 4 [79].

[496] TB G1155, page 8475.

[497] Witness statement Sarah Rayney, exhibit 4 [83].

[498] ts 2464, 30 March 2017.

[499] ts 2465, 30 March 2017.

[500] ts 2510, 30 March 2017.

[501] Defendant's closing submissions [1970].

[502] TB G1852, page 14528.

[503] Witness statement Kelly Nebel, exhibit 203 [22] [23].

[504] ts 883, 10 March 2017.

[505] Defendant's closing submissions [2029].

[506] Defendant's closing submissions [2026].

[507] ts 1914, 23 March 2017.

[508] Witness statement Sharon Coutinho, exhibit 69 [222] [224].

[509] Responsive witness statement Raelene Johnston, exhibit 26B [38]; see also ts 1451, 17 March 2017.

[510] ts 883, 10 March 2017.

[511] Witness statement Sharon Coutinho, exhibit 69 [230] [232].

[512] Witness statement Rohan Coutinho, exhibit 65 [137].

[513] ts 884, 10 March 2017.

[514] TB G0876, page 5984.

[515] TB G0228, page 2307.

[516] TB G0876 page 5988; ts 4133, 8 May 2017.

[517] ts 4132, 8 May 2017.

[518] TB G1155, page 8467.

[519] TB G1155, page 8472.

[520] See above at **[**417**]** [420].

[521] See above at [320].

[522] Witness statement Francis John Brandham, exhibit 15 [68] [72].

[523] Witness statement Paul Robinson, exhibit 169 [96] [98].

[524] ts 4131, 8 May 2017.

[525] TB G1852, page 14528.

[526] Witness statement Paul Robinson, exhibit 169 [267.4].

[527] Witness statement Warren Wheatley, exhibit 108 [25].

[528] ***The State of Western Australia v Rayney [No 3]*** [493] [494]; TB G0086, page 415.

[529] ts 3227, 7 April 2017.

[530] ts 3229, 7 April 2017.

[531] ts 893, 10 March 2017.

[532] ts 895, 10 March 2017.

[533] ***The State of Western Australia v Rayney [No 3]*** [492]; TB G0086, page 414.

[534] Witness statement Kornelis Prins, exhibit 224 [47] [65].

[535] ts 4770, 19 July 2017.

[536] Witness statement Paul Robinson, exhibit 169 [157]; TB G0228, page 2314 2315.

[537] ts 4143, 8 May 2017.

[538] ts 4144, 8 May 2017.

[539] ts 714, 8 March 2017.

[540] ts 715, 8 March 2017.

[541] Defendant's closing submissions [2145].

[542] See above at [215].

[543] Witness statement Sarah Rayney, exhibit 4 [72] [75].

[544] TB G1166, page 8558.

[545] Responsive witness statement Lloyd Rayney, exhibit 2 [132] [136].

[546] ts 716, 8 March 2017.

[547] Responsive witness statement Raelene Johnston, exhibit 26B [48].

[548] Witness statement Mark McKenzie, exhibit 110 [124] [127].

[549] TB G1016, page 7264.

[550] Witness statement Mark McKenzie, exhibit 110 [134] [135].

[551] TB G1891, page 14830.

[552] Responsive witness statement Raelene Johnston, exhibit 26B [227].

[553] TB G1929, page 14961.

[554] TB G1987, pages 15281 15287.

[555] Responsive witness statement Lloyd Rayney, exhibit 2 [113] [114].

[556] Defendant's closing submissions [2161].

[557] Witness statement Ernest Da Silva, exhibit 63 [114] [115].

[558] Defendant's closing submissions [2174].

[559] PST130, page 5040.

[560] Witness statement Sharon Coutinho, exhibit 69 [239] [242].

[561] Witness statement Sharon Coutinho, exhibit 69 [280] [282].

[562] Witness statement Sharon Coutinho, exhibit 69 [313]; ts 2409, 29 March 2017.

[563] ts 2407, 29 March 2017.

[564] Witness statement Rohan Coutinho, exhibit 65 [203].

[565] Witness statement Kerry Jenke, exhibit 107 [39].

[566] ts 3214, 7 April 2017.

[567] Witness statement Kerry Jenke, exhibit 107 [40].

[568] Witness statement Kelly Nebel, exhibit 203 [28], [31].

[569] TB G1342, page 9626 9627.

[570] ts 4520, 17 July 2017.

[571] TB G0426, page 3220.

[572] TB G0429, page 3223.

[573] TB G0434A, page 3227.

[574] TB G0437, page 3240.

[575] TB G0483, page 3354.

[576] TB G0487, page 3361.

[577] TB G0553, page 3682.

[578] ts 4523, 17 July 2017.

[579] ts 2409, 29 March 2017.

[580] ts 851, 9 March 2017; witness statement Sarah Rayney, exhibit 4 [171].

[581] Defendant's closing submissions [2202].

[582] TB G1194, page 8731 8732.

[583] Witness statement Christopher Reeve, exhibit 105 [30].

[584] TB G1280, page 9287.

[585] Responsive witness statement Lloyd Rayney, exhibit 2 [137] [139].

[586] Witness statement Christopher Bond, exhibit 192.

[587] Witness statement Caitlyn Rayney, exhibit 3 [40] [42]; witness statement Sarah Rayney, exhibit 4 [13] [14].

[588] ts 3199, 7 April 2017.

[589] ts 3198, 7 April 2017.

[590] ts 3200, 7 April 2017.

[591] ts 3201, 7 April 2017.

[592] Exhibit 106.

[593] ts 3201, 7 April 2017.

[594] ts 3203, 3205, 7 April 2017.

[595] Responsive statement Lloyd Rayney, exhibit 2 [309] [311].

[596] Exhibit 109; TB G1987, pages 15258 15259.

[597] Exhibit 109; TB G1987, pages 15268 15272.

[598] See above at [702].

[599] Exhibit 109; TB G1987, pages 15281 15285.

[600] Exhibit 109; DST0007.

[601] Exhibit 109; TB G1987, pages 15299 15307.

[602] TB G0486, page 3360.

[603] Exhibit 109; DST14.

[604] Exhibit 109; G1987, page 15315.

[605] ts 2917, 5 April 2017.

[606] TB G0667, page 4088 4089.

[607] Witness statement Gregor Hart, exhibit 78 [85] [92].

[608] Witness statement Pieris Pieri, exhibit 178 [33] [38].

[609] Witness statement Sanjeev Albuquerque, exhibit 113 [60] [70].

[610] Witness statement Gary Saunders, exhibit 77 [27], [29].

[611] TB G1090, page 7451; DST033; exhibit 84, line 769.

[612] TB G1090, page 7452; DST34; exhibit 84, line 770.

[613] TB G1141, page 8254; G1137, page 7796.

[614] ts 790, 9 March 2017.

[615] ts 1015, 1020, 13 March 2017.

[616] Witness statement Molly Rayney, exhibit 9 [6] [24].

[617] Defendant's closing submissions [2340].

[618] ***The State of Western Australia v Rayney [No 3]*** [655].

[619] ***Sands v State of South Australia*** [2015] SASCFC 36; (2015) 122 SASR 195 [238].

[620] ***Truth (NZ) Ltd v Holloway*** [1961] NZLR 22; [1960] 1 WLR 997; ***Harding v Essey*** [2005] WASCA 30; (2005) 30 WAR 1 [120] (Pullin J).

[621] ***Toomey v Mirror Newspapers Ltd*** (1985) 1 NSWLR 173, 182 (Hunt J).

[622] ***Speight v Gosnay*** (1891) 60 LJ QB 231; (1891) 51 JP 501.

[623] ***Sims v Wran*** [1984] 1 NSWLR 317, 320.

[624] ***McManus v Beckham*** [2002] 1 WLR 2982; [2002] EWCA Civ 939 [34] (Waller LJ).

[625] ***McManus v Beckham*** [42] (Laws LJ).

[626] ***McManus v Beckham*** [34] (Waller LJ).

[627] Defence [35].

[628] Defence [36].

[629] Defence [40].

[630] Defendant's closing submissions [200].

[631] Defendant's closing submissions [204] [206].

[632] Defendant's closing submissions [218] [219].

[633] ***Carson v John Fairfax & Sons Ltd*** [1993] HCA 31; (1993) 178 CLR 44, 60.

[634] ***Uren v John Fairfax & Sons Pty Ltd*** [1966] HCA 40; (1966) 117 CLR 118, 150 (Windeyer J), cited with approval in ***Carson v John Fairfax & Sons Ltd*** (60) (Mason CJ, Deane, Dawson & Gaudron JJ).

[635] ***Carson v John Fairfax & Sons Ltd*** (61).

[636] ***Cassell & Co Ltd v Broome*** [1972] UKHL 3; [1972] AC 1027, 1071 (Lord Hailsham of St Marylebone LC); ***Carson v John Fairfax & Sons Ltd*** (115) (McHugh J); ***Aktas v Westpac Banking Corporation Ltd*** [2009] NSWCA 9 [91].

[637] ***Wilson v Bauer Media Pty Ltd*** [2017] VSC 521 [59].

[638] ***Carson v John Fairfax & Sons Ltd*** (70).

[639] ***Carson v John Fairfax & Sons Ltd*** (71).

[640] ***Selecta Homes & Building Co Pty Ltd v AdvertiserNews Weekend Publishing Co Pty Ltd*** [2001] SASC 140; (2001) 79 SASR 451, 470 [142] [143] (Gray J); ***March v E & MH Stramare Pty Ltd*** [1991] HCA 12; (1991) 171 CLR 506.

[641] ***Medlin v State Government Insurance Commission*** [1995] HCA 5; (1995) 182 CLR 1, 6.

[642] Western Australia, *Government Gazette,* No 132, *Defamation (Damages for Noneconomic Loss) Order 2017* (30 June 2017) 3575.

[643] ***Carson v John Fairfax & Sons Ltd*** (71) (Brennan J); ***Triggell v Pheeney*** [1951] HCA 23; (1951) 82 CLR 497, 514.

[644] ***Cerutti v Crestside Pty Ltd*** [2014] QCA 33; [2016] 1Qd R 89 [37], citing ***Triggell v Pheeney*** (514).

[645] ***Costello & Abbott v Random House Australia Pty Ltd*** [1999] ACTSC 13; (1999) 137 ACTR 1 [411].

[646] Defendant's closing submissions [3013.1] [3013.4].

[647] Defendant's closing submissions [3014].

[648] ***Forrest v Askew*** [2007] WASC 161 [68] [74].

[649] ***Cripps v Vakras*** [2014] VSC 279.

[650] ***Wilson v Bauer Media Pty Ltd*** [2017] VSC 521 [76] [80].

[651] ***Wilson v Bauer Media*** [84] [89].

[652] ***Herald & Weekly Times Ltd v Popovic*** [2003] VSCA 161; (2003) 9 VR 1 [385]; ***Lower Murray Urban and Rural Water Corporation v Di Masi*** [2014] VSCA 104; (2014) 43 VR 348 [116].

[653] Witness statement Lloyd Rayney, exhibit 1 [1006] [1017].

[654] ***Ratcliffe v Evans*** (1892) 2 QB 524, 528 531.

[655] ***Carson v John Fairfax & Sons Ltd*** (61).

[656] ***John Fairfax & Sons Ltd v Kelly*** (1987) 8 NSWLR 131, 140.

[657] ***John Fairfax & Sons Ltd v Kelly*** (139).

[658] TB G0086, page 667; ***The State of Western Australia v Rayney [No 3]*** [1594]; ts 1062, 14 March 2017.

[659] TB G0086, page 372; ***The State of Western Australia v Rayney [No 3]*** [318]; ts 1063, 14 March 2017.

[660] ts 1064, 14 March 2017.

[661] ts 1064, 14 March 2017.

[662] ts 1067, 14 March 2017.

[663] Statement of claim [9.1].

[664] Statement of claim [9.3], [9.4], [9.5], [9.6], [9.7], [9.8].

[665] Statement of claim [9.9].

[666] Statement of claim [9.10].

[667] TB G0571, page 3733.

[668] TB G0555, page 3690; G0557, page 3694; G0561, page 3698; G0566, page 3704; and G0567, page 3705.

[669] Media bundle, M0768, page 1288.

[670] The various publications are pleaded in answer 2 to the plaintiff's answers to the defendant's request for further and better particulars of claim filed 5 December 2008 and principally concern a statement by Deputy Commissioner Dawson supporting DSS Lee, suggesting that he had conducted 'a meticulous and professional' investigation.

[671] ***West Australian Newspapers Ltd v Elliott*** [2008] WASCA 172; (2008) 37 WAR 387 [60], citing ***Pamplin v Express Newspapers Ltd (No 2)*** [1988] 1 WLR 116, 120.

[672] See [243] [245] above.

[673] Defence [46(b), (c), and (d)].

[674] Defendant's closing submissions [3117].

[675] ***Rayney v Reynolds*** [2016] WASC 219.

[676] ***Rayney v Reynolds [No 2]*** [2016] WASC 254.

[677] ***Rayney and Legal Practice Board of Western Australia*** [2016] WASAT 7.

[678] TB G0595, page 3834.

[679] Witness statement Lloyd Rayney, exhibit 1 [1719] [1720].

[680] ***Legal Profession Complaints Committee and Rayney*** [2016] WASAT 142.

[681] ***Legal Profession Complaints Committee v Rayney*** [2017] WASCA 78.

[682] Witness statement Paul Meyer, exhibit 19 [33].

[683] Witness statement Richard Lawson, exhibit 30 [6].

[684] Witness statement Linda Black, exhibit 13 [34].

[685] ts 1064, 14 March 2017.

[686] Witness statement Lloyd Rayney, exhibit 1 [1722].

[687] Barton Consultancy Report 29 January 2009 [22], exhibit 217.

[688] Report of M Langridge 20 January 2017 [4.18] [4.19], exhibit 221.

[689] ts 4790, 19 July 2017.