IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2014] EWHC 4493 (QB)

Claim No. HQ11D03790

Royal Courts of Justice

Thursday, 18th December 2014

Before:

MR. JUSTICE WARBY

B E T W E E N :

HELAL UDDIN ABBAS — Claimant

- and -

MOHAMED YOUSUF SHAH — Defendants

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MR. J. PRICE (instructed by Bryan Cave LLP) appeared on behalf of the Claimant.

MISS T. KUMAR (instructed by Sahota Solicitors) appeared on behalf of the Defendant.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE WARBY:

1 This is an action for libel in which the claimant complains of allegations that he has been violent towards women, including in particular his former wife, Saleha. The action is now fixed for trial by judge alone, commencing on 2nd March 2015, and this is the pre-trial review. The majority of the directions remaining to trial are agreed in principle, subject to the application by the defendant which I now have to address. That application seeks permission to amend the Defence. The defendant wishes to plead to the defamatory meaning alleged by the claimant but, more significantly, to plead a defence of justification. I refer to justification because the date on which the alleged libel was published means that the relevant defences are those that existed at common law and not the new statutory defences created by the Defamation Act 2013. The defendant also seeks to plead certain matters in mitigation.

2 The defendant's application is opposed on behalf of the claimant on the grounds that it is a new case raised after unacceptable delay, which is inadequately pleaded and inadequately supported by evidence.

3 The background is as follows. The claimant was until May of this year a councillor in the London Borough of Tower Hamlets. In 2010 he was the Labour candidate for the position of Mayor in the election of that October. At that time the defendant was the editor of the London Bangla, which is a weekly free newspaper published online and in print in Bengali and English in the Borough of Tower Hamlets.

4 The publication complained of took place in the London Bangla of 15th October 2010. It consisted of an article and advertisement which told readers that a rally against domestic violence was to take place in Tower Hamlets organised by "Friends of Saleha", to "stop wife beating mayoral candidate Helal Abbas". The claimant's complaint in this action is that those words, together with the other words in the article and advert, meant and were understood to mean that he "had a history of committing violent assaults on women close to him, and in particular on his former wife, Saleha Ali."

5 On 18th January 2011, Miss Ali made an affidavit in which she referred to allegations against her husband that he had been violent towards her during their marriage, which lasted from 1986 to 1995. She said that she was aware of adverts being placed by an organisation styling itself "Friends of Saleha", accusing her former husband of being violent to her during the marriage. She said:

"These allegations are wholly untrue. Mr. Abbas was never violent to me before, during or after our marriage. I also never saw or heard of him being violent to any other lady before during or after our marriage. During our marriage I never made any complaint to the authorities or any person to the effect that Mr. Abbas was violent to me."

6 On 10th October 2011, this libel action was brought. Criminal proceedings were also brought by the Crown Prosecution Service against the defendant over the same publication under the Representation of People Act 1983. In those proceedings the defendant put in a defence case statement dated 2 February 2012 in which he said at para.1:

"(a) The accused denies that the advert allegedly containing a false statement of fact in relation to Helal Abbas's personal character was published for the purposes of effecting the return of a candidate at the election.

(d) The accused contends that he had reasonable grounds for believing the prospective rally to be genuine; and that he believed the allegations of domestic violence against Helal Abbas to be true."

7 The defendant went on to say that he took reasonable steps at the time to authenticate the veracity of the allegations. His defence was summarised at para.2 of the defence case statement in these terms:

"The accused takes issue with the prosecution in relation to the following facts and reasons:

(a) It is denied the accused committed the offences alleged for the following reasons:

(i) He had reasonable grounds for believing the allegations of domestic violence against Helal Abbas to be true, and he took reasonable steps at the time of publishing the advert to authenticate the veracity of the allegations;

(ii) He did not regard the advert as being published for a candidate in an election and therefore did not believe it required the inclusion of the names and addresses of the printer, promoter and person on behalf of whom the material was being published."

8 The defence case statement referred to a number of individuals who had been consulted by the defendant regarding the allegations of domestic violence, and who had confirmed their belief in the same, and gave the names of five individuals.

9 Default judgment in this action was entered in favour of the claimant on 12th January 2012, but set aside in June of that year on the basis that the CPS had elected to discontinue criminal proceedings against the defendant. The claimant consented to the setting aside of that judgment, and directions were given for the service of a Defence on 22nd November 2012.

10 The defendant then made an application for third party disclosure against the CPS and Ms Ali, seeking copies of Ms Ali's medical records. That application was adjourned on a number of occasions, and in the end pursued only against Ms Ali. Ultimately it was dealt with on 4th March 2014 by Tugendhat J, who dismissed it. He did so on the basis that it was premature because the defendant had not pleaded a defence of justification in this action, and he was not persuaded that it was likely that the disclosure would support the defendant's case or adversely affect that of the claimant, even if the defendant had pleaded a defence of justification. Tugendhat J recorded at [23] that a witness statement had been made by Ms Ali on 21st February 2014 in which she said she had never understood herself to have been a victim of domestic violence, that her medical records were very private, and that she had asked her GP to review the records and had been told that there was no note of her complaining of any physical violence during her marriage or after divorce or at any time.

11 Tugendhat J noted that the defendant's defence case statement in the criminal proceedings was an adequate plea of a *Reynolds* defence to a libel action (responsible publication on a matter of public interest), and could stand as his defence in this action. On 18th March 2014 the defendant filed as his Defence in this action his defence case statement from the criminal proceedings together with a supplemental Defence document dated 18th March 2014. The supplemental document contained an account of the investigations that had been undertaken by the defendant prior to publishing, and said in para.7, in a passage on which Ms Kumar on the defendant's behalf relies, that on 14th October 2010:

> "I had no reason at that point to presume the advert was anything other than genuine because I had seen evidence that the organisation calling a meeting was genuine, and I had obtained confirmation from many people that the allegations have generally been believed within the community."

12 The claimant filed and served a Reply on 1st April 2014, which began in this way at para 1:

> "1. The claimant pleads this Reply in response to the second defendant's case as pleaded in the following documents:
>
> (i) Defence dated 18 March 2014;
>
> (ii) Defence case statement dated 2 February 2012.
>
> 2 The claimant understands that the effect of the above documents is to assert that the second defendant has a defence of qualified privilege as set out in *Reynolds v. Times Newspapers Limited* and *Jameel v. Wall Street Journal Europe*. The claimant pleads to such a defence in his Reply."

13 Given the reference to the second defendant I should mention that at that time there was a first defendant in the form of London Bangla Limited, which is no longer a defendant to the action.

14 Directions were given by the Master on 29th July 2014, with provision for a three day trial of what was then clearly understood to be a *Reynolds* public interest defence. Disclosure was then given, but witness statements were not exchanged on the due date according to the Master's directions, and still have not been. The parties will be ready, I am told, to exchange on 23rd January, and on that basis the trial date can be maintained, subject to this application.

15 What happened instead of exchange of witness statements was that alternative dispute resolution was attempted, but it failed, and it ended on about 28th November 2014. On 3rd December 2014, the defendant instructed Sahota Solicitors, and on 11th December they issued the application notice that is now before the court. That application notice attaches draft amendments to the Defence. An explanation is given in the application notice. This refers to the late instruction of solicitors. It is said that the pre-trial review and the trial can still be effective. At para.10 of the application notice, by way of evidence, it is asserted that:

> "… the defendant has consistently made known his belief in the truth of the allegations, but due to delays and being a litigant in person until 3rd December 2014, the issue of truth (and meaning) has not been properly, correctly or adequately pleaded. Permission will not delay trial, nor prejudice the claimant. Refusal to amend would deny a fair trial."

16 The essential features of the draft amendments are as follows. First, new paras.10 and 11 are proposed in which issue is taken with the alleged meanings or meaning of the words complained of, and reliance is placed on the full context. It is specifically denied that the words mean that the claimant has a history of committing violent assaults on women close to him.

17 Para.12 pleads a defence of justification. The first three sub-paragraphs of that paragraph set out three meanings which the defendant will set out to prove true. These are meanings generally known as '*Lucas Box*' meanings. They include the allegation that the claimant is a wife beater. The remaining eight sub-paragraphs of para. 12 set out particulars of justification. Paragraphs (iv), (v) and (vi) deal with the statement of a Detective Sergeant Adam Keeble, which is said to record admissions by Ms Ali relating to domestic violence. At (vi) and (vii) of the particulars, it is said that hearsay evidence will be relied on to support the truth of such admissions, and a list is given of witnesses who will be relied and who, it is said, will say that they were told from various sources that Ms Ali was the victim of domestic violence perpetrated by the claimant. The list overlaps with the list given in the defence case statement in 2012.

18 At paras.(viii) and (ix) the pleader says that inferential evidence arises from the fact that the CPS dropped the criminal charges against the defendant on the ground that medical evidence disclosed to the prosecution by Ms Ali undermined their case. Reference is made to the failed attempts to obtain disclosure from Ms Ali, but it is averred that the inference can be made, even without disclosure, that there was something in Ms Ali's medical records which supported the dropping of the criminal charges.

19 At (x) these words appear:

> "For the avoidance of doubt it is accepted that there is no direct eyewitness evidence of physical domestic violence against Miss Ali by her then husband, the Claimant."

20 At (xi) it is alleged that there was an incident of common assault involving a lady called Ms Lilian Collins in January 2002, as it turns out. Paragraph 13 refers to suggestions of anger control problems, and suggests that the claimant has been guilty of aggression and abuse towards at least one other woman, other than his former wife. Paragraph 14 seeks to rely on extinction or mitigation of damages on psychological abuse of Ms Ali, referred to as "mental torture" in her interview with DS Keeble, if that is all that is established. In para.15 it is suggested that, if mental torture is established, that is as bad as physical abuse:

"…proof of one is proof of the gist of the other. In any event, if necessary, the Defendants will rely on section 5 of the Defamation Act 1952."

21 A witness statement of the defendant prepared last night is now relied on. It seeks to explain the delay in putting forward this defence in ways already indicated in the application notice. It is said that the defendant was a litigant in person and unaware of the proper course of pleading a defence accurately until he told advice from Sahota Solicitors. He says he was overwhelmed by the criminal charges and proceedings, and matters were delayed by the third party disclosure application, which took a lot of time, and he could not afford legal advice.

22 The defendant then sets out to show that he has sufficient evidence to support the plea of justification that is put forward. He says:

"20 I have six witnesses, including myself, who all say that they were told that the claimant was a wife beater. [he then lists them] Unfortunately the sources themselves are unwilling to come forward for fear of community reprisal, or otherwise not willing to commit themselves to attending court. A seventh witness, Miss Lilian Collins, will be a witness to the effect that she was left shaken and upset a public incident when the claimant shouted and then lunged at her."

21 I also have the evidence of a statement from DS Keeble in which she admitted to incidents (and I think here Miss Ali could only be referring to incidents of actual violence being reported to her GP but not to the police), and that the violence was never such that it required hospital treatment. Everybody knows that lots of violence goes unreported or does not require hospital treatment, but that does not make it any less true or less painful for the victim."

23 The witness statement of DS Keeble that is exhibited to the defendant's statement is dated 22nd February 2012, and it records interviews that DS Keeble had with Saleha Ali on a number of dates starting on 17th December 2010. On that date he says:

"I spoke to Saleha and made an entry on the CRIS report which read 'that she had been married to Helal Abbas for nine years but had divorced him some 17 years ago. She said there had been no report of DV made to the police, although she had reported incidents to her GP. There would only be one or possibly two people who know about this. She did say that she had never been subjected to violence which would

have required hospital treatment, and said that she was subjected to mental torture rather than anything else'."

24 DS Keeble's statement goes on:

> "The entry is meant to make it clear that Saleha said she had never been subjected to domestic violence at the hands of Helal Abbas. The entry was made on the CRIS and is timed and dated, and there are no separate notes of this conversation.
>
> The contact I had with Saleha was for two reasons: firstly, to establish if she had suffered any violence; and secondly, to establish if she was willing to make a witness statement in this case.
>
> On 7th January 2011, I again spoke to Saleha in order to establish whether she had been able to find her affidavit, but she had not been able to. She again said that she had not been subjected to domestic violence.
>
> Throughout the time that I spoke to Saleha she was consistent in stating that she had not been subjected to any domestic violence at the hands of Helal Abbas."

25 The 7th January 2011 is ten days before the date of the affidavit made by Ms Ali to which I have already referred.

26 For the defendant, Ms Kumar has submitted that the proposed amendments do not change the essence of the defendant's case and should not take the claimant by surprise. That submission I reject. It is quite clear to me that the defence case statement did not assert that the allegation of wife beating was true, but rather put forward a case that it was reasonably believed to be true by the defendant. Equally, the supplemental Defence document put forward in March 2014 does not state clearly or at all that the defendant will assert the truth of the allegation of wife beating of which complaint is made. It is perfectly plain also that the claimant's lawyers did not understand that defence to be advanced. That is clear from the Reply, if nothing else.

27 Whether or not the defendant intended in his own mind to put forward a defence of justification by means of either of those documents I do not have decide, but what I can conclude is that he did not make clear to the claimant or his advisers that there was any intention to put forward that defence. So I am satisfied that the claimant has not so far prepared to meet a defence of justification but only one of *Reynolds* privilege. There is, of course, a significant difference between the two. As Mr. Price points out on behalf of the claimant, a *Reynolds* defence focuses on the conduct of the defendant in

and about the preparation and publication of the offending words, whilst a plea of justification focuses on the conduct of the claimant.

28 As to the delay in putting forward the proposed defence, the material on which the draft Amended Defence is based is not new by any means, as will be apparent from what I have already said. It is clear from the defence case statement and other materials before me that the defendant had most, if not all, of the information and material upon which the amendments are based as long ago as February 2012, and some of it much sooner than that. The lateness of the application is explained, as I have indicated, on the basis of the defendant's status as a litigant in person, the confusion caused by the criminal charges, and the delay of his third party disclosure application. I am bound to say that I find that rather surprising in the light of the correspondence, and the evidence that this defendant has produced previously in this litigation, which demonstrates an intelligent and capable mind, which is not surprising on the part of someone who was the editor of a weekly newspaper.

29 In any event, my attention has been directed to the Court of Appeal's decision in *Tinkler v. Elliott* [2012] EWCA Civ 1289, where at para.32 Kay LJ observed as follows:

> "I accept that there may be facts and circumstances in relation to a litigant in person which may go to an assessment of promptness but, in my judgment, they will only operate close to the margins. An opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person."

30 I therefore conclude that this is, as submitted on behalf of the claimant, a new case put forward at a late stage without adequate explanation or justification for the delay.

31 It is submitted on behalf of the defendant by Ms Kumar that the claimant would suffer no prejudice if this amendment were allowed to be made, and that the trial date could be maintained with little change to the evidential picture, given that the witnesses on whom reliance will be placed for the purposes of justification are, to a large extent, the same witnesses on whom the defendant would have relied and would rely in support of his defence of *Reynolds* privilege. It has been made clear on behalf of the defence that the application for third party disclosure against Ms Ali would not be renewed so that the trial date would not be threatened.

32 Mr. Price for the claimant was unable to point to any specific prejudice or to assert positively that the trial date would be lost or threatened if the amendment was allowed. He said he simply could not tell at this stage whether it would be possible to prepare his client's case in time for the trial date if the amendment were allowed. It seems to me that there may be some risk of prejudice to the trial date, but not one that can be crystallised in any concrete way at this stage. In those circumstances, it would be wrong to put too much weight on the lateness of the amendment, the inexcusable delay in putting it forward, and the potential prejudice to the claimant.

33 I turn to the principles that I should apply. CPR 17 governs the power to allow amendments to statements of case. The discretion granted under that rule has to be exercised in accordance with the overriding objective of course. However, the court will only permit amendments which comply with the established rules of pleading, and should not allow an amendment if it appears to the court that the proposed case has no real prospect of success. Those considerations may have greater weight if the amendment is made at a late stage.

34 Historically, the court has often taken the approach that amendments to statements of case, provided they comply with the rules that I have referred to, should be allowed, as long as any prejudice to the opposite party can be compensated in a costs. A case cited by Ms Kumar in support of that proposition on this application is the well known case of *Cobbold v. The London Borough of Greenwich*, decided on 9th August 1999, in which Peter Gibson LJ said this:

> "The overriding objective is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed."

35 Ms Kumar also refers to the case of *Proetta v. Times Newspapers* for the proposition that if permission to amend is refused where a defendant has failed to set out his real case in his previous pleadings, there must be some measure of injustice to the defendant.

36 There is, however, another strand of authority highlighted by Mr Price which is more consonant with the modern approach to litigation and is exemplified by the case of *Swain-Mason and others v. Mills & Reeve* [2011] 1 WLR 2375. There, the Court of Appeal reversed a decision of Peter Smith J to allow the claimant to amend to his case at the start of what would have been the trial. The headnote gives the gist of the decision. It reads as follows:

> "Although there is no inflexible rule that a very late amendment to plead a case not resulting from some late disclosure or new evidence can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim, the court should be less ready than in former times to grant a late application to amend a pleading. A heavy onus lies on a party seeking to make such an amendment to justify it as regards his own position, that of the other parties to the litigation and that of other litigants in other cases before the court. If a very late amendment is to be made the amending party is obliged to put forward an amended text which itself satisfies to the full the requirements of proper pleading. From the moment the amendment is made, the opponent must know the amended case which he has to meet with as much clarity as he entitled to under the rules."

37 The Court cited with approval the unreported Court of Appeal decision of *Worldwide Corpn v GPT Ltd* (2 December 1998). At para.70 of *Swain-Mason* Lloyd LJ said:

> "Later in the judgment the court said this under the heading 'Approach to last minute amendments':
>
> > 'Where a party has had many months to consider how he wants to put his case and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given and which, Mr. Brodie has suggested, applies in the instant case is that without the amendment a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided.
> >
> > We accept that at the end of the day a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the

amending party to show the strength of the new case and why justice both to him, his opponent and other litigants requires him to be able to pursue it.'

72 As the court said, it is always a question of striking a balance. I would not accept that the court in that case sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court.

73 A point which also seems to me to be highly pertinent is that, if a very late amendment is to be made, it is a matter of obligation on the party amending to put forward an amended text which itself satisfies to the full the requirements of proper pleading. It should not be acceptable for the party to say that deficiencies in the pleading can be made good from the evidence to be adduced in due course, or by way of further information if requested, or as volunteered without any request. The opponent must know from the moment that the amendment is made what is the amended case that he has to meet, with as much clarity and detail as he is entitled to under the rules."

38 At para.85 of *Swain-Mason* the court dealt with the *Cobbold* case, which had been cited to the judge below. It was held that the judge's reliance on what Peter Gibson LJ had said in *Cobbold's* case was mistaken and wrong in law, though understandable because of the limited citation to him. It is clear from the *Swain-Mason* case that in the instance of very late amendments which threaten the trial date, the approach set out in *Cobbold* is not the one to be taken.

39 These statements of principle are consistent, in my view, with some long established principles relating to late amendments in defamation cases. As long ago as 1970 Lord Denning MR observed in *Associated Leisure v. Associated Newspapers* [1970] 2 Q.B 450 at 455-456 that where a party seeks to plead justification at a late stage the court will closely enquire into its conduct and will not permit a loose and ineffective pleading at a late hour.

40 The present case involves a late but not a last-minute application. There are two and a half months to go before trial, albeit some of that time is taken up by the vacation. It may well be that the trial date could be maintained if a properly pleaded case could be presented at this stage, and the matter presented efficiently over the coming weeks and months. I am prepared to proceed on the basis that there is only a limited degree of threat to the trial date and, whilst some prejudice would undoubtedly be suffered by the claimant if an amendment was allowed, it does not seem to me likely that the trial date would be put at risk. However, the application is made at a late stage when the trial is not far off, and has been unjustifiably delayed. The authorities I have cited do make clear that at a late stage an amendment must be pleaded to the full in an adequate manner, in such a way as to make clear to the claimant what the case is that he has to meet. Further, the ordinary principle that the court will not allow an amendment which appears to have no real prospect of success must apply just as much to a late amendment as one made early on in the litigation.

41 So far as pleading principles in defamation cases are concerned, they are very well established. In *Ashcroft v. Foley* [2012] EMLR 32, the Court of Appeal said at [35] as follows:

> "In general terms, the importance of a properly pleaded meaning is difficult to overstate. In virtually every libel action the meanings are key to the determination and proper conduct of all aspects of the litigation from the initial stages through to a trial if one takes place."

42 As to the need to plead proper and sufficient particulars, the requirements are set out in Gatley on Libel and Slander (12th Ed) para.27.11, where this is said:

> "While it used to be acceptable on very rare occasions where the defamatory words themselves contained very specific and detailed charges, for the defendant to allege generally that the words were true without giving any particulars, it is now necessary, in order to comply with the rules of pleading, for the defendant to give details of the matters on which he relies in support of his plea of justification. Thus, where a general charge of misconduct is made and a defendant seeks to enter a plea of justification he must plead the specific instances of misconduct with which he seeks to justify the charge with sufficient particularity as to enable the claimant to know precisely what are the facts to be tried - for example, where the claimant is accused of incompetence, administrative or financial mismanagement and dereliction of duty, the defendant must give a clear indication of what he suggests the claimant did or did not do."

The principal source for those statements of principle is the *Ashcroft v. Foley* case itself. It is also well established that it is not legitimate to rely on rumour to establish the truth of a defamatory statement.

43 Finally, s.5 of the Defamation Act 1952 provides as follows:

> "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges."

As is obvious from that wording, the section only applies where the words complained of contain two or more distinct charges. In that event, proof of the truth of one can be a defence to a claim in respect of the other.

44 I turn to apply those principles to the draft Amended Defence in this case. There is no objection taken to the defendant now pleading a denial of the claimant's pleaded meaning, as is done in proposed paras.10 and 11. The controversial aspects begin when it comes to the *Lucas Box* meanings in paras.12(i) to (iii). As to those, again there is relatively little controversy. At the core of those meanings is the allegation that the claimant was a wife beater. That is plainly a meaning the words are capable of bearing, and one which, in principle, it is legitimate for the defendant to defend as true. The remaining words in paras.(i), (ii) and (iii) do not, in my judgment, assist the defendant in establishing a defence, because they seek to defend meanings of which the claimant does not complain. Accordingly, even if they are meanings which the words are capable of bearing, it seems to me unnecessary and potentially confusing to leave them in place in this defence, and that the defendant would lose nothing of value by the elimination of all the words in the *Lucas Box* particulars except for those that allege that the claimant was a wife beater.

45 Turning to the particulars of justification, it is necessary to consider whether these contain statements of fact which are sufficiently clear and precise as to enable the claimant to know what the case is that he has got to meet, which are relevant, adequate to support the plea of justification, and have a real prospect of success.

46 I deal first with the alleged admissions to DS Keeble. The key pleaded allegation here is in para.(v).

> "For the avoidance of doubt, it is averred that Miss Ali told a serving police officer during a formal police investigation that she was the victim of incidents of violence, but that none of these incidents required

> hospital treatment; and moreover [generally] the treatment she was subjected to was 'mental torture' rather than anything else."

It is then said in para.(vi):

> "For the sake of completeness it is averred that the subsequent denials by Miss Ali of being a victim of domestic violence are rejected; and it is averred that her admissions made at the outset to DS Keeble on 17 December 2010 are true."

47 A number of things can be said about this pleading. First, this is an allegation against the claimant of criminal offences against his ex-wife, but it is as vague and indeterminate as it is possible to be. No detail is given of what form of violence is alleged to have been used, when, where or under what circumstances. It is impossible to see how the claimant can be expected to deal with that in any way other than by denying that he was guilty of any violence against his wife at any stage, which would be a denial of a completely general kind. It is perfectly clear that that is his position.

48 Secondly, the pleading also levels an accusation of falsehood against Ms Ali. When one realises that she has made an affidavit stating that she was not the victim of any domestic violence it is apparent that this is, or may be, an allegation of perjury against her. She has also made a witness statement to similar effect, of course. Those, therefore, are extremely serious allegations which are lacking in any detail at all.

49 Thirdly, the sole basis for these allegations at this point in the pleading is the statement of DS Keeble. The defendant exhibits this statement as the material supporting his proposed Amended Defence. There is no evidence before me to suggest that the defendant or his lawyers have approached this officer to obtain any further or better evidence from him, if indeed he was able to provide any. The defendant's case is that the first of the paragraphs I have quoted above implies that Ms Ali told DS Keeble that whilst she had never been to hospital due to violence she had reported domestic violence to her GP. However, when the statement is examined and looked at as a whole it is perfectly clear that the officer is not saying that any allegation of domestic violence of a physical nature was made to him by Ms Ali. Indeed, he is positively saying that no such allegation was made, and that on the contrary he was repeatedly told by Ms Ali that there had been no violence. The witness statement does not support the pleaded case, it contradicts it. So, of course, do Ms Ali's affidavit of January 2012, made shortly after DS Keeble's statement, and Ms Ali's witness statement of 21 February 2014.

50 In conclusion, this section of the particulars of justification appears to me to be no more than a repetition of the alleged libel, coupled with the allegation that a supporting statement was made by Ms Ali to a police officer in 2010; but when looked at, the evidence of the police officer is not supportive of that case, which is clearly unsustainable. As Mr. Price observed, if that witness statement was put in as the evidence-in-chief of DS Keeble, he would not cross-examine the officer and there would be no evidence capable of supporting a finding such as the defendant seeks to invite.

51 I turn to the hearsay evidence. As I have said, para.(vii) of the particulars of justification identifies five witnesses, plus the defendant, who will give hearsay evidence and say they were told that Ms Ali was the victim of violence. The first point to make about this is the one already made: there are no details whatever of when this is supposed to have happened, where and how, or in what circumstances.

52 Secondly, this paragraph needs to be read with para.(x) which, as I have already stated, says that there is no direct eye witness evidence of physical violence being inflicted on Ms Ali by the claimant. It is an inevitable inference from what appears on the face of the draft pleading, therefore, that these witnesses cannot have heard of this violence either directly or indirectly from an eye witness, unless it was Ms Ali herself, which is not suggested. So what one is confronted with here on the face of it is hearsay rumour evidence and not evidence of fact. Such evidence could form part of a defence of *Reynolds* privilege, but cannot be legitimate in support of a defence of justification.

53 If the obvious inference that I have identified from the pleading were wrong, it would be a simple matter to demonstrate, by showing the court witness statements of the individuals concerned, that the position was otherwise. That has not been done, although I have been told that some fresh witness statements have been prepared on the defendant's behalf, or will be prepared – it is not at the moment quite clear which.

54 What I have been shown, by the claimant's side, are the statements made for the purposes of the criminal proceedings by four of the five witnesses, other than the defendant, that are named in the draft Amended Defence. Without going into the detail of them, it is perfectly plain from those that, as things stood at that stage, the evidence the witnesses were able to give was hearsay emanating from unidentified individuals about the claimant's behaviour towards his wife. To put it another way: mere rumour. Those statements do nothing to assist the defendant or to undermine the conclusions that seem to follow from the face of the draft statement of case. Nor could evidence of this kind shore up the defendant's case based on the statement of DS Keeble.

55 As for the inferential case about the medical records that is pleaded in paras.8 and 9 of the draft amendment, those paragraphs could not stand on their own as a sufficient plea of justification. It seems to me that the pleaded inference clearly cannot be sustained on the material that has been identified to me. Tugendhat J was not persuaded when he looked at the material before him that it was likely that disclosure of medical records would support a plea of justification even if there were one. That is wholly unsurprising given the February 2014 statement of Ms Ali to which Tugendhat J referred. No fresh evidence has been produced on this application and, as I have said, it is accepted that there would not be a further application for third party disclosure against Ms Ali even if the amendment were allowed.

56 The allegation that the claimant committed a common assault on Ms Lilian Collins at a Labour Party meeting in 2002 might perhaps, at a stretch, have been relevant by way of bad character evidence in support of an allegation of domestic violence if there had otherwise been a sufficiently pleaded and sustainable case at this late stage, but it clearly cannot stand as a particular of justification by itself.

57 As to the attempt to rely on psychological abuse or mental torture by way of mitigation of damages, that appears to me to be illegitimate because it is an allegation other than one which is made in the words complained of. Neither side suggests that the words complained of convey an allegation that the claimant subjected his wife to psychological abuse or mental torture. Therefore, this is an attempt to mitigate damages by proof of misconduct which is not material to the issues in the case.

58 The attempt to rely on s.5 of the Defamation Act 1952 appears to me to be misconceived, because this is not a case in which there are even arguably two distinct allegations, one of which could be proved by way of justification of the totality.

59 For those reasons, I dismiss the defendant's application for permission to amend, save in so far as it seeks to put forward a case in relation to meaning in paras.10 and 11.