

CORLISS

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1980 No. 2764p

THE HIGH COURT

BETWEEN:

PATRICK CORLISS AND MICHAEL DIGGIN

Plaintiffs

and

IRELAND, THE ATTORNEY GENERAL, THE
MINISTER FOR JUSTICE, COMMISSIONER
PATRICK McLOUGHLIN

Defendants

Judgment of Mr. Justice Hamilton delivered the 23rd day of July, 1984.

After the jury had been empanelled to try this case and before plaintiffs Counsel had made his opening address to the jury, Counsel on behalf of the defendants herein submitted that the plaintiffs' pleadings did not disclose a cause of action and that consequently the action should not be allowed to proceed.

In view of the importance of the matter and the legal issues involved, I decided to discharge the jury and deal with the matters raised in the submission by Counsel for the defendants as a preliminary issue.

Though the relief sought by the plaintiffs in these proceedings against the defendants consists of a claim for damages for defamation, the action is unusual in that, unlike in most actions for defamation, the defamatory matter alleged does not consist of words, written or spoken, visual images or gestures but as appears from the Statement of Claim

delivered on their behalf is alleged to consist of the actions of the Minister for Justice and the former Commissioner of the Garda Síochána in:-

1. transferring the first-named plaintiff from the scene of Crime Section of the Technical Bureau of the Garda Síochána on the 21st day of November, 1978 to Pearse Street Garda Station as Detective Sergeant, and
- (2) transferring the second named plaintiff from the scene of Crime Section of the Technical Bureau, Garda Síochána, to Store Street Garda Station as a Detective Sergeant on the 21st day of November, 1978.

In the said Statement of Claim, it is alleged at paragraph 23 thereof that:-

"The said actions in transferring the plaintiffs and each of them out of the scene of Crime Finger-prints Section, Technical Bureau, Garda Síochána, meant and were understood to mean in its ordinary and natural meaning:-

- (a) that the plaintiffs and each of them had been involved in a scandal in the Finger-prints Section, Technical Bureau, Garda Síochána,

- (b) that the plaintiffs and each of them were incompetent and not fit to be trusted or employed to carry out any work in the Finger-prints Section, Technical Bureau, Garda Síochána,
- (c) that the plaintiffs and each of them had been guilty of dishonourable conduct,
- (d) that the plaintiffs and each of them were unfit to remain as members of the Finger-prints Section, Technical Bureau, Garda Síochána,
- (e) that the plaintiffs and each of them was an incompetent Garda,
- (f) that the plaintiffs and each of them was a dishonest Garda,
- (g) that the plaintiffs and each of them was a Garda who had been guilty of conduct detrimental to the force and which warranted their transfer from the Technical Bureau,
- (h) that the plaintiffs and each of them was a Garda who had done something dishonest,
- (i) that the plaintiffs and each of them was a Garda who

by reason of a false identification of finger-prints had endangered the freedom of persons who were innocent,

(j) that the plaintiffs and each of them were a person who was willing to permit perjury; namely the giving of false evidence,

(k) that the plaintiffs and each of them had given false evidence on oath and thereby warranted their transfer,

(l) that the plaintiffs and each of them had been guilty of conduct warranting a reduction in their status."

It was further alleged in the said Statement of Claim at paragraph 24 thereof that:-

"Further or in the alternative the said actions in transferring the plaintiffs and each of them out of the scene of Crime Finger-print Section, Technical Bureau, Garda Síochána, meant and were understood to mean

(a) that the plaintiffs and each of them had been involved in a scandal in the Finger-print Section, Technical Bureau, Garda Síochána,

(b) that the plaintiffs and each of them were incompetent and unfit to be trusted or employed to carry out any

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work in the Finger-print Section, Technical Bureau,
Garda Síochána,

- (c) that the plaintiffs and each of them had been guilty of dishonourable conduct,
- (d) that the plaintiffs and each of them were unfit to remain as members of the Finger-prints Section, Technical Bureau, Garda Síochána,
- (e) that the plaintiffs and each of them was an incompetent Garda,
- (f) that the plaintiffs and each of them was a Garda unfit to be in the Technical Bureau,
- (g) that the plaintiffs and each of them was a dishonest Garda,
- (h) that the plaintiffs and each of them was a Garda who had been guilty of conduct that was detrimental to the Force and which warranted their transfer from the Technical Bureau,
- (i) that the plaintiffs and each of them was a Garda who had done something dishonest,
- (j) that the plaintiffs and each of them was a Garda who by

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reason of a false identification of finger-prints

had endangered the freedom of innocent persons,

(k) that the plaintiffs and each of them was a person who was willing to commit perjury, namely the giving of false evidence,

(l) that the plaintiffs and each of them had given false evidence on oath,

(m) that the plaintiffs and each of them had been guilty of conduct warranting a reduction in their status in the Garda Síochána."

It was further alleged at paragraph 25 of the said Statement of Claim that:-

"The said actions were calculated to and did disparage the plaintiffs and each of them in their positions as members of the Garda Síochána and reduced them in status in the said Force" and

at 26:-

"In consequence of the said actions on the part of the defendants, the plaintiffs and each of them had been injured in their credit, character, and reputation in the said position as members of the Garda Síochána and in their every day social standing within the

"community and they and each of them had been brought into hatred, ridicule and contempt and they and each of them suffered loss, damage and expense, mental distress, mental anguish and sorrow."

In their Defence delivered on the 2nd day of March, 1981 the defendants pleaded, inter alia, that:-

- "4. The decision that the first named defendant should be transferred from the scene of Crime Section of the Technical Bureau of the Garda Síochána to duties at Pearse Street Garda Station was made by the Commissioner of An Garda Síochána pursuant to the powers vested in him by virtue of Section 8 (1) of the Police-forces Amalgamation Act 1925 or otherwise vested in him" and
- "7. The decision that the second named plaintiff should be transferred from the scene of Crime Section of the Technical Bureau, Garda Síochána to duties at Store Street Garda Station, was made by the Commissioner of the Garda Síochána pursuant to the powers vested in him by virtue of Section 8 (1) of the Police-forces Amalgamation Act, 1925 or otherwise vested in him."

Liberty was given to the defendants to amend their Defence by the addition of the following paragraph:-

- "13. The defendants deny that the actions in transferring the plaintiffs and each of them out of the scene of Crime, Finger-prints Section, Technical Bureau, are actionable in law as "defamation" as is alleged or at all.
14. The defendants deny that the actions referred to at paragraph 13 above (hereinafter referred to as "the said actions") bear or were understood to bear any of the meanings alleged at paragraphs 23 or 24 of the Statement of Claim delivered herein or any other defamatory meaning or meanings.
15. The said actions were actions of the fourth-named defendant in his capacity as the Commissioner of An Garda Síochána while discharging the office, duties and functions of the Commissioner of An Garda Síochána and by reason of the matters aforesaid, the occasion of the said actions or the actions themselves were privileged."

As I understand Mr. Sutton's submission, it is:-

1. ~~that the acts~~ alleged against the defendants and pleaded at

paragraphs 21 and 22 of the plaintiffs' Statement of Claim are not actionable in law as defamation;

- (2) that there cannot be an actionable wrong of the nature of slander based on acts simpliciter;
- (3) that to constitute actionable wrong of the nature of slander by actions or acts, such actions or acts must by their very nature convey a defamatory meaning, such as by gestures or actions of that kind;
- (4) that the act of the Commissioner in exercising his right to transfer a member of the Garda Síochána to other duties cannot be such an act and cannot be actionable in law as defamation.

On the question as to whether there may be an actionable wrong of the nature of slander based upon an act or action simpliciter it is stated at paragraph 3, page 2 of Gatley on Libel and Slander, 6th Edition that:-

"A man commits the tort of defamation when he publishes to a third person words or matter containing an untrue imputation against the reputation of another",

and in the footnote thereto it is stated that

"matter" is academically the more accurate term, as it

comprehends every medium whereby defamatory thought and ideas can be expressed or conveyed (see Spencer Bower's Actionable Defamation, 2nd Edition, page 226)."

It is stated at paragraph 22 of the same publication that:-

"Publication is effected by any act on the part of the defendant which conveys the defamatory meaning of the matter to the person to whom it is communicated."

Section 14 (2) of the Defamation Act 1961 provides that:-

"Any reference in this part to words shall be construed as including a reference to visual images, gestures and other methods of signifying meaning."

An act or action is undoubtedly a method of signifying meaning and I agree with the statement of the Lord President of the first division of the Court of Sessions in the case of Drysdale .v. Earl of Rosebury (1909 Session Cases at page 1125) where he stated that:-

"I think there may be an actionable wrong of the nature of slander by actions alone; but the question must always be whether the innuendos sought to be put upon such actings can in truth reasonably be drawn from them."

He further stated that:-

"In this case the matter has been admirably put by the Lord Ordinary, and I have really nothing to add to what his Lordship has said."

In his opinion the Lord Ordinary stated that:-

"This is an action of damages for slander; and it is peculiar in this respect that no spoken or written words are founded on as conveying by themselves any imputation on the pursuer's character. The issue which the pursuer proposes for the trial of the cause reflects this peculiarity, for, after summarising the leading averments on record, it concludes with the query, "whether by the said letter, words and actings, the defender falsely and calumniously represented that the pursuer had been unfaithful in the discharge of his duty, and was unfit to be trusted with the custody of the defender's books, papers or money to the pursuer's loss, injury and damages".

"The defender's counsel argued that the form of the pursuer's issue was in itself conclusive against the relevancy of the action as an action for slander, because it appears from the issue that

"the letter written by the defender and the words spoken by his agent were not in themselves actionable; and they could not become so merely in consequence of actings which had followed upon them. There is certainly no reported case in Scotland in which actings have been used for the purpose of importing a slanderous meaning into words which were not in themselves defamatory or as in themselves importing a slanderous accusation. The case of Kennedy v. Allen 10D 1293 on which the pursuer's counsel founded as precisely in point, appears to me to be of a wholly different nature. No doubt it was the circulation of a letter which was the subject of complaint, but the pursuer averred and offered to prove that the letter itself contained a false and actionable insinuation, and it was on this ground that the court allowed an issue. No actings were founded on except the publication of the letter which is an element common to all actions based upon written slander. On the other hand, I do not doubt, and it has been more than once so decided in England, that an action for slander may lie although no defamatory words, spoken or written, are founded upon. Thus a picture may convey a slanderous imputation as plainly as a paragraph in a newspaper, and instances

"may readily be figured where a slander may be conveyed by signs or gestures only. It is therefore in my opinion, not conclusive against the pursuer's case, that it is laid partly upon the actings of the defender or his authorised agent, and becomes therefore necessary to examine the averments in the condescence in order to ascertain whether the actings complained of are reasonably capable of supporting the proposed innuendo."

The Lord Ordinary then proceeds to outline the facts of the case and then proceeds to say that:-

"In none of the actings complained of can it be said that the defender exceeded his legal rights. The safe and its contents, as well as the books and papers which were taken possession of or examined on the 4th of January, were the exclusive property of the defender, and he had an absolute right at any time to have them removed for any purpose that he chose, including an investigation into the correctness of the pursuer's accounts. He had also an absolute right to ensure that the contents of the safe should remain undisturbed until the investigation was commenced; as the whole keys of the safe could not be delivered

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"up owing to some of them being in possession of an absent clerk, the sealing of the safe seemed a reasonable precaution to adopt. The pursuer himself could draw no defamatory inference from this act any more than he could have done from the request to deliver up the keys; and of course once the safe had been sealed it was necessary to break the seals in order to get possession of the contents. No doubt, people who heard of what had been done, or who saw that an investigation was being made into the books and accounts of the pursuer, might be disposed to draw unfavourable inferences as to the reason for such an investigation; and they might even leap to the conclusion that no such investigation would have been made if the pursuer had been faithfully discharging his duties. Such an inference, however, would have been entirely unwarranted and it is not one for which the defender can be made responsible. Similar inferences might have been drawn, if the pursuer had been summarily dismissed, from the mere fact of his dismissal; but if the dismissal was itself within the defender's rights, no responsibility would attach to him for the conjectures by which outsiders might seek to explain the circumstances."

In the argument before the first division of the Court of Sessions,

the Lord President proposed what he regarded as the question fundamental to the case namely can a legal act convey an imputation of slander?

It is obvious from the opinion of the Lord Ordinary and the unanimous decision of the first division of the Court that they considered that in that case it could not.

The Lord President had, however, stated that:-

"The question must always be whether the innuendo sought to be put upon such actings can in truth reasonably be drawn from them."

The actions of the Commissioner in transferring the plaintiffs out of the scene of Crime Finger-prints Section, Technical Bureau, Garda Síochána, in their ordinary and natural meaning are not, in my opinion, capable of the meanings attributed to them in paragraph 23 of the plaintiffs' Statement of Claim herein and I will strike the entire of paragraph 23 from the plaintiffs' Statement of Claim.

Having regard to the averments of fact contained in paragraph 4 to 19 inclusive of the plaintiffs' Statement of Claim, I am however of the opinion that the innuendos pleaded in paragraph 24 of the claim can be reasonably drawn from them.

The defendants' application and submissions in this case have been

grounded on the pleadings herein and no evidence has been adduced.

In their Defence the defendants have pleaded that the decisions that the first and second-named plaintiffs should be transferred from the scene of Crime Section of the Technical Bureau of the Garda Síochána to alternative duties as set out in the Statment of Claim and Defence were made by the Commissioner of An Garda Síochána pursuant to the powers vested in him by virtue of Section 8 (1) of the Police-forces Amalgamation Act 1923 or otherwise vested in him. In their reply, the plaintiffs deny that the decision to transfer them was made by the Commissioner in pursuance of the powers so vested in him and claim alternatively that they were not exercised by way of a bona fide exercise of the said powers.

Consequently I cannot proceed to deal with this application on the basis that the actions of the Commissioner were lawful acts performed by him in exercise of the powers vested in him.

If these facts are established in evidence, then the observations of the Lord Ordinary and the Lord President hereinbefore referred to may have considerable relevance as indeed may have the observations of Lord Justice Clarke in Robertson .v. Keith 1936 Sessions Courts where he stated at page 47 that:-

"Without entering upon further detailed examination of authority,

the law, as I understand it may be summarised in these propositions:

1. An act is prima facie within the competence of the public official doing or authorising it when it is the kind of act that is within his ordinary duty to discharge.
2. When a public official does an act that is prima facie within his ordinary duty, there is a presumption that he has acted within his authority.
3. This presumption is not absolute, but may be rebutted by showing that the act was unrelated to any duty arising on the particular occasion in which case the act ceases to be within the authority or competence of the public official and becomes unlawful.
4. Where an act is within the competence, no civil liability arises from the doing of the act, unless it can be shown that the act was done maliciously and without probable cause.
5. Want of probable cause and malice are not necessary, unrelated and independent. The absence of just cause may go to prove malice, and similarly the presence of oblique or dishonest motive may go to show the absence of probable cause.

6. Malice may be inferred from recklessness, and the facts and circumstances from which it may be inferred need not be extrinsic to the circumstances in which the act is done or to the manner of doing it

7. Circumstances may show that an act was done with malice, or without probable cause or that it was an act with the competence of the person doing or authorising it.

In some cases according to the angle from which the question : approached, the same facts may be liable to infer each of these conclusions.

8. The onus probandi is on the pursuer to show that the act complained of is with the competence of the person doing or authorising it or if within the competence, that it was done maliciously and without probable cause."

As the issue as to whether or not the former Commissioner was acting in pursuance of the powers conferred on him in transferring the plaintiff is an issue raised on the pleadings, I cannot at this stage presume to decide that his actions constituted lawful acts.

This question and the implications to which it gives rise if decided in favour of the defendants will have to await the evidence given at the hearing of the action as I must at this stage hold that the Statement of Claim delivered on behalf of the plaintiffs, even with paragraph 23 thereof struck out, discloses a cause of Action.

