THE HIGH COURT

[2018] IEHC 856

[2016 11369 P]

BETWEEN:

PAUDIE COFFEY

PLAINTIFF

AND

ICONIC NEWSPAPERS LTD T/A THE KILKENNY PEOPLE

AND

SAM MATTHEWS

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 30th day of November, 2018

1. This is the judgment of the Court in respect of an application by the Plaintiff in defamation proceedings to have the jury discharged. Following the conclusion of the Plaintiff's case the Defendants exercised the right to open their case to the jury. In the course of his address outlining the nature of the Defence's case and the defences upon which his clients intended to rely, senior counsel for the Defendants, Mr Fanning, referred to a press release dated the 8th January, 2016 which had been drafted on behalf of John Paul Phelan TD by a public relations consultant, Neans McSweeney. She sent the press release by via email to the deputy editor of the first Defendant, Sean Keane. The press release was referred to and utilised in an article published by the Defendants in the Kilkenny People newspaper, the subject matter of these proceedings. The jury were informed that it was intended to call Neans McSweeney to give evidence of the intention behind the press release.

Grounds for the Application:

2. Senior Counsel for the Plaintiff, Mr. Keane, invited the Court to discharge the jury on two grounds; firstly, that Mr. Fanning had persistently and flagrantly breached a ruling of the Court on the admissibility of any evidence which went to meaning and, secondly, the jury had been prejudiced by having been informed that Ms. McSweeney was going to be called to give evidence as to intention when in truth the evidence went to meaning. The Defendants cast the application as one entirely without merit.

3. Mr. Fanning submitted he had been very careful to obey the rulings of the Court. Indeed, he had reminded the jury in the course of the opening that the question of meaning was entirely and exclusively a matter for them and for nobody else. In that regard, he is, of course, absolutely correct, however, he insisted that Ms. McSweeney was entitled to give evidence of intention behind the press release as approved by Mr. Phelan on the grounds that this was a separate and distinct document from the article which had been based upon it.

4. I took it from the submissions made on behalf of the Plaintiff to the contrary that references to intention in this context amounted to nothing more than a lightly veiled cloak for introducing evidence as to meaning of the impugned article. When reference was made in the opening of the case to the defences pleaded in Defence, however, no mention was made of a plea contained at paragraph 17 thereof that the Defendants

intended to rely on the provisions of the Civil Liability Act 1961 in meeting the Plaintiff's claim. Not wanting to assume from the omission that the Defendants had abandoned the plea, I decided to enquire of Mr. Fanning what his client's intentions were in this regard. He replied that the omission was unintentional and confirmed that the Defendants intended to rely on it.

5. The significance of the plea in the context of the application is that if the article is found to be defamatory s.35(1) of the Civil Liability Act, 1961, while not expressly pleaded, is the provision on foot of which the Defendants intend to invite the jury to apportion fault in respect John Paul Phelan's alleged wrongdoing as the author of the press release, the Plaintiff having failed to issue proceedings against him as a concurrent wrongdoer, any such claim against him being now statute barred. In the circumstances the effect of the provision is to identify the Plaintiff for the purposes of contribution with John Paul Phelan in respect of any degree of fault apportioned to him thus making the Plaintiff responsible therefore and reducing the damages, if any, accordingly.

The Law

6. This provision and its legal consequences in a defamation action, indeed in any action in tort, was construed by this Court in *Keogh v. RTE* [2018] IEHC 340, a decision on which the Defendants say they intend to rely in due course. Having regard to the significance of the plea in the context of this application I think it appropriate that some reference should be made to the law on the relevance or otherwise of intention on the part of the publisher since this goes to the heart of the matter in controversy.

7. The law is succinctly summarised by Gatley on Libel and Slander, 13th Ed. at Chap.3 para. 3.15 under the heading *"Intention and Knowledge of the Publisher*", as follows:

> *"It is clearly established at common law that in determining the meaning of words the intention and knowledge of the publisher are immaterial. To this there was a limited exception in cases where the Defendant merely distributed the work of others. The common law exception was supplemented with considerable alteration by s.1 of the Defamation Act, 1996 (The UK Defamation Act) Furthermore, the general rule does not apply where the Defendant speaks on a privileged occasion and the issue is whether he was actuated by malice."*

In passing it should be noted that s. 27 of the Defamation Act, 2009, provides for the statutory defence of innocent publication.

8. By special Reply to the defence of qualified privilege the Plaintiff pleaded malice. To illustrate the relevance of intention to the distinction between 'meaning' and 'malice' Gatley goes on to cite the following very helpful extract from the judgement of Hirst L.J. in *Loveless v. Earl* [1999] E.M.L.R, 530 at 538-539:

> *"Meaning is an objective test entirely independent of the Defendant's state of mind or intention. Malice is a subjective test entirely dependent on the Defendant's state of mind and intention. Thus, in a case where words are ultimately held objectively*

to bear meaning (a) if the Defendant subjectively intended not meaning (a) but meaning (b) and honestly believed meaning (b) to be true, then the Plaintiff's case on malice would be likely to fail."

9. The relevance of 'intention' in the context of identification and publication was considered by the Supreme Court in *Bradley v. Independent Star Newspapers & Ors* [2011] IESC 17. The principal of intention as a test for identification of a Plaintiff in the context of publication as formulated by Lord Denning MR in Hayward v Thompson [1982] QB 47 is inconsistent with Irish law. Referring to this at p. 37 of his judgment Hardiman J. observed:

> *"I cannot agree with the last quoted statements of Lord Denning in as much as they imply that intention is a necessary constituent of the tort of libel. I do not believe that proof of intention is necessary to constitute a libel action and I do not believe that, in general, the Defendant's intention is of relevance, except in the case where malice is in issue or the publication is said to be accidental. I agree with the statement of the learned editors of the 10th edition of Gatley:*
>
> *'It has to be said that Lord Denning's emphasis on intention is somewhat in conflict with the established principle that save in the context of malice the intention of the publisher of a libel is irrelevant as regards his liability.'"*

10. For his part Fennelly J. commenting on the same question stated at para 40 of his judgment:

> *"One of the fundamental principles of the law of defamation is that the intention of the publisher is irrelevant to his liability if what he publishes is defamatory. This is most clearly demonstrated by the famous case of Hulton v. Jones [1910] A.C. 20, …whether a publisher who publishes a libel innocent of all knowledge that it refers to a particular person is, nonetheless, liable to that person."*

And at para. 51 his Lordship observed further:

> *"There are sound reasons of principle for not making intention the test…If intention were to become the test, it would, for example, be open to a person not named in an article to seek to establish intention by means of discovery or interrogatories. The test for identification would cease to be whether the words, construed objectively, referred to the Plaintiff, but rather whom the writer had in mind."*

11. Turning for a moment to the subject email, which the jury have seen, the press release contained therein commenced by referring to an instruction received by Neans McSweeney from her client in the following terms "*John…*" which I take to be John Paul Phelan "…asked me to send this to you and you alone." The release is headed: *"Hands off Kilkenny, furious John Paul Phelan T.D. tells party colleague."* Thereafter the text consists of a serious of quotations purporting to be the comments of the TD in relation to the

Waterford Boundary Review subsequently published by the Defendant in the impugned article.

12. The Defendants are responsible for the way in which the content of the press release was presented to the public; indeed, it is not suggested otherwise nor is it contended that John Paul Phelan or Neans McSweeney are in any way responsible for the selection or placing of a photograph of the Plaintiff with the article or for the choice of or prominence given to the headline. Publication in these circumstances may have significant consequences. The issue also arose in *Keogh v. RTE*, supra. Where a person publishes a statement or sends a document to another which they know or have reason to believe is likely to be published, that person may be jointly and severally liable for any defamatory material contained in the statement or document as published by the other. The law is stated thus in Gatley 13th Ed. at chapter 6.17:

> *"As a general rule, when a letter is addressed to a particular person, the writer is not responsible except for a publication to that person. However, if in the circumstances of the case the writer knows that the letter will be opened and read by some person other than the person to whom he addressed it, he will be liable for the publication to that person."*

Decision

13. Although the email is addressed to the deputy editor of the paper and was sent to him exclusively – I don't want to comment further on that aspect of matters because it may well be subject to debate if the case proceeds, – on the face of it there would appear to have been an intention that the material was to be used and published as the editor should think fit. It follows that if the jury were to find the quotations in the press release, repeated in the article, bore the meanings or any of the meanings complained of by the Plaintiff and that these were defamatory, it follows that had John Paul Phelan been joined in the proceedings he would be responsible for and liable with the Defendants in defamation as a concurrent wrongdoer. However, no such proceedings were issued and any proceedings as might now be brought would be liable to be defeated by a plea of statute bar.

14. In the context of the defence under s.35 and the defence that the article was published on an occasion of qualified privilege, which the Plaintiff seeks to meet by showing malice, it is quite clear on authority that evidence as to intention of the Defendants is material and is admissible even though, as already indicated, the rule in general is that the intention of the publisher is irrelevant. Accordingly, as the Defendants intend to rely on s. 35 of the Civil Liability Act, 1961 and intend to make the case that if any of the impugned statements are held to be defamatory the Plaintiff should be identified for the purposes of contributory negligence with the author and co-publisher, John Paul Phelan TD, his intention, given the plea of malice, is clearly relevant.

15. Had he had been joined as a Defendant, or separate proceeding had been issued against him and a defence of qualified privilege raised, the question of malice would no doubt have been pleaded by the Plaintiff in reply, consequently the intention behind the remarks

in the press release would have been material. If the defence under s. 35 were to succeed and the jury were to get to that point the question of malice and therefore intention would potentially go to the apportionment of fault based as it is, and this too is material, on the concept of blameworthiness rather than causation.

16. John Paul Phelan TD cannot be responsible for the way in which the Defendant set out the article or for the headline or publication of the photograph; accordingly, it is possible that in due course, should it fall to be decided, that the jury could take the view in the event any of the statements are found by them to be defamatory, that the way in which the material provided by John Paul Phelan was set out by the Defendants in the article with the accompanying photograph and the prominence of the headline "*Coffey the Robber*" for which they are responsible goes to the issue of malice. Furthermore, having regard to the defence under s. 35, there could be circumstances in which, for example, the jury would find an absence of malice on the part of John Paul Phelan, but find that there was malice on the part of the Defendants arising from the way in which they set out, wrote and headed the article, commented on the quotations and associated what was written with a photograph of the Plaintiff. If it arises in due course, that will be a matter for the jury; no doubt there's a lot of water to go under the bridge before that issue falls for consideration.

17. The foregoing illustrates and underscores the relevance and thus the admissibility of Ms. McSweeney's evidence in relation to intention. It seems to me, having regard to the Defendant's intention to run the s. 35 defence and the issue of malice raised in reply to the defence of qualified privilege, that the Defendants are entitled to call her as a witness to give such evidence. Having regard to the judgment delivered in the case on the 23rd of November in respect of a previous application by the Plaintiff to discharge the jury, I took the time last night to review the transcript of the evidence adduced so far and to consider the law as well as what had been urged on the Court by the parties. Having done so I am quite satisfied that although there were one or two incidences of intervention by the Court in circumstances where I thought the line of what was permissible in terms of questioning had been crossed, the portrayal of these infractions by Mr. Keane as persistent breaches of the Court's rulings by Mr. Fanning is not, at least on my view of it, supported by the transcript. Rather, it seems certain that if the transgressions about which complaint is now made had been considered in any way significant I would have expected further objections to have been made over and above those on which the Court ruled as they when they arose.

Ruling

18. I am satisfied that there was nothing of substance in the manner of the cross examination or about what was said regarding the calling of evidence of intention which would amount to such prejudice as would render a fair trial no longer possible and warrant the Court in taking the nuclear option of discharging the jury. For all these reasons, the Court will refuse the application; the trial will proceed.