

THE HIGH COURT

[2014 No. 9351 P.]

BETWEEN

LYNDA MEEGAN

PLAINTIFF

AND

TIMES NEWSPAPERS LIMITED T/A THE SUNDAY TIMES

DEFENDANT

**JUDGMENT of Mr. Justice Barr delivered on the 6th day of November, 2015**

1. In this action, the plaintiff claims damages for defamation against the defendant, in relation to an article which appeared in the defendant's newspaper, "The Sunday Times", on 14th September, 2014. The following allegations were contained in the article:-

*"A senior figure in the Continuity IRA (CIRA) has been identified by Special Branch as the person who received sensitive information from a former garda about operations against dissident republications.*

*Joe Fee, a convicted bomb maker who lives in Monaghan is the focus of an investigation into the disclosure of information likely to be of use to terrorists.*

*The female officer is said to have sent texts to Fee and alerted him to the identities of dissidents arrested by Gardaí. The texts were intercepted by Crime and Security, the garda agency responsible for spying on dissidents.*

*The officer who cannot be named resigned after being confronted. She is the subject of a continuing criminal investigation."*

2. The plaintiff states that she is the former member of An Garda Síochána referred to in the article. She has pleaded that these allegations are false and defamatory of her.

3. In its defence, the defendant has pleaded, inter alia, that the plaintiff was not identifiable from the content of the article. The defendant has also pleaded the defence of fair and reasonable publication on a matter of public interest pursuant to s. 26 of the Defamation Act 2009.

4. In this application, the plaintiff seeks discovery of documents from the defendant. The first and second categories of documents sought in the notice of motion are as follows:-

*"(i) The notebooks used by the reporter and/or reporters/researchers involved in researching and writing the article identified at paragraph 3 of the defence and published under the headline 'Convicted Bomb Maker was Recipient of Garda Intelligence' which appeared on 14th September, 2014 in the defendant's newspaper and as identified at paragraph 6 and 7 of the Statement of Claim, to include all drafts of the said article and sources, notes, memorandum, essays, aide-memoire and other materials used and/or prepared by the defendant, its servants or agents in respect of the said article as published by the defendant on 14th September, 2014.*

*(ii) Copies of the defendant's news list, news conference schedules and minutes thereof containing reference to the publication of the article described in the within proceedings maintained by the author and/or authors, news editors and/or news editor, chief sub-editor and/or sub-editor and/or sub-editors and/or other servants and agents of the defendant for the Irish edition of The Sunday Times for publication of the Sunday Times of September 14th, 2014."*

5. The plaintiff states that having regard to the plea contained in the defendant's defence to the effect that the plaintiff was not identifiable from the words contained in the article, it is relevant and necessary for the plaintiff to have discovery of documents from the defendant. The plaintiff argues that in circumstances where the defendant claims that the plaintiff is not identifiable from the words complained of and does not deny that the plaintiff is, in fact, the person referred to in the article, the reporters' and/or researchers' notebooks are likely to confirm or otherwise whether the said article referred to the plaintiff. The plaintiff further argues that the said news schedules, news lists and editorial materials maintained by the defendant's servants or agents will contain reference to the intention and decision of the defendant to publish the defamatory article concerning the plaintiff.

6. The plaintiff further argues that the said documentation will tend to provide proof of the issues surrounding the identification of the plaintiff as the subject of the article wherein she is accused of criminal offences while a member of An Garda Síochána.

7. In support of her argument that these categories of documents are relevant and necessary, the plaintiff referred to the following extracts from the judgment of Fennelly J. in *Ryanair Plc v. Aer Rianta c.p.t.* [2003] 4 I.R. 264 at p. 276:-

*"In order to establish that discovery of particular categories of documents is 'necessary for disposing fairly of the cause or matter', the applicant does not have to prove that they are, in any sense absolutely necessary. Kelly J. considered the matter in his judgment in *Cooper Flynn v. Radio Telefís Éireann* [2000] 3 I.R. 344. He derived the useful notion of 'litigious advantage' from certain English cases. He adopted the following statement of Bingham M.R. in *Taylor v. Anderton* (C.A.) [1995] 1 W.L.R. 447 at p. 462:-*

*'The crucial consideration is, in my judgment, the meaning of the expression 'disposing fairly of the cause or matter'. Those words direct attention to the question whether inspection is necessary for the fair determination of the matter, whether by trial or otherwise. The purpose of the rule is to ensure that one party does not enjoy an unfair advantage or*

*suffer an unfair disadvantage in the litigation as a result of a document not being produced for inspection. It is, I think, of no importance that a party is curious about the contents of a document or would like to know the contents of it if he suffers no litigious disadvantage by not seeing it and would gain no litigious advantage by seeing it. That, in my judgment, is the test.'*

*It may not be wise to substitute a new term of art, 'litigious advantage' for the words of the rule. Nonetheless, the discussion gives guidance as to the context in which the matter has to be considered. Within that context, the court has to reach a conclusion as to the likely effect of the grant or refusal of the discovery on the fair disposal of the litigation.*

*The change made in to O. 31, r. 12, in 1999, exemplifies, however, growing concern about the dangers of unnecessarily costly and protracted litigation and, in particular, the burdens on parties and the courts arising from excessive resort to automatic blanket discovery. The public interest in the proper administration of justice is not confined to the relentless search for perfect truth. The just and proper conduct of litigation also encompasses the objectives of expedition and economy."*

8. In relation to the first two categories of documents sought, the defendant stated that it is a well-established principle of the law of defamation that intention on the part of the person who made the impugned statement is irrelevant to the question as to whether the plaintiff was identified in the defamatory statement. The defendant referred to the following statement of principle in the judgment of Fennelly J. in *Bradley v. Independent Star Newspapers Limited* [2011] 3 I.R. 96 at p. 131:-

*"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 E. Hulton & Co. v. Jones [1910] A.C. 20, a case which raised the converse issue, whether a publisher who publishes a libel innocent of all knowledge that it refers to a particular person is, nonetheless, liable to that person. A well known newspaper published an article describing the attendance at a motor race at Dieppe. It described the antics, intending to refer to a fictitious person, of one Artemus Jones, and said of him that he was 'with a woman who is not his wife, who must be, you know - the other thing!'. It added:- 'Really, is it not surprising how certain of our fellow-countrymen behave when they come abroad? Who would suppose, by his goings on, that he was a churchwarden at Peckham?' The real Artemus Jones was not, of course, a churchwarden at Peckham or anywhere else. He was a barrister on the North Wales Circuit. Nonetheless, a majority in the Court of Appeal and the House of Lords unanimously held that the test was not whether the defendant intended to refer to the plaintiff but whether the words published were understood by reasonable people who knew the plaintiff to refer to him."*

9. Later, in the course of the same judgment, Fennelly J. stated as follows at p. 134:-

*"I would add that the principle that intention is irrelevant is a sound one. As already stated, the Oireachtas intervened by enacting s. 21 of the Defamation Act 1961 (now repealed) to mitigate the effects of innocent defamation. There are sound reasons of principle for not making intention the test. The press frequently prints stories concerning many sorts of wrongdoing, without identifying the miscreants. There may be many reasons. They may not have sufficient evidence to stand up in court as a justification defence. They may be in fear. Stories often develop piece by piece. Journalists may be motivated by a wish to protect persons. The stories may, nonetheless, be of public importance. 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."*

10. The defendant also referred to the following paragraph from Gatley on *Libel and Slander* (12th Ed.), at para. 7.5:-

*"The common law rule: intention immaterial. At common law it is immaterial that the defendant did not intend to refer to the claimant or did not even know of his existence. The question is: Would the words complained of be understood by reasonable people who knew the claimant to refer to him? If so, they are published of and concerning the claimant, no matter what the intention of the defendant may have been."*

11. The defendant also referred to the decision in *Newstead v. London Express Newspaper Limited* [1940] 1 K.B. 377 in support of its argument that the intention of the person making the statement is irrelevant to the question of identification of the plaintiff in the article.

12. The defendant argued that it was immaterial whether the defendant intended to identify the plaintiff or not. The proper test was an objective one: whether reasonable people who knew the plaintiff identified her as the subject of the article. The defendant pointed out that in the grounding affidavit sworn by the plaintiff's solicitor, Mr. MacGuill, it was stated that the plaintiff would, in the course of prosecuting her case, objectively establish to the satisfaction of the jury that the article complained of did, in fact, refer to her. It was stated that she would do this by calling evidence to the effect that she was, in fact, identified by third parties as the person to whom the article referred. Mr. MacGuill stated that in circumstances where the defendant had not denied that she was the subject matter of the said article, discovery of the said notebooks used by the reporter and/or reporters involved in researching and writing the article, would remove any doubt that this article was intended to and did, in fact, refer to the plaintiff. The defendant argued that the question of the reporter's intention was irrelevant to the matters which would be decided at the trial of the action.

13. I am satisfied that the argument put forward by the defendant is correct. Whether the defendant intended to refer to the plaintiff or not, is immaterial. The test is whether reasonable people, who know the plaintiff, understood it to refer to her. The plaintiff does not require discovery of documents to establish this in evidence. The plaintiff is not entitled to the first two categories of discovery on this basis.

14. The third category of documents sought was in the following terms:-

*"(iii) Copies of all references and advices made and sought and received by the author and/or authors of the article with respect to the decision not to publish the plaintiff's name."*

15. The plaintiff alleged that it would appear from the defence filed on behalf of the defendant, that an active decision was made by the defendant to attempt to conceal the identity of the plaintiff in the knowledge that the accusations made against her in the impugned article were defamatory of her and in spite of such knowledge, the defendant wilfully, recklessly and maliciously proceeded to publish the defamatory words of and concerning the plaintiff. The plaintiff further argued that the documents sought were relevant to the defendant's requirement of full proof of all pleas and allegations and assertions made by the plaintiff in her Statement of Claim.

It was submitted that the said category was particularly relevant to the plaintiff's claim for aggravated damages for irresponsible publication concerning the plaintiff in her professional reputation.

16. In the Plenary Summons and Statement of Claim, there is a claim to aggravated damages. However, the plaintiff has not pleaded any specific basis on which the entitlement to such damages is said to arise.

17. In response to this aspect, the defendant has argued that aggravated damages are only payable where there has been some additional hurt to the plaintiff's feelings caused by the conduct of the defendant. This is given statutory recognition in s. 32(1) of the Defamation Act 2009, which provides that where the court finds that the defendant was liable to pay damages to the plaintiff in respect of a defamatory statement and the defendant conducted his or her defence in a manner that aggravated the injury caused to the plaintiff's reputation by the defamatory statement, then the court may, in addition to any general, special or punitive damages, payable by the defendant to the plaintiff, order the defendant to pay to the plaintiff damages, referred to as "*aggravated damages*", of such amount as it considers appropriate to compensate the plaintiff for the aggravation of the said injury.

18. The defendant submitted that the plaintiff is not entitled to go on a fishing expedition by seeking discovery, in the hope that she would unearth something in the documents, which would give rise to additional hurt over and above that caused by the conduct of the defendant in publishing the article and thereby provide the basis for a claim to aggravated damages. The defendant argued that the plaintiff must know what additional hurt she had suffered and did not need discovery to establish such a claim.

19. The defendant relied on the case of *Henry v. News Group Newspapers Limited* [2011] EWHC 1058, and in particular to the following portions of the judgment of Eady J.:-

*"7. The purpose of aggravated damages is to compensate the claimant for any salt that the relevant defendant has rubbed in the wound over and above the injury caused by the defamatory publication(s) complained of. It follows that the aggravating conduct must have been known to the claimant. It cannot be relevant to enquire into what was going on behind the scenes ('What the eye does not see ...')."*

...

*10. Mr. Warby submitted that the disclosure application was a fishing expedition, in effect, to enable the claimant to advance her (irrelevant) case as to the state of the defendant's actual knowledge (through one or more unidentified employees). Various reasons were advanced, but clearly the primary point is that the only 'facts' as to the defendant's state of mind that could conceivably be relevant to the issue of aggravated damages are those perceived or known about by the Claimant. Accordingly, disclosure of documents cannot assist."*

...

*15. Mr. Warby further submits that it cannot be right to seek to augment damages in a libel action, which are intended to be primarily compensatory, by trying to prove that one's beliefs about a defendant's conduct are in fact true and extracting documents for that purpose. The result could well be that the award would then reflect injury to feelings caused by the disclosure rather than the publication. Also, there would be a risk of introducing, impermissibly, an element of punishment."*

20. The defendant also pointed out that the plaintiff had not pleaded malice against the defendant as a basis for any award of aggravated damages. The defendant relied on the following statement of the law in *Gatley on Libel and Slander*, (12th Ed.) at para. 31.8:-

*"Malice. Where the claimant has pleaded malice in his reply in rebuttal of a defence of qualified privilege or honest comment, the parties must give disclosure of all documents which support or undermine the claimant's case on the defendant's state of mind. But where the claimant relies on the defendant's motivation or state of mind in publishing the words in aggravation of damages, he is not entitled to disclosure from the defendant."*

21. I am satisfied that the defendant's contention in this regard is correct. The plaintiff cannot seek discovery of documents in the hope that that will unearth something which will provide a basis for claiming aggravated damages. As submitted by Mr. Quinn, S.C., in order to make such a plea, the plaintiff must be able to point to some conduct on the part of the defendant which has caused the plaintiff additional hurt, over and above that caused by the publication of the article. The plaintiff must know what that conduct was. The plaintiff is not entitled to seek discovery of documents as a means of establishing a claim to aggravated damages.

22. At the hearing of this application, the plaintiff advanced a further ground for seeking discovery, which was not included in her original request for voluntary discovery, nor in the grounding affidavit sworn by her solicitor. This was, to the effect, that having regard to the fact that the defendant had pleaded the defence of fair and reasonable publication on a matter of public interest, pursuant to s. 26 of the Defamation Act 2009, she was entitled to obtain discovery of documents from the defendant. I adjourned the hearing of the motion to allow the plaintiff to make her claim in this regard on affidavit. Following that, both parties made legal submissions on the issue.

23. Section 26 of the Defamation Act 2009, is in the following terms:-

*"26.— (1) It shall be a defence (to be known, and in this section referred to, as the "defence of fair and reasonable publication") to a defamation action for the defendant to prove that—*

*(a) the statement in respect of which the action was brought was published—*

*(i) in good faith, and*

*(ii) in the course of, or for the purpose of, the discussion of a subject of public interest, the discussion of which was for the public benefit,*

*(b) in all of the circumstances of the case, the manner and extent of publication of the statement did not exceed that which was reasonably sufficient, and*

*(c) in all of the circumstances of the case, it was fair and reasonable to publish the statement."*

(2) For the purposes of this section, the court shall, in determining whether it was fair and reasonable to publish the statement concerned, take into account such matters as the court considers relevant including any or all of the following:

- (a) the extent to which the statement concerned refers to the performance by the person of his or her public functions;
- (b) the seriousness of any allegations made in the statement;
- (c) the context and content (including the language used) of the statement;
- (d) the extent to which the statement drew a distinction between suspicions, allegations and facts;
- (e) the extent to which there were exceptional circumstances that necessitated the publication of the statement on the date of publication;
- (f) in the case of a statement published in a periodical by a person who, at the time of publication, was a member of the Press Council, the extent to which the person adhered to the code of standards of the Press Council and abided by determinations of the Press Ombudsman and determinations of the Press Council;
- (g) in the case of a statement published in a periodical by a person who, at the time of publication, was not a member of the Press Council, the extent to which the publisher of the periodical adhered to standards equivalent to the standards specified in paragraph (f);
- (h) the extent to which the plaintiff's version of events was represented in the publication concerned and given the same or similar prominence as was given to the statement concerned;
- (i) if the plaintiff's version of events was not so represented, the extent to which a reasonable attempt was made by the publisher to obtain and publish a response from that person; and
- (j) the attempts made, and the means used, by the defendant to verify the assertions and allegations concerning the plaintiff in the statement.

(3) The failure or refusal of a plaintiff to respond to attempts by or on behalf of the defendant, to elicit the plaintiff's version of events, shall not—

- (a) constitute or imply consent to the publication of the statement, or
- (b) entitle the court to draw any inference therefrom.

(4) In this section—

"court" means, in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury;

"defamation action" does not include an application for a declaratory order."

24. The plaintiff's counsel submitted that the burden of proof rested upon the defendant to establish the matters specified in section 26. He stated that by pleading s. 26, the defendant was putting in issue the question of whether the servants or agents of the defendant acted fairly and reasonably in relation to the publication of the article. He stated that the issue of whether there was responsible journalism, was thus raised on the pleadings. In these circumstances, it was necessary for the plaintiff to have discovery of documents so as to properly deal with this issue at the trial of the action.

25. In support of this argument, the plaintiff referred to the decision in *Walsh v. The Newsgroup Newspapers Limited* [2012] 3 I.R. 136. Counsel for the plaintiff submitted that it was clear from the decision of O'Neill J. in that case that discovery of documents would be granted where it was relevant to support a claim for aggravated damages, or to counter a defence raised by the defendant pursuant to s. 26 of the 2009 Act. The plaintiff referred to the following portion from the judgment of O'Neill J. at para. 25:-

"[25] ...The plaintiff submits that this category of discovery is relevant because the existence or non-existence of documents in this category would be directly relevant to advancing the plaintiff's case, to the effect, that the plaintiff or his representative was misled by the defendants as to the manner in which their investigation of the incident took place, and hence could assist the plaintiff in overcoming the defendants' defence of fair and reasonable publication pursuant to s. 26 of the Defamation Act 2009...

[26] The plaintiff makes the case that the story was, in effect, procured by financial inducements offered by the defendants through its crime correspondent to Mr. Watters, and that the defendants misrepresented to the plaintiff or his representative that they had obtained the story from An Garda Síochána. The defendants deny these allegations. In my view, discovery of documents relating to communications between the defendants and An Garda Síochána would be relevant to the resolution of these disputed issues. The resolution of these issues will be central to a determination on the plaintiffs claim for aggravated damages and also to the defendants' defence of fair and reasonable publication pursuant to s. 26 of the Defamation Act 2009. Insofar as this category of discovery is concerned, therefore, I am quite satisfied that the plaintiff has established that category 7 of the discovery sought is relevant to the issues in dispute in the action."

26. The plaintiff's counsel submitted that the offending article in this case was published on the front page of the newspaper and on its website. In these circumstances, it was submitted that the discovery sought was relevant to the matters raised in s. 26(1)(b) and (c). He submitted that it was also relevant to the matters which were raised for consideration by virtue of s. 26(2)(a), (b), (d) and (j). The plaintiff submitted that by invoking the provisions of s. 26, the defendants specifically put in issue the question of whether there was responsible journalism in the preparation and publication of the offending article. It was submitted that the discovery sought was directly relevant to the issues raised on the pleadings.

27. In response, counsel for the defendant stated that this application was merely a fishing expedition on the part of the plaintiff. He

submitted that the plaintiff was trying to dig up some documentation which would provide a basis for her claim to aggravated damages. He stated that this was clearly impermissible for the reasons set out in the judgment of Eady J. in *Henry v. Newsgroup Newspaper Limited* [2011] EWHC 1058. He stated that the key question for determination by the court was whether discovery of documents was necessary for disposing fairly of the cause or matter. In this regard, he cited the judgment of Fennelly J. in *Ryanair Plc v. Aer Rianta c.p.t.* [2003] 4 I.R. 264, as referred to earlier in this judgment.

28. Counsel for the defendant submitted that the present case was not comparable to the circumstances in *Walsh v. Newsgroup Newspaper Limited* [2012] 3 I.R. 136. He stated that in the Walsh case, extensive particulars had been furnished of the circumstances giving rise to the claim for aggravated damages. In the present case, no such particulars were given. The plaintiff had not set out any basis for her claim to aggravated damages. There was just a bare claim to such relief in the Statement of Claim.

29. Counsel further submitted that the plaintiff had not set out any cogent reasons as to why she should be given discovery of documents having regard to the plea in the defence pursuant to s. 26 of the Defamation Act 2009. In this regard, the plaintiff's solicitor had in a supplemental affidavit sworn on 21st October, 2015, set out the reasons why the documentation was relevant to the claim made pursuant to s. 26 of the Defamation Act 2009:-

*"I say and believe that, while the Statement of Claim in the within proceedings does not contain a plea referring expressly to section 26 of the Defamation Act 2009, the said section being pleaded in defence to the plaintiff's claim, the categories of documentation sought to be discovered on the within Notice of Motion are relevant to the within proceedings in light of the aforementioned plea by the defendant to the effect that it intends to rely on the said section 26."*

30. The defendant's counsel submitted that this was a mere formulaic reason and was not a sufficient basis for directing discovery of documents against the defendant.

31. The court must consider whether the defendant in making the plea under s. 26 of the 2009 Act, thereby opened itself to an application for discovery of documents. There is some support for this proposition in Cox and McCullough *"Defamation, Law and Practice"* published by Clarus Press Limited, 2014, where the following opinion is stated at para. 14-109:

*"Where there is a plea under s. 26 of fair and reasonable publication on a matter of public interest, there may be a requirement to discover journalist's notes and other material relating to the issue of whether or not it was fair and reasonable to publish the statement concerned."*

However, there is no authority cited for this statement.

32. The decision in *Walsh v. Newsgroup Newspapers Limited* [2012] 3 I.R. 136, also supports the view that where a defence has been raised under s. 26 of the 2009 Act, the plaintiff will be entitled to seek discovery of documents from the defendant.

33. I am satisfied that the plaintiff is correct in her assertion that by raising the defence of fair and reasonable publication on a matter of public interest, the defendant has put in issue the question as to whether the defendant's servants or agents acted fairly and reasonably in publishing the article. By making such a plea, the defendant has opened itself to an application for discovery of documents. The plaintiff will only be able to adequately deal with the assertions made by the defendant in this regard if she is given discovery of the journalist's notes and other background material relevant to the publication of the article. In particular, she will need discovery of documents in order to deal with the issues raised in s. 26(1)(b) and (c). She will also need discovery of documents to deal with the matters raised by s. 26(2)(a), (b), (d) and (j). Accordingly, I direct that the defendant is to make discovery in the terms of the notice of motion. I will hear the parties in relation to the name of the deponent and the length of time required to make the discovery.

34. I should state that in directing that the defendant make discovery of documents, I am expressing no view on the issue as to whether any or all of the documents may be covered by either journalistic privilege or legal professional privilege. These are matters that can be raised in the usual way in the affidavit of discovery. The court will adjudicate on those issues, if and when they are raised by the defendant in its affidavit of discovery.