Neutral Citation: [2015] IEHC 288

THE HIGH COURT

[2012 No. 6977 P]

BETWEEN

CORNELIOUS M. CAGNEY

PLAINTIFF

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND

DEFENDANT

DECISION of Mr. Justice Hedigan delivered the 7th of May 2015

1. I have acceded to the defendant's application to withdraw the plaintiff's case from the jury. The following are my reasons for doing so.

2. The principle which should guide the court in an application such as this is straightforward. It may be stated as follows; the jury are the judges of the facts in any case submitted to them for their determination. A judge sitting in a case being tried by a jury will be very reluctant to interfere with a jury's unique function. As a general principle, it is only when the judge is satisfied that, on the undisputed facts, no case in law exists, that he may withdraw the case from the jury. When he is so satisfied however, he must, in justice to the defendants withdraw the case from the jury. See *Paul Reid v. The Commissioner of An Garda Síochána and Others,* High Court, 9th May 2014 and *Lydia O'Hara v. The Board and Management Scoil Chriost Rí and Another*, High Court 8th July 2014 para. 3.

3. The plaintiff's claim herein is for damages for defamation. He alleges that the bank caused two entries to be made in the Irish Credit Bureau (ICB) against his name, according to him categories "K" and "L". These categories mean respectively that his credit card had been revoked and that he had settled an account for less than the amount due. The bank denies that it defamed the plaintiff and relies upon the defence that it communicated this information to the Bureau on occasions that were of qualified privilege. It pleads that the letters complained of were published; -

> (1) In pursuance of a legal and/or social and/or moral duty to a body which had a corresponding duty of interest to receive them and/or
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> (2) In the protection or furtherance of an interest to a body which had a common or a corresponding duty or interest to receive them and/or
>
> (3) In the protection of a common interest to a body sharing the same interest.

4. The Irish Credit Bureau is a credit reference body owned and financed by its members. They are all financial institutions or local authorities. It was created for the mutual protection of its members. The Bureau retains information supplied by its members on the performance of credit agreements between financial institutions and borrowers. This information may be accessed by its members in order to assist them in assessing the risk of providing credit to borrowers. The Bank of Ireland is a member.

5. Section 18 (2) of the Defamation Act 2009 provides that it shall be a defence to a defamation action for the defendant to prove that: -

> *"(a) the statement was published to a person or persons who—*
>
> *(i) had a duty to receive, or interest in receiving, the information contained in the statement, or*
>
> *(ii) the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest, and*
>
> *(b) the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons."*

Section 18 (6) of the 2009 Act provides that such defence shall be known as the "*defence of qualified privilege*".

Section 18 (7) of the 2009 Act defines "*duty*" as "*a legal, moral or social duty*" and "*interest*" as "*legal, moral or social interest*".

6. Qualified privilege is helpfully defined in Cox and McCullough's *Defamation Law and Practice* at para. 8-01 as follows: -

> *"…an occasion of [qualified] privilege will generally arise (both at common law and under the 2009 Act) where the publisher has a legal, social or moral duty to publish the offending material and the recipient has a reciprocal interest in receiving it, and it becomes a question of fact as to whether or not in a particular case, such a mutuality of duties or interests exists. If publication (even of untrue material) occurs on an occasion of privilege and is warranted by the occasion, this is sufficient to afford the defendant a defence in a defamation action, provided only that the plaintiff cannot prove that the defendant was acting with malice."*

I gratefully adopt this passage from the learned authors.

7. The defence of qualified privilege is not lost because the statement complained of is untrue. Gatley on Libel and Slander 12th edition at para 14.18 states in this regard: -

> *"The fact, however, that the defendant is mistaken as to the facts and the statement does not deprive him of the privilege: the very purpose of the defence is to allow the making, in good faith, of untrue statements."*

Thus even if the bank were wrong about the revocation of the plaintiff's card and that his account was settled short the defence of qualified privilege is not lost.

8. It seems clear from the judgment of Palles CB in *Fitzsimons v. Duncan and Kemp* 1908 2 I.R. 42 that fair and reasonable enquiries as to credit, made by traders and consequently the furnishing of such details is an occasion that is privileged. The learned Chief Baron said: -

> *"I entertain a clear opinion that the occasion was privileged. It is essential to the due carrying on of mercantile business that a wholesale trader, who contemplates selling on credit to a retail trader, should be entitled to make fair and reasonable enquiries as to the solvency of the latter;"*

This is a very old judgment arising from an age that could not possibly have contemplated the complexity and flexibility of modern financial transactions including ones made electronically. Yet the learned Chief Baron's wisdom still reaches out across more than a century to us. To do business, whether in the horse and buggy days of 1908 or the cyber world of today, one must be able to find ways to accurately assess the creditworthiness of those with whom one wishes to trade. That is done for financial institutions by the Irish Credit Bureau. The ability of those institutions to rely upon such an agency is crucial to their ability to provide ready, flexible ways for everyone to access credit and thereby use credit and debit cards and the ubiquitous ATM. All of these enhance and convenience many of the essential activities of modern daily life. Needless to say this should be done in a way that respects the privacy and the rights of the people affected. Thus in my judgment the communication of the information that the plaintiff's card was revoked in 2010 and that his account was settled short in 2012 was made on an occasion of qualified privilege.

9. This privilege may be defeated by a plaintiff where he can establish that the communication was made with malice. This means that the defendant acted with an improper motif on the privileged occasion. See Cox and McCullough (cited above) at paragraphs 8.103 and 8.104. The plaintiff has not pleaded malice and has not sought during the hearing to establish malice. Indeed the plaintiff himself said on a number of occasions that he did not know why the bank had communicated the information to the Irish Credit Bureau. Moreover it was manifestly clear from the evidence of John Ruddy of the Bank of Ireland, who made the decision to communicate with the Bureau, that he did not even know the plaintiff. It was quite clear that he simply acted in the normal way on the information that was communicated to him. Thus the occasion of qualified privilege has been established and no defamation can arise from the communication in question.

10. The plaintiff has many bitter complaints about the way in which he was treated by the bank. This case however is solely concerned with the question as to whether the bank defamed him when it communicated the bureau the information that resulted in his being accorded a status of "K" and "L". As I have decided that the communication was on an occasion of qualified privilege, that claim must fail. I find that on the undisputed facts no case in law exists and thus I was compelled to withdraw the case from the jury.