[2018] IEHC 673

THE HIGH COURT

[2016 11369 P]

BETWEEN:

PAUDIE COFFEY

PLAINITFF

AND

ICONIC NEWSPAPERS LTD T/A THE KILKENNY PEOPLE

AND

SAM MATTHEWS

DEFENDANTS

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 23rd day of November, 2018

1. This is an application brought by the Plaintiff to discharge the jury in a defamation suit on the ground that counsel for the Defendant had evinced an intention to introduce and had sought to adduce on the cross examination of the Plaintiff impermissible evidence as to the meaning of an article about which he complains and published by the Defendants. The essence of the objection is that putting the evidence of a witness who had been identified by the Plaintiff, the former Irish rugby international Mick Galwey, to the effect that he considered the impugned article to be a joke trespassed impermissibly on a function which is the exclusive preserve of the jury.

2. The Plaintiff contends this was a deliberate attempt to prejudice the jury as to meaning which cannot be corrected by a direction of the Court or by way of examination of the witness since the latter course, in particular, would inevitably involve an inquiry into the witness's understanding of the article and thus its meaning, the very mischief which the rules of evidence as to admissibility in a defamation action are designed to prevent. Moreover, that the evidence was likely to have had an impermissible and prejudicial impact on the jury was exemplified by the reports of the previous day's proceedings in three national newspapers. The Irish Times and Irish Independent reported that Mr. Galwey would be coming to court to give evidence that he regarded the article as a "complete joke" and furthermore in the Examiner that his comment at Thomand Park "here comes Coffey the robber" was "all banter".

3. Counsel for the Defendants, Mr. Fanning SC, opposing, submitted that the application was entirely misconceived. The only person the Plaintiff had identified by name as having made any comment to him arising from the impugned article was Mick Galwey. It was he who had sent an email to the Plaintiff's cousin, Richard Coffey, which he then forwarded and which had first alerted the Plaintiff to the existence and content of the article. The email had been read into the record of the Court by the Plaintiff's counsel who then invited him to comment on the content. The Plaintiff had also given evidence of having met Mick Galwey with other well-known individuals during a testimonial match for Anthony Foley at Thomand Park in the Autumn of 2015 when on seeing the Plaintiff approach he had exclaimed jocosely "here comes Coffey the robber" a remark greeted by laughter in which the Plaintiff joined notwithstanding that internally he had felt ridiculed. On his evidence, this was the catalyst for seeking legal advice and instituting the proceedings.

4. The Defendants were unaware of Mick Galwey's potential involvement in the case or of the email and the reaction it conveyed or of the remarks he made on meeting with the Plaintiff at Thomand Park until these facts were introduced by the Plaintiff when giving his evidence in chief. Accordingly, the Defendants were entitled to explore these matters with him under cross examination. In the circumstances, it was also entirely appropriate and permissible that an approach be made on behalf of the Defendants to the witness so identified in order to ascertain whether he would be willing to give evidence concerning these matters and, if so, it was absolutely proper such should be put to the Plaintiff so as to enable him comment upon it; this was not to be conflated with evidence as to the meaning which the witness may have attributed to the article.

5. In reply, counsel for the Plaintiff, Mr. Quirke SC, drew the attention of the Court to particular propositions, the essence of which was evidence as to meaning, put to the Plaintiff on Day 2 of the trial (at pp. 156 and 159 of the transcript) to illustrate the point that counsel for the Defendants had gone much further than exploring the question of the impact of the impugned statement. He submitted that the only construction which the propositions could bear went to meaning, something which was simply impermissible and in the circumstances prejudicial. That the propositions were likely to have been so understood by the jury was amply illustrated by the commentary and reporting of the Plaintiff's cross examination the previous day in three national newspapers.

6. The parties are agreed on the law. Counsel referred the Court to the decision of the Supreme Court in *Dawson v. Irish Brokers Association* [1998] IESC 39 and the recent decision of this Court in *Ryanair & Ors v. Van Zwoll & Ors* [2017] IEHC 798, as authorities for the approach which the court should adopt on an application to discharge the jury in a civil action. This maybe summarised as follows: the granting of such an order should be a remedy of the very last resort and only achieved in the most extreme circumstances. In essence, the question to be addressed by the trial judge is whether or not, having due regard to the matter in question and the circumstances which have given rise to the application, a fair trial may yet be had by the parties; fairness, not factors such as cost, time, convenience or effort expended, must be the principle determinant of the issue since that is a prerequisite to the achievement of the object for which the trial process is established, doing justice between the parties in accordance with the law.

7. In the circumstances which have given rise to the present application it is, in my judgment, significant the case is not made that the impugned article was published in jest. It is not suggested nor has any application been made to rule on whether or not the words complained of are capable of bearing any of the meanings attributed to them by the Plaintiff or for that matter bearing any defamatory meaning. Accordingly, it will be a matter of fact for the jury to determine whether the wording of the impugned article bears any of meanings contended for by the Plaintiff and, if so, whether these are defamatory of the Plaintiff, that is to say, have injured his reputation in the minds of reasonable members of society.

8. It is not material to the establishment of the cause of action whether the Plaintiff dislikes or disapproves of the material which has been published by the Defendants or that the material may be abusive, vulgar or has likely upset or hurt him, rather it is the harm, if any, to the Plaintiff's reputation engendered by the publication of the impugned statement which is necessary in order to constitute the tort, though, other consequences where they arise will be material to the assessment of damages.

9. The circumstances of this case illustrate the very thin line which may exist between evidence as to meaning and evidence as to the impact or effect of an allegedly defamatory statement. In my judgment, having carefully considered the evidence material to the application, the media articles and authorities to which the Court has been referred and the submissions made on behalf of the parties, I feel compelled to accept the submissions made on behalf of the Defendants. In this regard I am satisfied that the line of what is permissible has not been crossed in a material way such as would render it no longer possible for a fair trial to be had between the parties and thus warrant the Court in making an order to discharge the jury.

10. Lest there should be any doubt about it, like any other witness Mick Galwey will not be permitted to give any evidence which goes to the meaning he may have attributed to the article although his reaction thereto as described by the Plaintiff during his evidence in chief may properly be explored with him in due course. The Court is mindful that the trial is at an early stage and that in due course the jury will be directed on the law to be applied to the issues as well as to their function, including the determination of the meaning which they and they alone consider would likely have been placed on the article by reasonable members of society. Accordingly, the application will be refused and the Court will so order.