

THE HIGH COURT

[2015 No. 226CA; 2015 No. 227CA]

BETWEEN:

JOAN DARDIS AND BERNADETTE CURTIS

APPELLANTS

– AND –

BUS ÉIREANN/IRISH BUS

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 8th November, 2016.

I. Facts

1. Bernadette Curtis ("Ms Curtis") and her sister, Joan Dardis ("Ms Dardis"), are regular visitors to the Shrine of Our Lady of Knock. On 23rd June, 2013, they went with eight family members to Busáras. Among those family members was Ms Dardis' adult daughter, Jennifer ("Ms Jennifer Dardis"). The intention of the family-party was to take a bus from Busáras to Athlone, and to change bus there for Knock.
2. Ms Curtis and Ms Dardis were travelling on free travel passes. Ms Curtis is entitled to such a pass as she has a disability. Ms Dardis was travelling on a carer's pass; however, the person for whom she cared had, regrettably, passed away some years previous to June, 2013, and a carer's pass is only good for free travel when the holder of same is travelling with the person for whom s/he cares. So Ms Dardis had no entitlement to travel on the carer's pass.
3. Ms Jennifer Dardis had her two children with her, one a toddler, the other nine years old. When the family party got on the bus, the toddler was resting on her mother's shoulder. So Ms Jennifer Dardis asked if she could settle the child before paying the driver. He agreed to this and continued to take fares from other passengers who were boarding. When, after a few minutes, Ms Jennifer Dardis had not returned to pay the fares owing, the driver went down the bus to collect those fares.
4. According to both Ms Curtis and Ms Dardis (no-one else from the family-party gave evidence), Ms Jennifer Dardis had by this time sent her son up the bus with a €50 note to pay the driver; however, he refused to take money from a child. The driver, a soft-spoken gentleman, who gave evidence and who did not strike the court as a person who would be roused swiftly to temper, denied that he was ever approached by the nine-year old or refused to take payment. The court believes him and does not believe that Ms Jennifer Dardis ever sent her son up the bus with a €50 note.
5. In terms of what the driver allegedly did next, there was a striking inconsistency in the evidence offered by the two sisters. Ms Curtis claims that the driver came down the bus, roused to a temper by the fact that a nine year-old had been sent to pay him, asked to see the passes that the older passengers were using, and then said words to the effect of 'Right, all of you off the bus.' Ms Dardis' account was different. She said the driver came down the bus and asked Ms Jennifer Dardis to pay. (This is also what the driver says he did). At this point, according to Ms Dardis, Ms Jennifer Dardis indicated that she was not going to pay for her children.
6. It is not clear why, after getting on the bus, Ms Jennifer Dardis had an apparent change of mind as to the need to make payment. The evidence of both appellants is that Ms Jennifer Dardis asked the driver if she could settle the child before paying, a request to which the driver politely acceded. Yet a few minutes later, according to Ms Dardis, Ms Jennifer Dardis was telling the driver that she was not obliged to pay the fares that he was seeking. In any event, according to Ms Dardis, after the driver met with Ms Jennifer Dardis's refusal to pay, he asked to see the passes that various family members were using. Then, she claims, he erupted into a temper and said words to the effect of 'Right, all of you off the bus'.
7. In short, according to Ms Curtis, the driver came down the bus in a temper because Ms Jennifer Dardis' son had the audacity to offer payment. But, according to Ms Dardis, the driver came down the bus, sought payment of Ms Jennifer Dardis, and then erupted into a temper.
8. The inconsistencies do not end there. According to Ms Curtis, after the driver directed everyone to get off the bus, they did so. Yet she went on to say that when the Gardaí were called to resolve the altercation that had now arisen between the driver and the family group, she (Ms Curtis) was still on the bus. Ms Dardis's testimony was that when the driver asked everyone to get off the bus, they did. Which sister's evidence is to be preferred? In fact, the court prefers the evidence of the driver which was entirely coherent, contained no inconsistencies, and chimes with common-sense. He stated simply that he came down the bus, asked for payment, was refused payment, and went to fetch an inspector.
9. Around this time, the Gardaí were called for, presumably at the behest of the inspector, to resolve the difficulty that had now arisen. The evidence of the garda who attended at the scene, evidence that the court accepts as entirely true, was that, when he arrived, the family-party was still on the bus and that he (quite sensibly) asked them to get off so that matters could be resolved discreetly instead of in front of all the other passengers. The family-group acceded to this invitation and got off the bus. The fact that they were still on the bus at the time the garda arrived gives lie to the suggestion that the driver put the family-group off the bus.
10. The discussion that followed with the garda was calm and there was no great altercation. Both driver and garda indicated in evidence that at no stage was there ever any offer by any of the family-party to hand over the €50 that Ms Jennifer Dardis (according to both Ms Curtis and Ms Dardis) had allegedly handed to her child, only to deny moments later (according to Ms Dardis) that she was liable to pay a fare. Had there been such an offer, the driver indicated, he would simply have accepted the payment and headed off with the bus. But no payment being forthcoming, the family party could not travel as a complete party on the bus. So the bus left without them and they took a taxi to Heuston Station where they caught the train to Clarendon and travelled together to Knock.
11. What does the court accept to be the true facts of what occurred? It has indicated some of its conclusions above but it is as well to re-state them here:

- (1) the family-party boarded the bus;
- (2) Ms Jennifer Dardis asked if she could settle her infant child before paying such fares as were due;
- (3) the driver acceded to this request;
- (4) no payment being forthcoming, the driver subsequently went down the bus to collect the fares due from Ms Jennifer Dardis;
- (5) Ms Jennifer Dardis' son was not sent up the bus with a €50 note to pay the fares owing;
- (6) Ms Jennifer Dardis denied that she was liable to make any payment for her children;
- (7) the driver then got off the bus to fetch an inspector;
- (8) the driver did not at any time explode in temper;
- (9) the driver did not put the family-party off the bus;
- (10) after the driver dis-embarked, the family-party remained on the bus;
- (11) the Gardaí were sent for by Bus Éireann;
- (12) the garda who attended at the scene got on the bus and asked the family-party to disembark so that matters could discreetly be discussed;
- (13) the family-group acceded to this invitation and got off the bus;
- (14) the discussions that followed were polite and restrained;
- (15) at no time in the course of these discussions was any payment proffered;
- (16) due payment not having been made, the family-party could not travel as a complete party and the bus left without them;
- (17) the family-party subsequently made its way to Knock by train instead.

II. Ms Curtis' Claims.

12. Ms Curtis comes now to court claiming that Bus Éireann, its servants or agents are guilty of the wrongs identified below. These wrongs were unsuccessfully sued upon in the Circuit Court and the matter now comes before this Court on appeal.

(a) A failure to inquire quietly and politely of the circumstances.

Having regard to the conclusions of fact reached above, the court considers no such failure to arise.

(b) The making of innuendoes that Ms Curtis had failed or refused to purchase a ticket to travel on the bus.

Having regard to the conclusions of fact reached above, it appears to the court that the focus of the events that transpired was Ms Jennifer Dardis' refusal to pay for her children. As to the family's getting off the bus, this was a sensible suggestion by the garda who attended at the scene; he invited the family-party to disembark so that he could get to the bottom of matters discreetly; as the family-party were travelling as a party it was natural that they would disembark together; and they acceded to what they perceived as an invitation. The court does not consider that any innuendo was made at any point that Ms Curtis had failed or refused to purchase a ticket to travel on the bus. Even asking her to produce her free travel pass for checking did not involve any such innuendo; many people are often asked to produce a ticket or bus-pass when travelling on public transport and no-one thinks anything of it.

(c) A failure to take any or any reasonable care for Ms Curtis.

Having regard to the conclusions of fact reached above, there is no basis for this assertion.

(d) A failure to implement a system of surveillance, management or control of their premises and vehicles in order to prevent the type of incident that in fact occurred

This amounts in effect to a contention that Bus Éireann should have a system in place whereby young mothers are refused permission to settle down infant children on a bus before they furnish a bus-fare. The court must admit to some surprise that such an ideal would be contended for. Certainly the court finds no legal failing that such a system does not pertain. If anything, the driver in this case is to be commended for his politeness in allowing a young mother to board a bus and settle a child down, rather than refusing her permission to board until full payment was made, as he was perfectly entitled to do.

(e) Injuring Ms Curtis' credit, character and reputation, subjecting her to scandal, ridicule and contempt, and causing her to suffer shame, embarrassment, humiliation, mental distress, loss, damage, convenience and expense.

Having regard to the conclusions of fact reached in Part I, it appears to the court that the focus of the events that transpired was Ms Jennifer Dardis's refusal to pay for her children. Ms Curtis was not the focus of attention. As to the family's getting off the bus, this was a sensible suggestion by the garda who attended at the scene; he invited the family-party to disembark so that he could get to the bottom of matters discreetly; and they acceded to what they perceived as an invitation.

Bus Éireann contended that, given a single public order offence of which Ms Curtis was convicted in the past, she has little or no

reputation that could be sued upon in defamation in any event. This aspect of matters is considered later below.

(f) Wrongfully, and in breach of contract, in breach of representations made and warranties given, Bus Éireann, its servants or agents, failed, refused and/or neglected to comply with the terms and conditions attached to the use of free travel passes, acting in a manner at variance with the representations and statements made regarding the use of free travel passes.

Ms Curtis was entitled to travel on her free travel-pass and, notwithstanding what occurred, could have gone to Athlone (and then Knock) on the bus by herself. She elected not to do so when the rest of the family-party were not travelling with her. But that she elected so to proceed does not yield the conclusion that Bus Éireann is guilty of the above-mentioned wrongs, and as a matter of law they are not.

(g) By reason of the matters aforesaid, defamation, negligence, breach of duty, breach of contract and misrepresentation, as a consequence of which Ms Curtis has suffered various types of injury.

Having regard to all of the various conclusions reached above, there is no basis in fact or law for any of these alleged wrongs.

III. Ms Dardis' Claims.

13. Ms Dardis comes to court claiming that Bus Éireann, its servants or agents are guilty of the wrongs identified below. These wrongs were unsuccessfully sued upon in the Circuit Court and the matter now comes before this Court on appeal.

(a) A failure to inquire quietly and politely of the circumstances.

Having regard to the conclusions of fact reached above, the court considers no such failure to arise.

(b) The making of innuendoes that Ms Dardis had failed or refused to purchase a ticket to travel on the bus.

Ms Dardis was travelling on a carer's pass, but, as of 23rd June, 2013, the person for whom she cared had, regrettably, passed away some years previously, and a carer's pass is only good for free travel when the holder of same is travelling with the person for whom s/he cares. In other words, Ms Dardis failed to purchase a ticket to travel on the bus when she ought to have done so.

(c) A failure to take any or any reasonable care for Ms Dardis.

Having regard to the conclusions of fact reached in Part I, there is no basis for this assertion.

(d) A failure to implement a system of surveillance, management or control of their premises and vehicles in order to prevent the type of incident that in fact occurred.

This amounts in effect to a contention that Bus Éireann should have a system in place whereby young mothers are refused permission to settle down infant children on a bus before they furnish a bus-fare. The court must admit to some surprise that such an ideal would be contended for. Certainly the court finds no legal failing that such a system does not pertain. If anything, the driver in this case is to be commended for his politeness in allowing a young mother to board a bus and settle a child down, rather than refusing her permission to board until full payment was made, as he was perfectly entitled to do.

(e) Injuring Ms Dardis' credit, character and reputation, subjecting her to scandal, ridicule and contempt, and causing her to suffer shame, embarrassment, humiliation, mental distress, loss, damage, convenience and expense.

As mentioned above, Ms Dardis was travelling improperly on a carer's pass. She had failed to purchase a ticket to travel on the bus even though she ought to have done so. Even had the driver pointed directly at her and said 'You have not paid your fare when you ought to have done so', something the driver never did, he would have been entirely correct in such an assertion.

Bus Éireann contended at the hearing that, given a multiplicity of dishonesty offences of which Ms Dardis was convicted in the past, she has little or no reputation that could be sued upon in defamation in any event. This aspect of matters is considered later below.

(f) Wrongfully, and in breach of contract, in breach of representations made and warranties given, Bus Éireann, its servants or agents, failed, refused and/or neglected to comply with the terms and conditions attached to the use of free travel passes, acting in a manner at variance with the representations and statements made regarding the use of free travel passes.

As mentioned above, Ms Dardis was travelling improperly on a carer's pass. She had failed to purchase a ticket to travel on the bus even though she ought to have done so. She therefore had no entitlement to travel on the bus.

(g) By reason of the matters aforesaid, defamation, negligence, breach of duty, breach of contract and misrepresentation, as a consequence of which Ms Curtis has suffered various types of injury.

14. Having regard to all of the various conclusions reached above, there is no basis in fact or law for any of the wrongs alleged by Ms Dardis to have been done to her.

IV. The Decision in Watters

15. Under s.6(2) of the Defamation Act 2009, the tort of defamation consists of "the publication, by any means, of a defamatory statement concerning a person to one or more than one person (other than the first-mentioned person)." Section 2 of the Act of 2009 defines a "defamatory statement" as "a statement that tends to injure a person's reputation in eyes of reasonable members of society". Bus Éireann queried at the hearing of the within appeal whether either of Ms Curtis or Ms Dardis has much, if any reputation, given Ms Curtis' conviction for a single public order offence in the past, and Ms Dardis' conviction for a multiplicity of dishonesty offences in the past. Counsel for each of Ms Curtis and Ms Dardis relied on the decision of the Circuit Court in *Watters v. Independent Star Ltd.* [2010] IECC 1 in support of the contention that, notwithstanding these convictions, each of Ms Curtis and Ms Dardis enjoys, at the least, a 'residual reputation' that can be sued upon in defamation.

16. In *Watters*, the plaintiff was serving two sentences of imprisonment for certain child pornography offences, these being offences

that rightly attract very considerable public opprobrium. He sued for defamation following publication of a newspaper article which alleged that he had been engaged in a "seedy" and "weird" relationship with another prisoner who had attracted a certain notoriety for the offences he had committed. It was claimed that the men had been "alone in the showers" and "that no-one ever caught them doing anything" but noted that it had been "suggested that something might be going on". The plaintiff claimed that there was a defamatory innuendo that he had been engaged in an "illicit homosexual relationship" with the other prisoner and was not sincere in seeking rehabilitation in respect of his addiction to child pornography.

17. Counsel for the defendant in *Watters* relied on Australian authority (*Rivkin v. Amalgamated Television Services PTY Limited* (2001) NSWSC 432) to argue that it is not defamatory in this day and age to say of a person that s/he is engaged in lawful sexual activity with another adult. In the Circuit Court, Matthews J. found that there were distinctive reasons for identifying a defamatory dimension to the allegations of homosexual conduct in that case, viz. (1) the prison-rule breaking aspect of the acts involved, (2) the notorious character of the alleged associate and (3) the hypocritical stance implicitly assigned to a plaintiff who had "sought in particular with... family members who had supported him to be truthful and honest with respect to his relationships with people and his behaviour in prison".

18. Subtracting elements (1) to (3), it is clear that Matthews J. did not question the general proposition that it is not defamatory to allege that a person engages in lawful sexual activity. And, if the court might express an *obiter* opinion, rightly so. The enlightened general perception of homosexuality evidenced, *inter alia*, by the approval of the 34th Amendment of the Constitution, appears to this Court to have the necessary consequence that no defamation can nowadays arise in an allegation that (i) a person engages in some lawful sexual activity, and/or (ii) has a particular sexual orientation, save, in each case, where such allegation involves innuendo, e.g., as to dishonesty. Thus, *Reynolds v. Malocco* [1999] 2 I.R. 203, must, it seems to the court, be seen as, at the least, no longer correct in its contrary findings. If language is a living thing, so too are the predominant mores and opinions shared by "reasonable members of society". Of course, the particular significance of *Watters* in the context of the within proceedings is in the findings of Matthews J. as to 'residual reputation', viz:

"Although he has suffered a substantial loss of reputation the Plaintiff cannot reasonably be said to be in the same category as a convicted prisoner who refuses to accept his guilt, continues to deny all offences and do absolutely nothing but serve a sentence under protest of innocence with no remorse, contrition, acceptance of wrongdoing or any intention to rehabilitate or not re-offend. There is therefore in my view in this Plaintiff a residual 'reputation' capable of being damaged by the nature of the allegations suggested in the [impugned] article....He has because of the manner in which he has met the case against him in the Circuit Criminal Court a residue of reputation that is capable of being damaged and fits into a category of prisoner who is different in degree, if not in kind, to those who, in similar circumstances, simply deny all wrongdoing despite their conviction."

19. The court does not know how Ms Curtis or Ms Dardis met the criminal charges that were successfully laid against them in the past. Neither, however, does the court consider that one or more public order or dishonesty convictions, now of some years' vintage, of themselves necessarily deprive a person of reputation sufficient to ground an action for defamation at some later stage, albeit that the existence of a criminal record may impact (less so perhaps in the case of a single public order conviction, more so certainly in the case of a multiplicity of dishonesty offences) on the amount of damages that might be awarded if the various elements of defamation are established, and here, of course, they have not been established. For the reasons identified previously above, the court does not consider that any of the incidents that occurred at Busáras on 23rd June, 2013, and of which each of Ms Curtis and Ms Dardis separately makes complaint, involved the publication of a defamatory statement concerning either of them to one or more other persons.

V. Damages Sought by Ms Curtis.

20. Ms Curtis seeks, *inter alia*, damages for (1) defamation, negligence and breach of duty, (2) breach of contract and/or misrepresentation, (3) wrongful interference with Ms Curtis and breach of her constitutional right to a good name and privacy; (4) loss of reputation in the eyes of right-thinking members of society. Having regard to all of the various conclusions reached above, all of Ms Curtis' claims for damages are refused.

VI. Damages Sought by Ms Dardis.

21. Ms Dardis seeks, *inter alia*, damages for (1) defamation, negligence and breach of duty, (2) breach of contract and/or misrepresentation, (3) wrongful interference with Ms Dardis and breach of her constitutional right to a good name and privacy; (4) loss of reputation in the eyes of right-thinking members of society. Having regard to all of the various conclusions reached above, all of Ms Dardis' claims for damages are refused.

VII. Costs.

22. The court will hear the parties on the issue of costs.