

THE HIGH COURT
CIRCUIT COURT APPEAL

[CIRCUIT COURT RECORD NO. 2009/1190]

BETWEEN**MARY MCNAMARA****PLAINTIFF****AND****DUNNES STORES (PARKWAY) LIMITED****DEFENDANT****JUDGMENT of Ms. Justice Murphy delivered on the 9th day of March, 2017.**

1. This is an appeal from an order of the Circuit Court made on 8th July, 2015 in which the Circuit Court awarded the plaintiff damages in the sum of €20,000 together with costs of the proceedings in respect of her claim for damages for slander, false imprisonment, assault, battery and/or trespass to the person.

2. The plaintiff's claim arises from events which occurred on 3rd May, 2008 in a shopping mall at Parkway, Limerick. The sequence of events is not materially in issue and was as follows:-

Background

3. On 3rd May, 2008, which was a Saturday, the plaintiff and her then twelve year old daughter, Tamara, were shopping for a confirmation outfit for Tamara. They purchased an outfit at a shop known as "Adams" and went to the defendant's premises in Parkway looking for matching items. The plaintiff had two bags with her being the shopping bag from Adams in which the confirmation outfit was placed, and a large zipped handbag.

4. While in the drapery section they came to the attention of one of the defendant's security staff, a Mr. Syed Hasnain Alam, who observed them first on camera one and then on camera seven of the store's CCTV system. In a statement made approximately a week after the events and maintained in evidence, he stated that the plaintiff placed an item or items of clothing into her bag.

5. The plaintiff and her daughter left the store. At the time they left the store Mr. Alam was quite a distance away from them observing the security cameras. He rushed out of the store after them and he can be observed doing so on the general shopping mall security CCTV footage at 16:50:26. Unfortunately, the initial interaction between the plaintiff and Mr. Alam is not captured on the mall CCTV footage because the camera operator was following the progress of an attractive young woman who he claimed to be his cousin.

6. 31 seconds later at 16:50:57, the mall CCTV footage shows Mr. Alam standing in front of the plaintiff, between her and the mall exit. The plaintiff's daughter Tamara is seen standing to the side of her mother, looking on. There are people moving about the mall and certainly one passer-by can be seen looking at the encounter between the plaintiff and Mr. Alam.

7. The CCTV footage shows three frames per second. In the course of the ten seconds between 16:50:57 and 16:51:07, the plaintiff can be seen opening the Adams bag for inspection by Mr. Alam and Mr. Alam is seen lifting items in the Adams bag.

8. At the end of the encounter, Mr. Alam is seen heading back towards Dunnes Stores. The plaintiff is seen heading in the opposite direction towards the exit of the mall. As she does so, there is a noticeable turn of her head and she appears to be saying something which catches the attention of a female shopper who briefly turns around.

9. The plaintiff proceeded to the car park where she met another of her daughters and apparently by chance met the operator of the mall CCTV camera, a Mr. Tony O'Connor who, having observed the encounter between Mr. Alam and the plaintiff on the mall CCTV, urged her to make a complaint to Dunnes Stores.

10. Minutes later, the plaintiff and her two daughters returned to Dunnes Stores where they spoke with a female manager who was slightly known to the plaintiff. They complained to her about the actions of Mr. Alam. The plaintiff has given evidence and it has not been disputed by the defendant, that the manager apologised for Mr. Alam's behaviour and later that day phoned to see how the plaintiff's daughter Tamara was faring in the aftermath of the incident. The relevant footage from the Dunnes Stores CCTV cameras was downloaded and recorded on the instructions of the manager.

11. Ten days after these events, an initiating letter was sent by the plaintiff's solicitor which, *inter alia*, stated:-

"In addition to our understanding that the entire incident was caught on CCTV, we hereby request that you provide us with a copy of same or in the alternative, undertake not to destroy or otherwise interfere with same pending the hearing of the case should proceedings be issued."

12. Two months later on 3rd July, 2008, the defendant's head of insurance wrote to the plaintiff's solicitors indicating that they had carried out full and careful inquiries into the allegations made by the plaintiff. The letter raised the issue of qualified privilege and stated:-

"We are entitled to take whatever reasonable means necessary to protect our property. In this regard we are entitled to make appropriate enquiries as to proof of purchase. We would respectfully suggest that the events occurring on the day in question related to our reasonable and appropriate enquiries in this regard."

The letter went on to complain that the plaintiff herself had escalated the situation by referring to the security officer in terms which were both abusive and racist and that the remarks were:-

"...in fact a slur on our employee's good reputation and character and would in themselves warrant further

investigation.”

The letter concluded by stating:-

“It may well be [that the plaintiff] was affronted by being approached by our security officer, but we hold that this approach was discreet and reasonable in the circumstances, on which basis we would hold that there was no issue of defamation or false imprisonment”.

The letter stated that the plaintiff and her family continued to be welcome to shop in Dunnes Stores.

13. Proceedings for slander, false imprisonment and/or negligence were issued on behalf of the plaintiff on 28th May, 2009, a little over a year following the incident.

14. The CCTV footage of the plaintiff’s movements in Dunnes Stores was not preserved. The defendant has not offered any cogent explanation as to how it went missing other than to state in an affidavit of discovery that the:-

“said footage despite extensive searches cannot be located and accordingly the date upon which it was last in the possession of the Defendant is not known.”

The pleadings

15. In the indorsement of claim on the civil bill the plaintiff pleads that on 3rd May, 2008 she was in the defendant’s premises as a customer and/or invitee. At paras. 4 and 5 she sets out her account of events being as follows:-

“4. The Plaintiff was shopping with her daughter Tamara McNamara and they had bought some items in Adam’s children’s wear in the Parkway Shopping Centre. They then proceeded to Dunnes Stores to find some matching garments. They did not find anything suitable and were exiting the shop. The security guard then wrongfully and unlawfully assaulted and battered the Plaintiff by grabbing the Plaintiff by the shoulder and behaving in a threatening and aggressive manner and preventing the Plaintiff from leaving the premises. The security guard then accused the Plaintiff and her daughter of wrongfully unlawfully and maliciously of stealing items from the said Defendant’s store when he said to them “You took something”. The Plaintiff was stopped ‘dead in her tracks’ and startled. The security guard then demanded loudly that she show him the contents of her bags. She initially refused to allow him to search her bags but he would not allow her to exit. She felt she had no choice but to stand there while he searched through her handbag and shopping bags without her express consent. At this point a crowd had started to gather around them, which included a number of Tamara McNamara’s school friends as well as other shoppers.

5. Having finished searching her bags and finding nothing incriminating the security guard then snapped that they could go. Our client was deeply upset and embarrassed and asked that he apologise. He initially refused but then mumbled a barely audible sorry. A few minutes after the incident the Plaintiff and her daughter returned to Dunnes Stores to report the incident to management. There they saw the same security guard sitting at his station looking at the security monitor with a number of other Dunnes Stores staff around him. They were reviewing the security footage and were all looking at the screen as he pointed. They then all turned to watch our client and her daughter as they approached.

The security guard was later identified as Alahad Ziheem.

6. The said words referred to above at paragraphs 4 and 5 above, and/or taken in conjunction with the attitude, demeanour, conduct and/or gestures of the security guard (who was clearly identifiable as such) in their nature and ordinary meaning and/or by innuendo meant and/or understood to mean:

(a) That the Plaintiff was a shoplifter;

(b) That the Plaintiff had stolen merchandise from the Defendant;

(c) That the Plaintiff had committed a criminal offense punishable by imprisonment;

(d) That the said security guard was justified in apprehending and accusing the Plaintiff of shoplifting in the shop;

(e) That the Plaintiff had been apprehended in the act of attempting to steal merchandise from the Defendant;

(f) That the Plaintiff was dishonest and/or untrustworthy person;

(g) That the Plaintiff was a person of low character.

7. The said security guard spoke and published the said words maliciously and/or with the intention of inflicting emotional suffering upon the Plaintiff and/or he was reckless as to the effect of the publication of the said words and his associated actions upon the Plaintiff.

8. Further or in the alternative there was negligence and/or breach of duty on the part of the Defendant, its servants or agents or contractors, in and about the maintenance and/or provision of security at its premises and/or in and about the manner of its dealing with the Plaintiff.

9. By reason of the foregoing matters the Plaintiff has suffered, sustained and incurred severe personal injury, loss, damage and expense. She has also been greatly injured in her credit and reputation and has been held up to public ridicule, odium and contempt. She has suffered considerable embarrassment and distress.

10. Further, or in the alternative, and without prejudice to the aforesaid, the actions of the Defendant as set out in paragraphs 4 and 5, amount to false imprisonment as a result of which the Plaintiff suffered loss and damage set out at paragraph 9.

11. Further, or in the alternative, and without prejudice to the aforesaid, the Defendants, their servants or agents, were negligent in that they failed to ascertain that the Plaintiff had not stolen any items as a result of which the Plaintiff

suffered the loss set out at paragraph 9.

PARTICULARS OF NEGLIGENCE

The Defendant was negligent in that they:

(a) failed to ensure that the persons recruited as employees and/or contractors were properly trained;

(b) failed to employ competent employees.

AND THE PLAINTIFF CLAIMS:

(A) damages for slander, false imprisonment and/or negligence;

(B) interest pursuant to the Courts Act, 1981;

(C) costs"

16. Later, the civil bill was amended to include a claim for assault, battery and trespass to the person.

17. A notice for particulars was served by the defendant on 21st September, 2009. When asked for particulars of the alleged assault and battery, the plaintiff directed the defendant to para. 4 of the indorsement of claim. When asked to specify the manner in which it was alleged that the defendant's security guard had behaved in a threatening and aggressive manner, the defendant was again directed to para. 4 of the indorsement of claim. When asked for particulars of all malevolence alleged, the plaintiff simply directed the defendant to para. 5 of the indorsement of claim.

18. A defence was filed on 3rd May, 2011, three years to the day of the incident. A full defence was filed putting the plaintiff on proof of every fact pleaded, including that she was even in Dunnes Stores on the occasion in question. Interestingly, there is no specific denial that the security guard searched her bags.

19. It was denied that the words referred to at paras. 4 and 5 of the indorsement of claim or taken in conjunction with the attitude, demeanour, conduct or gestures of the security guard (who was clearly identifiable as such) in their natural and ordinary meaning and/or by innuendo meant or were understood to mean the meaning set out in para. 6 of the indorsement as alleged or at all. It was denied that the security guard spoke or published the said words maliciously and/or with the intention of inflicting emotional suffering upon the plaintiff and/or he was reckless as to the effect of the publication of the said words or his associated actions upon the plaintiff. Negligence, breach of duty, injury, loss and damage were denied. Embarrassment and distress were also denied.

20. Further or in the alternative to all of the above pleas and without prejudice to them, the defence pleaded that:-

"any word spoken and/or published and/or any actions taken by the defendant, its servants or agents took place and were published on an occasion of qualified privilege and took place without malice. Lest there be any doubt about the matter, the final plea was to the effect that each and every plea, particular, statement and averment contained in the civil bill is hereby denied as if same were set forth hereunder and traversed seriatum."

Apart from raising the issue of qualified privilege, this seems to the Court to be an unnecessary plea in circumstances where the defendant had already denied every specific fact pleaded in the indorsement of claim.

21. On 17th November, 2014, the plaintiff was given liberty to amend the pleadings by the insertion of a claim for damages for assault and/or battery and/or trespass to the person.

22. On the same day, an order for discovery was made. An affidavit of discovery was sworn by one Noreen Curran who avers that she was the security manager of Dunnes Stores (Parkway Limited) at the time of the incident. Two items were discovered, namely the limited copy of the mall CCTV footage and a statement of Syed Hasnain Alam made according to the evidence, approximately a week after the incident. The internal Dunnes Stores CCTV footage, the preservation of which was requested within a week of the events had, as already stated, been lost.

23. The plaintiff's claim came on for hearing before the Circuit Court on 8th July, 2015. The defendant lodged a notice of appeal from that order on 17th July, 2015.

The evidence

24. The Court should have had real evidence in the form of CCTV footage of the entire transaction between the plaintiff and the defendant's security guard which appears to have lasted from 16:50:26 to 16:51:07, a period of 41 seconds. Similarly, the Court should have had CCTV footage of events in Dunnes Stores which the plaintiff asked to have preserved, observing the events which allegedly gave rise to a suspicion in the defendant's employee that the plaintiff had taken items from the defendant's store. Unfortunately, all that is available to the Court is a glimpse of the defendant's employee at 16:50:26 clearly rushing from the store in pursuit of the plaintiff and the last 10 seconds of his interaction with the plaintiff in the middle of the shopping mall. The Court therefore has to reconstruct what happened from the evidence of the parties and their witnesses as to what happened in the shopping mall during the missing 31 seconds.

Evidence of Mary McNamara

25. The plaintiff, Mary McNamara, gave evidence that she and her daughter Tamara were shopping for confirmation clothes. They had purchased her main outfit in a shop called "Adams" and then went to Dunnes Stores to look for a matching top. She estimated that they may have spent up to fifteen minutes in Dunnes. She stated that she had a handbag and a shopping bag from Adams with her. Not having found anything suitable in Dunnes, they left.

26. She stated that they were hurrying out as it was late when she felt a hand on her shoulder and heard someone say "you took a something". Asked to explain, she said "a man touched my shoulder and said 'you took a something'". He said "let me look in your bags". She did not know who he was; he was not in uniform and did not say that he was from Dunnes Stores or that he was security or anything. Asked did he say why he wanted to look in her bags, the plaintiff claimed that "you took a something" were the only words he spoke to her. She stated that:-

"He looked in both bags. He rummaged my handbag and rummaged the bag with the clothes in it from Adams. He asked to look in both bags".

The plaintiff gave evidence that she asked him to apologise because people were looking and she wanted him to apologise. He initially refused but finally said "Sorry".

27. She left the shopping centre and went to her car in which another daughter was waiting. She stated that *"she got a fright"*. She said that she was approached by a Mr. Tony O'Connor, a security man for Parkway, who said he had just seen on the camera what had occurred. He advised them to go in and tell the manager of Dunnes Stores what had happened and so they returned to Dunnes Stores, to the customer service desk located at the front of the store. She asked to see the manager who she recognised; she *"kind of knew her"*. According to the plaintiff the manager said *"I am very sorry for all of his behaviour"*. There were people including Mr. Alam gathered around the security monitors and Tamara suddenly got very upset according to the plaintiff. The manager repeated the apology. Later on that day the manager phoned to apologise again and to ask how Tamara was.

28. On cross-examination the plaintiff confirmed that while she was in Dunnes Stores she went to the children's section and was looking at items in that section to match with the outfit they had already bought. Asked if she took anything out of the Adams bag at any stage she replied that she thought she *"might have pulled out a sleeve held it up you know like that"*. She did not think she had taken the top out of the Adams bag; she had just opened it. Asked whether she took it out at all even to match it, she replied *"no, I took my purse out of my handbag"*. She stated that she took her purse out of her handbag and left it on top of a railing. She rejected the suggestion that that would be quite an insecure place to leave a purse.

29. She accepted that at one stage she was bending down behind a rail and explained that she was looking underneath at sizes. She rejected the suggestion that when she came up from a bent position that she had five empty hangers in her hand. She did not dispute that she moved to a slightly different part of the shop, still in the clothing section. It was put to her that Mr. Alam would say that he saw her put an item of clothing into her bag. The plaintiff responded that it was probably her purse which he saw her putting into her bag.

30. She denied that she left in a hurry but accepted that she was rushing. She accepted that Mr. Alam caught up with her on the way out of the shopping centre, somewhere about halfway down the mall, towards the exit.

31. It was put to her that Mr. Alam never made physical contact with her, to which the plaintiff replied *"I'm sorry but he did"*. The plaintiff maintained that he touched her shoulder; that he held on to her shoulder. It was put to her that Mr. Alam had said *"Excuse me"*; that he indicated that he was from Dunnes Stores security and he indicated that she had a few items from Dunnes Stores. Asked did she remember him saying that, she replied *"No"*. It was put to her that he said that she had a few items from Dunnes Stores. She said that was not what was said, that he said *"you took a something from the Dunnes"*.

32. She went on to say that she initially thought she had perhaps left something behind and Mr. Alam was running after her to give it to her. She thought she had left her purse behind and he was running after her with it. The plaintiff rejected the suggestion that she was asked to return to the store and repeated that what he said was *"you took a something"*. She denied the suggestion that she refused to go back to the store because she said she was never asked to do so. However, the Court notes that later in the same cross-examination she stated that during this interaction the defendant's security guard *"kept asking me to go to the back room, I was really embarrassed"*.

33. She accepted that he asked to look into her bags. When questioned whether he asked to look in both bags, the plaintiff replied *"he rummaged, he rummaged through it and opened and shut it"*, in relation to the Adams bag. She maintained that he just took her handbag and looked in it.

34. The plaintiff claimed that he looked through the Adams bag while she was holding it; that he put his hands into it and pulled the contents up and down. She agreed that she willingly showed the bag to him.

35. It was then put to her that she refused to allow him to look in her handbag. She agreed that the handbag was a fairly large bag and that she was holding it with the Adams bag. The plaintiff maintained that Mr. Alam grabbed it and started rooting through it. She denied that he looked through it item by item and stated that he just looked through it. Counsel for the defendant suggested that the evidence was that he grabbed it and pulled it from her hands to which initially she replied *"yes"*. When asked if it was a violent grabbing, she then said *"no he didn't hold it in his own hands"* and stated that she was still holding it when he rummaged through it. When asked about her contradictory response a moment earlier, she said:-

"I said he had the bag. I had the handbag, opened it. He held it, felt it. There were two straps. He had one strap and rummaged through it".

She maintained that he was holding one strap, the bag was held out open to him and he was rummaging through it. She agreed that it was a struggle because she was still shocked. It was put to her that she refused to show him that bag and she replied:-

"I never ever refused and he never asked me to go back to the shop".

36. It was put to her that she called him racist and abusive names. She denied that she did that and denied that she was a racist. The words alleged to have been used by her were *"foreign, black cunt"*. Asked about the number of people who were around, the plaintiff responded *"a few people"*. When asked about her response in the reply to particulars, indicating that the incident lasted approximately five minutes, she answered that it just seemed like that. Asked that on the basis of the CCTV footage, the entire incident took 40 seconds, the plaintiff estimated a couple of minutes.

37. Cross-examined on the issue of the number of bystanders and on her reply to particulars indicating that there were approximately fifteen people gathered around, the plaintiff responded that she could not say exactly how many. She did not count them but maintained that there was a crowd gathered round. Asked what she meant by *"crowd"*, the plaintiff responded *"more than one"*. When asked by the Court whether *"gathered around"* means gathered around the incident, the plaintiff responded *"yeah, they were gathered around the doorways as well"*.

38. It was suggested to the plaintiff that Mr. Alam was only ever polite and professional. The plaintiff denied that that was so. It was put to her that he did not shout but that he spoke in a reasonable voice. The plaintiff repeated that she first felt his hand on her shoulder before he said anything. It was suggested to the plaintiff that as a Muslim, Mr. Alam would not touch a woman who was not his wife.

39. The CCTV footage was then explored with the plaintiff to establish that while there were lots of people present in the mall, there was not a crowd gathered around as pleaded in the plaintiff's indorsement of claim.

40. Counsel for the defendant pointed out that the plaintiff's evidence had been to the effect that the Adams bag was checked first and thereafter her large black, zipped handbag. The video footage, which is the last 10 seconds of the interaction, shows the security guard, Mr. Alam inspecting the contents of the white Adams bag but does not show him examining the contents of the black handbag.

41. Insofar as the question of false imprisonment arises, the plaintiff suggested that by his presence, Mr. Alam was preventing her from leaving.

Evidence of Tamara McNamara

42. Tamara McNamara, daughter of the plaintiff was called and confirmed the evidence of her mother as to the shopping expedition on 3rd May, 2008. Her evidence was that as they were walking out from Dunnes Stores down through the shopping mall, a man ran straight up towards her mother, grabbed her by her shoulder and said *"you took something, you took something"*.

43. Her first impression, she claimed, was that they were being robbed. She confirmed that he was dressed in a suit and had a tie and a white shirt. She stated that she was taken aback because he kept saying that they took something and that he had his arm on her mother.

44. She confirmed that her mother had bags with her at the time. She stated that her mother had her handbag on her shoulder and had the Adams bag. Her mother opened the Adams bag and then he had a look at the Adams bag. He *"kind of lifted the things"* and then he got the handbag and had a quick look in the handbag. He kept saying that they took something. He was adamant that they took something, but he just walked away then after that and they were in shock.

45. Asked did he apologise she stated that *"he kind of goes 'oh sorry'"*, suggesting that it was an insincere apology. Asked how she felt at the time, she stated she thought she was very upset because she thought they were being attacked:-

"I thought because he came at us with such force you know because he went at us because even in the video we are at a totally different speed to what he is coming out of the shop so do you know we were only cruising down the thing, down the mall".

46. Asked about the presence of other people, she said there was a few. She confirmed that she knew two of the people there, being school friends of hers. Asked about whether her mother was speaking or shouting as she left the scene, she stated that she did not remember her mother talking or saying anything.

47. She stated that she became upset as they went out to her sister's car. She stated that they were approached by Tony O'Connor, the man monitoring the mall security footage, who advised them to go back in to Dunnes Stores and complain. His reaction to the incident gave them the confidence to go back in despite their embarrassment.

48. She confirmed that they went back in and spoke to a manager in Dunnes Stores. She stated she became upset because she could see the security guards and his co-workers looking at the CCTV footage. She claimed the manager sympathised with them and said that she was sorry for what had happened.

49. She stated that the experience has left her very nervous going into shops and that she has become very precise when handling things in shops. If she has bags with her she would always ask someone else to hold her handbag if she is looking at something or she would put the bags away from the rail.

50. Cross-examined on behalf of the defendant, she was asked whether they had pulled out the Adams purchases to match them. She stated that they did not pull it out because the colour was such an exact colour. They looked in the bag but did not pull the contents out.

51. She confirmed her altered habits when shopping. She agreed that she is very precise now because otherwise matters might look wrong to a security guard but said *"but there are ways of dealing with it"*.

52. She was questioned about her mother's taking her purse out of her black handbag and replacing it in the bag. She agreed that the issue of the purse had not arisen in the earlier court proceedings and may have arisen during conversations with her solicitor. She stated that the purse was a large purse and would be different from a top or some pants or something. She confirmed that her mother had been bent down behind railings while browsing. She denied that anything was taken off any railings.

53. She denied that they left the premises in a hurry. She denied that they were going faster than the normal approach to a car. She contended that the phrase *"rushing home"* does not mean that you are running and characterised it by saying that you could be rushing home to cook the dinner but it does not mean that you run down the street.

54. She agreed that her version of the sequence of events was different to her mother's in that her recollection was that Mr. Alam said *"you took something"* and then grabbed hold of her mother.

55. She was also taken through the video footage which showed Mr. Alam at 16:50:26 coming at some speed from Dunnes Stores. He is next seen at 16:50:57, 30 seconds later, standing in front of the plaintiff, Mary McNamara. Her daughter did not agree that there was no indication of aggression from his body language. She contended that his initial approach, which is not caught on the CCTV, was in an aggressive manner. She contended that he never asked them to return to the store. She agreed that her mother was asked to show her bags. She denied that only one bag was shown. She confirmed that she did not remember which hand he used when examining the items in the Adams bag. She cannot remember seeing his examination of the black bag but confirmed that her mother showed him the two bags. When pressed she insisted that her mother had shown him the two bags.

56. She confirmed that no words had been addressed to her; that she had not been touched. Again she confirmed that her recollection was that the security guard had said *"you took something"* and then grabbed her mother by the shoulder. When pressed on the point about his inspection of the black bag, she replied:-

"He looked in the bags because he had such a manner that he wouldn't let us alone unless he looked in the bags. He wouldn't have let us past."

She agreed that there was nothing on the video showing him looking in the black bag but restated that she showed him the two bags "cause you can see him standing in front of us and he wouldn't let us past unless we showed him".

57. When put to her that Mr. Alam had never apologised, she stated that he had said "sorry" but with an attitude like he did not mean it. She denied that her mother used bad language when asked about the sharp turn of her mother's head visible on the video. She stated that her mother was looking behind her because everyone was looking at her.

58. When asked whether Mr. Alam was entitled to ask, she agreed that he was so entitled but that his manner and demeanour was totally out of order, that he went the wrong way about it. She did not dispute that Mr. Alam was entitled to make inquiries but maintained that he went the wrong way about it.

Defence evidence

59. The only witness called on behalf of the defence, was Mr. Alam, the security guard involved in the incident. He confirmed that he was an employee of Dunnes Stores; that he was from the Punjab Province of Pakistan; that he had been in Ireland since November, 2004; and that he had come to Ireland on a student visa. He worked on a student visa for eight years until 2012 after which he got a working visa. He confirmed that he is a married man, that his wife is a doctor in Limerick Regional Hospital; that his sister, two brothers-in-law and two uncles are all doctors in Ireland. He started working in Dunnes Stores in November, 2007 initially for 20 hours a week on a student visa, and thereafter full-time from 2012.

60. He said he remembered the day of the incident. He was on duty at the podium. He saw Mrs. McNamara and her daughter going into the drapery section. He was watching them on camera one.

"She had two items in her hand, she bent down behind the rail, she comes up and puts the item in the bag which is what I saw on the CCTV".

61. He stated that he had been watching her for about five to six minutes when he saw her put items in the bag. Asked what he saw her holding, he stated that she had "two clothes" in her hand and five empty hangers. Asked at what stage he saw the five empty hangers, he stated:-

"At first stage, she was in the children's section. She bend down and come out with the empty hangers."

Asked about the significance of that and what she did with the hangers he said "she left the hangers there, she walked to the other section and she put the clothes inside the bag". He stated that he saw this first on camera one and when she moved to the other rail he watched her on camera seven. He stated he was watching on camera seven when he saw her putting items into her bag.

62. Asked what he saw next he stated:-

"I see she had one bag on shoulder and another bag in hand. And she walked away from the Dunnes immediately because this is just maybe two to four feet from the exit on the far side of the Dunnes."

63. He said he was almost 100 metres away from her in his position watching the monitor. He explained that the opening to the drapery section is at the very end of Dunnes Stores and his monitoring position was in the middle of Dunnes Stores up to 100 metres away. In order to catch up with her he had to make up that distance. He confirmed that she was with her daughter and that they were together. Asked what speed he was travelling at as he approached them, he answered "is not normal walk. Is quick walk".

64. Asked what happened as he came up behind them, he answered "I say 'excuse me, you took something from the Dunnes'". He stated that the plaintiff was aggressive towards him, that she showed him one bag, the white, bigger bag. He stated "you have to come to the Dunnes". He stated that she just opened up one bag and that he looked into it. He denied putting his hand in despite the evidence on video showing him touching the clothing in the bag.

65. Asked what he did then, he stated:-

"I never touch her or nothing. She was aggressive to me".

Asked what happened with the black bag he stated:-

"I told her to she had to come to the Dunnes but she did not want to come to the Dunnes, she never showed me the black bag".

He stated there was a conversation about the black bag and that he told her "you have to come to the Dunnes". He denied that he held the black bag. He denied that he rummaged in it with his hand inside it. He agreed he wanted to see into the black bag, he stated:-

"I told her to come to the Dunnes. Because for shoplifting you have to tell them to come to the Dunnes. I have no search for, no search of the black bag. I can't put in the hand to any bag, like you know, handbag."

66. He stated that while viewing Mrs. McNamara on the monitor, he did not observe anything involving a purse being taken out and put up on a railing. He denied that he was loud and stated that he was very polite. When asked whether his manner was aggressive or deferential, he referred to the fact that he works in the Childers Road Dunnes Stores, the busiest store in Limerick. He stated:-

"We have 95 arrests in 2014, 28 arrests were myself. We have nothing, no fight, never. No fight or no argument".

Asked about the process of arrest, he stated:-

"We always go to the outside and we talk to them and listen, you have...please come to the Dunnes and explain, I do that and the people understand like this has happened. Some shoplifters, some shoplifters are different but we never force them to come inside."

67. Asked whether he put his hand on Ms. McNamara's shoulder, he said:-

"No that's not true, she is the age of my mother. My mother was born in 1956. I don't know when she was born but I

never do that. I never do in my life. In nine years I work in Dunnes and in two years before I work in different shops. Part-time."

Asked by the Court that in arresting people surely you have to touch them, he replied, "yeah but not ladies". He confirmed that he had arrested ladies but never touched them. Asked how he arrested somebody without touching them he replied:-

"I just stop them and say please will you come to the Dunnes. I don't want to force..."

Mr. Alam went on to explain his process by reference to a recent case in which he had stopped a teacher who had taken goods to the value of €180 and Mr. Alam said:-

"I told her listen, you have a mistake. You have to talk to the manager. It is up to the manager, he can call the guards, or he can tell her go home like. I told her to go back to the shop and talk to the manager."

He did not touch her. The teacher came willingly back to the shop and she was arrested by Mr. Alam in the drapery section of the shop. He explained that it is the manager who has the authority to call the guards. Mr. Alam reports the incident and if the manager says call the guards, he calls the guards. Whether matters will proceed further is at the discretion of the manager.

68. Mr. Alam gave evidence that the plaintiff showed him the Adams bag but not the black bag; that he had a radio in his hand. Having left the plaintiff and her daughter, he went back to the shop and showed his manager the CCTV which was recorded. It is a matter for the manager as to whether any particular portion of CCTV will be recorded and it was confirmed to the Court that the relevant extracts of the CCTV from camera one and seven were in fact recorded. He watched the footage with the manager.

69. Asked what he believed as he approached the plaintiff outside Dunnes Stores, he stated:-

"I believe she took item from the Dunnes because she had five empty hangers and she was bent over and she dumped five empty hangers and she walked over to the rail and put items into bag".

Asked which bag he said:-

"I don't remember which bag. She put the items into bag".

He confirmed that he did not know her before the incident. He gave evidence that he did not know what happened to the Dunnes Stores CCTV footage because he moved from the Parkway store in April, 2009. He confirmed that four people viewed the footage when he returned to the store, being himself, section managers and the overall manager. He confirmed that he was not wearing any identity badge indicating his status as a security officer in Dunnes Stores.

70. On cross-examination asked whether he thought he acted very hastily in running after these women, Mr. Alam replied "yeah, because she leave the Dunnes very quickly after the second time she took the items". He agreed that he ran after her. He disagreed that he shouted at her and disagreed that he caught her on the shoulder. He pointed out that of the 30 missing seconds of video footage, up to 20 could have been spent catching up with the plaintiff. He agreed that he did state "you took something" but denied that he touched her on the shoulder. When it was suggested to him that that was the first thing that he said, Mr. Alam said:-

"No, how can I say if any other person took something? It makes no sense. If I walk to any person leaving the shop and said you took something. I don't want to argue with her, why should I be with her you took something? This is the word you know, it's aggressive. I say 'you knew I am from Dunnes. You took something' or I say 'you have a few items from Dunnes'."

It was put to him that he did not say anything about being from Dunnes, had no identification and was dressed as he was dressed in the witness box – in a suit, shirt and tie. He denied that he looked in both bags. He restated that he wanted her to come back to the Dunnes. He agreed that what he was looking for when he looked in the Adams bag was whether she had some items of clothing from Dunnes. He suggested that he had not put his hand in the bag but the Court notes that the available CCTV shows him touching the items in the Adams bag. Asked whether he believed that Mrs. McNamara took some clothes from Dunnes Stores, Mr. Alam answered:-

"I believe I still believe if I had my own CCTV I could..."

71. Asked why he did not use his radio to call shopping centre security, he stated that Dunnes Stores have their own policy and procedures and do not rely on the shopping centre security. Having stated again that he was sure that the plaintiff had taken some items from Dunnes, he was asked why he had walked away back to Dunnes Stores. It was put to him that as he walked away he realised he had made a mistake. Mr Alam responded:-

"No I was 100% sure, that's why I followed her."

Asked why he did not take any steps to arrest her if he was 100% sure, he explained that he told his manager.

72. Asked whether he called the guards he said he did not, that it was for his manager to call the guards. It was put to him that the reason that the guards were not called was because there was no basis for calling them and that there was no suggestion in the correspondence from Dunnes Stores that the plaintiff had taken anything from the shop. To that Mr. Alam's response was "I didn't write the letters, the security did". Asked whether he had been consulted about it, Mr. Alam stated:-

"They took a written statement from me and the next time they called me you have to go to the court".

When it was suggested to him that if he was correct a crime had been committed and goods had been stolen from Dunnes Stores, he said "yes". He asked whether this was on CCTV in Dunnes Stores he said "yes".

73. It was put to him that Mrs. McNamara did not use any racist language. He responded that she did. He repeated that he did not touch her and that he never checked her black bag. He pointed out that in his statement made a week after the event, with the assistance of the CCTV, he had recorded that she had referred to him as a "foreign, black, cunt". He again confirmed that when the plaintiff and her daughters returned to the shop to complain about their treatment, he was examining the monitors with other managers.

74. Mr. Alam was the sole witness called by the defence. The CCTV evidence has been lost despite an early request that it be preserved and the manager to whom the plaintiff complained and who apologised to her was not called. When the Court asked Mr. Alam whether the fact of the apology indicated that the manager had a different view of what was on the CCTV than he had, counsel for the defendant interjected to say that there was no evidence as to what the reasoning of the manager was; an apology might be made for a variety of reasons, including to deflate the situation and that the witness could not deal with the basis for the manager's reasoning. During this exchange Mr. Alam again repeated that the decision to call the guards is for the manager, not security and that on occasions even in clear cut cases, the manager might exercise her discretion not to call the guards.

Finding on the evidence

75. It is, to say the least, regrettable that both the Circuit Court and this Court have been deprived of the best evidence partly because Mr. O'Connor, the mall security officer, decided to follow the progress of a young woman rather than keeping his camera on the general activity in the mall. The Court is thus deprived of 30 seconds of video footage showing the manner in which Mr. Alam approached the plaintiff and her daughter and the nature of their initial interaction. Further, both this Court and the Circuit Court have been deprived of the internal Dunnes Stores CCTV footage showing the activity which gave rise to Mr. Alam's decision to pursue the plaintiff and her daughter and to tax the plaintiff with having taken an item or items from Dunnes Stores.

76. On the balance of probabilities, the Court considers that the truth lies somewhere between the two accounts given by the plaintiff and the defendant. Mr. Alam, the security guard, having seen what he considered and still considers to be a theft of items from the defendant, was hastening after the plaintiff and her daughter. His position at the monitors was up to 100 metres from where the plaintiff exited Dunnes Stores. Therefore he had considerable ground to make up to reach them. He can be observed moving in a semi-run from the store at 16:50:26.

77. Notwithstanding Mr. Alam's contention that as a Muslim he is prohibited from touching any woman other than his wife, the Court considers it likely in circumstances where he is rushing to apprehend the plaintiff before she leaves the shopping centre that he may well have tipped her on the shoulder to get her attention. The Court is quite satisfied that he did not grab her by the shoulder as contended for by the plaintiff. The plaintiff's evidence on this varied from being touched on the shoulder to being grabbed by the shoulder.

78. The Court is also satisfied on the balance of probabilities that the first statement uttered by Mr. Alam to the plaintiff was *"you took a something from the Dunnes"*. While the plaintiff gave contradictory evidence on aspects of the encounter, she was consistent and clear as to this aspect. Her evidence in this regard was corroborated by her daughter and indeed by Mr. Alam himself. In examination-in-chief when asked *"as you came up behind them, what happened?"*, he answered *"I say 'excuse me, you took something from the Dunnes"*. Later in his evidence he expanded on this by reference to the available CCTV footage from the mall by saying:-

"I was standing there. I was talking to her. I told her I am Dunnes security and you took some items from Dunnes and you have to come back to the Dunnes."

The only difference between Mr. Alam and the plaintiff is that he says that he prefaced his remark with the words "excuse me".

79. The evidence on behalf of the plaintiff is that Mr. Alam searched both of the plaintiff's bags: the Adams shop bag and her large, black, zipped handbag. The evidence suggests that the order in which they were searched was the Adams bag first and then the large black handbag. Mr. Alam contends that he was allowed to inspect the contents of the Adams bag but was not allowed to inspect the contents of the plaintiff's large handbag. While it is possible that the sequence of examination was in fact the black handbag first and thereafter the Adams bag and that the examination of the black bag is on the missing 30 seconds of CCTV footage, on the balance of probabilities the evidence of Mr. Alam, supported by the CCTV footage, is more persuasive. On the available footage it is clear that the plaintiff proffers the opened Adams bag to Mr. Alam and, contrary to his evidence that he did not put his hand in the bag, the CCTV evidence shows him touching the items in the bag. There is no evidence that thereafter the black handbag was proffered for his inspection.

80. At the time of the inspection of the Adams bag, Mr. Alam is seen standing a foot or so from the plaintiff and is blocking her path towards the exit. Again on the balance of probabilities the Court is more inclined to accept Mr. Alam's evidence that he did not apologise to the plaintiff at the end of their encounter. Given that to this day and in the course of his evidence he still maintains that the plaintiff stole items from Dunnes Stores, the likelihood that he would have apologised is slim. His immediate behaviour after his return to the store, was to have the manager and other Dunnes Stores personnel view the internal Dunnes CCTV of the events. In those circumstances, an apology would seem to have been unlikely.

81. The entire encounter, from the pursuit by Mr. Alam from Dunnes Stores to the stopping of the plaintiff in the middle of the shopping mall, took place in the presence of a number of people who were coming and going through the mall. Among them were two school friends of the plaintiff's daughter. While a crowd had not gathered around the incident as was pleaded in the indorsement of claim on the civil bill, the plaintiff had visibly been pursued and stopped by a man who had the demeanour of a security man and who carried a radio. One passer-by can be seen to look directly at the interaction as the plaintiff is opening the Adams bag to Mr. Alam. The two young people who the plaintiff's daughter identified as school friends are also noted to be watching events.

82. In the course of the interaction the Court is also satisfied on the balance of probabilities that having stopped her, Mr. Alam did invite the plaintiff to return to Dunnes Stores and the Court considers that it was probably this which prompted her to proffer her bag to Mr. Alam for inspection. While the plaintiff denied in cross-examination that she was requested to return to Dunnes Stores, at a later stage in the same cross-examination having said that he was shouting at her, she stated:-

"He kept asking me to go to the back room. I was really embarrassed".

She went on to state:-

"I was offering my bags to him."

83. On the issue of whether the plaintiff uttered abusive and racist remarks directed towards Mr. Alam, the Court is persuaded that she did so, not in the course of the interaction but immediately thereafter. At the end of the encounter as Mr. Alam is heading back towards Dunnes Stores and the plaintiff and her daughter are heading towards the exit, one can see a sharp, almost angry turn of the plaintiff's head and she appears to be shouting something. Whatever is uttered causes a woman walking through the mall to turn around and look towards the plaintiff. Whether the words used were as Mr. Alam recalled them approximately a week later, the Court is satisfied that the plaintiff's demeanour as she walks out is consistent with her making an angry utterance towards Mr. Alam.

Claim of assault and battery

84. The Court is satisfied that on the facts as established, Mr. Alam did not assault or batter the plaintiff. While the plaintiff veered from saying she was tipped on the shoulder to asserting that she was grabbed by the shoulder, the Court is satisfied that at most she was tipped on the shoulder for the purpose of obtaining her attention. There is no evidence that this tipping on the shoulder was accompanied by or induced any fear in the plaintiff. Indeed, the plaintiff gave evidence that her initial reaction was that she may have left something behind in Dunnes Stores and Mr. Alam, the security guard, was returning it to her. The Court is therefore quite satisfied that the plaintiff has made out no claim in respect of an assault or battery.

False imprisonment

85. Having overtaken the plaintiff there is little doubt that for some seconds the defendant's security guard, Mr. Alam, stood in front of the plaintiff and blocked her progress towards the exit. That said it is also clear from the CCTV that at all times he maintained a distance from the plaintiff such that had she chosen to do so the plaintiff could have simply walked passed him. In the circumstances, the Court is satisfied that the plaintiff has not made out a case of false imprisonment on the facts of this case.

Defamation

86. The Court is satisfied that the defendant's security guard by his conduct and his words defamed the plaintiff to any neutral observer. He pursued her from the shop moving at pace to overcome the distance between them. He stopped in front of her, impeding her progress. He accused her of having taken something from "the Dunnes" and in full view of passers-by, inspected the contents of one of her bags, the Adams bag.

87. While the plaintiff and her daughter gave evidence that they were not initially aware that Mr. Alam was a member of Dunnes Stores security staff because he was not wearing a uniform or carrying any identification, it appears to the Court from examining the CCTV footage that is available, that it is clear to any observer that Mr. Alam is a security guard. He is dressed in a dark suit, shirt and tie and is visibly carrying a radio.

88. The Court accepts the evidence of Mr. Alam that he asked the plaintiff to accompany him back to Dunnes Stores and she refused. Mr. Alam had an option at that stage. Convinced as he was that the plaintiff had taken an item or items from Dunnes Stores, he could have arrested her or alternatively, he could have let her go so that he could seek further instructions from his superiors in Dunnes Stores who had the discretion as to whether the matter should be taken further. Unfortunately Mr. Alam did neither but instead conducted an inspection however cursory of the contents of the Adams shopping bag in full view of passers-by.

89. It is noticeable in the CCTV footage that his action in doing so attracted the attention of one particular bystander. It is also noticeable in the CCTV footage that two young people identified as school companions of the plaintiff's daughter are observing the interaction between Mr. Alam and the plaintiff.

90. It appears to the Court therefore that the entire of the circumstances, both words and actions, did convey that the plaintiff was suspected of shoplifting; that she had committed a criminal offence. The defamation occurred in a busy thoroughfare of the shopping mall and while there was not a crowd gathered around the incident as pleaded by the plaintiff, there were definitely people present in the area, more than one of whom was taking an interest in the encounter between Mr. Alam and the plaintiff. The Court is therefore satisfied that there was publication of the defamatory matter.

Qualified privilege

91. In the event that the Court finds, as it has, that the plaintiff was defamed and that there was publication of that defamation, the defendant seeks to rely on the defence of qualified privilege. There was some debate between the parties, both in oral and written submissions, as to the basis of the protection afforded by qualified privilege.

92. The defendant relied heavily on the decision of Hardiman J. in *McCormack v. Olsthoorn* [2004] 3 I.R. 632 as establishing that a defendant had a legal right to protect his property by "taxing" an individual who he suspected of theft. In that case the defendant bona fide but mistakenly believed that the plaintiff had taken one of his plants. Hardiman J. went on to state at para. 22 of his judgment that he did not consider that the presence of bystanders in itself had the effect of destroying the privilege and he quoted Gatley on Libel and Slander (10th ed., Sweet & Maxwell, London, 2003) as follows:- "*The law has been fairly liberal in allowing charges to be made in the presence of others.*" He opined that he had no doubt that this too, is because of the hurried circumstances in which such accusations tend to be made. Hardiman J. went on to disagree with the decision in *Coleman v. Keane Limited* [1946] Ir. Jur. Rep. 5 in which an accusation of theft was held not to be privileged because it was made with the desire to recover the property, instead of a desire to bring a thief to justice. In the view of Hardiman J.:-

"There is no doubt that something said with a view to bringing a thief to justice is privileged, but it is not the only heading on privilege that arises in such circumstances. Privilege exists where a legally recognised duty or interest in speaking exists: in my view the legitimate desire to recover one's property is just as much a legitimate interest as the desire to bring a thief to justice. Very often, these desires will co-exist. Realistically, where there is a sudden theft or suspected theft, the owner or his agent will not pause to analyse his own motives in detail but will act immediately out of an instinctive and proper desire to stop a theft."

93. The plaintiff on the other hand pointed to academic criticism of the rationale of the decision in *McCormack v. Olsthoorn*. The plaintiff's submissions point to the criticism of the decision in *McCormack v. Olsthoorn* in Cox and McCullough, *Defamation Law and Practice* (Clarus Press, Dublin, 2014) at para. 8-74 that if the qualified privilege in a "stop thief" scenario:-

"...is rooted in the personal interest in the plaintiff's property, without any reciprocity on the part of the recipients of the publication, then there is no person with an interest to whom it is published, and it is difficult to see it as an act of incidental publication of a privileged statement. In cases where allegations of theft are necessarily overheard by third parties [...] then it is arguable that the only legitimate approach for the courts, if the defence of qualified privilege is to apply, is to follow the logic of Coleman v. Keane and to require the defendant to demonstrate a social interest in the prevention of crime (which, as a member of the public, the bystander would share) rather than a personal interest in the retrieval of property."

94. Fortunately, from the Court's point of view, on the facts of this case the Court is not required to choose between the conflicting decisions in *McCormack v. Olsthoorn* and *Coleman v. Keane Limited*, because even if one accepts and applies the rationale in *McCormack v. Olsthoorn*, qualified privilege does not arise in this case. In *McCormack v. Olsthoorn* the Court held that qualified privilege applied where a party genuinely but mistakenly accuses someone of theft. There is no evidence in this case that the defendant "genuinely but mistakenly" accused the plaintiff of theft. The only evidence offered by the defendant is that she did in fact steal items from Dunnes Stores.

95. It seems to the Court impermissible for a defendant to seek to rely on qualified privilege but run a defence of justification. That is what the defendant has done in this case. The only evidence called by the defendant is that of the security guard, Mr. Alam. He gave direct evidence that the plaintiff put one or more items in her bag; that he had been watching her for about five or six minutes; that she had "two clothes" in her hand and five empty hangers; that she left the five empty hangers in one part of the children's department and then moved to another rail covered by camera seven where the witness alleged that he saw her putting the items into her bag.

96. On returning to the store having challenged the plaintiff, Mr. Alam showed the events on the CCTV to the manager who downloaded the footage which has now gone missing. According to the evidence the footage was viewed by four people immediately following the encounter. This included the manager of Dunnes Stores who apparently apologised to the plaintiff after the event.

97. Only Mr. Alam was called to give evidence. He repeatedly asserted that the plaintiff had taken items from Dunnes Stores and stated that if he had the CCTV he could demonstrate the fact. He was given an opportunity on a number of occasions to agree that he was mistaken about the alleged theft but declined on each occasion to accept that he was so mistaken. On one such occasion when asked whether at a particular point he realised he had made a mistake, he answered:-

"No, I was 100% sure, that's why I followed her".

98. Neither in the pre-trial correspondence, nor in the pleadings, nor in the evidence, has the defendant unequivocally stated that the plaintiff was accosted because of a genuine but mistaken belief that she had taken items from Dunnes Stores such as might attract a right to plead qualified privilege in accordance with *McCormack v. Olschoorn*.

99. In the pre-trial correspondence dated 3rd July, 2008, the defendant asserted that it had carried out full and careful inquiries into the allegations maintained by the plaintiff. In the next paragraph it makes reference to the issue of qualified privilege as entitling it to take whatever reasonable means necessary to protect its property and to make appropriate inquiries as to proof of purchase. The letter goes on to assert that the plaintiff had been abusive and racist to the defendant's security guard. It asserts that the approach by him was discreet and reasonable in the circumstances and finally advises that the plaintiff is welcome to continue shopping in Dunnes Stores. There is no acknowledgement of a genuine but mistaken belief that the plaintiff had taken items from Dunnes Stores.

100. The defence filed by the defendant puts everything in issue including the plaintiff's presence in the defendant's shop on the relevant date. Qualified privilege is indeed pleaded but the circumstances giving rise to the invocation of qualified privilege are not set out. The only evidence called by the defendant is to the effect that the plaintiff stole items from Dunnes Stores.

101. During the hearing, the Court asked Mr. Alam, the sole witness called by the defendant, about the uncontradicted evidence that the defendant manager on the date saw fit to apologise to the plaintiff. The Court suggested that indicated that the manager had a different view of the events to Mr. Alam. Defence counsel objected to the line of questioning and stated that it would be wrong for the Court to draw an inference from such an apology because it was not known what the manager's reasoning was. Mr. Punch S.C. on behalf of the defendant suggested that an apology could be given for a variety of reasons, including to deflate the situation. He elicited testimony from the witness to the effect that the manager did not explain to him her thinking, and further elicited testimony that in some established cases of goods being taken without payment being made, the manager exercised her discretion not to call the guards. The thrust of this exchange was that an apology does not necessarily mean there was no theft.

102. The defendant was afforded ample opportunity to make it clear that its employee was acting in a genuine but mistaken belief that the plaintiff had stolen items from Dunnes Stores. It, however, specifically declined the opportunity and maintained its true position that the plaintiff had in fact stolen items from Dunnes Stores.

103. It is open to any defendant to plead justification should the circumstances allow. What is not permissible is to plead qualified privilege and then run the defence of justification. That in the Court's view is what occurred in this case.

104. In support of its contention that it was entitled to rely on the defence of qualified privilege notwithstanding Mr. Alam's repeatedly expressed view that the plaintiff had stolen items from Dunnes Stores, the defendant cited the Supreme Court decision of *Corcoran v. W. R. Jacob and Company Limited* [1945] I.R. 446. The defendant contended that it was authority for the proposition that an honest belief by a witness called on behalf of the defendant that a larceny had occurred did not destroy the defendant's qualified privilege. The facts were as follows:-

105. The plaintiff was employed as a store keeper by the defendant. As part of his work the plaintiff left the defendant's premises on messages for the defendant. While so engaged he purchased a small shovel for himself. On his return to the defendant's premises he carried the shovel inserted in his dungarees in such a way that only a portion of it was visible. At the request of a Mr. Noonan, a commissionaire in the defendant's employment, the plaintiff agreed to allow the commissionaire to search him as soon as certain other employees had left the immediate vicinity. The liability to be subjected to a search formed part of the plaintiff's contract with the defendant. Mr. Noonan, then attempted to assist the plaintiff in removing the shovel from his person and, in doing so, pulled the plaintiff's clothes about violently and slightly damaged them. The plaintiff thereupon refused to allow Mr. Noonan to continue the search. Sometime later Mr. Noonan in the presence of the plaintiff and another employee made a verbal report to a welfare officer of the defendant company, in the course of which he stated:-

"It was a piece of copper ten or twelve inches long that [the plaintiff] had".

In an action for slander and assault the plaintiff alleged that the words used imputed larceny to him. At the trial the plaintiff gave no evidence of malice and on the trial judge's ruling that the words were spoken on a privileged occasion the plaintiff sought to show malice:-

- a) by Mr. Noonan's demeanour in the witness box;
- b) by his allegations under cross-examination that the plaintiff and witnesses on his behalf had given false evidence;
- c) by his maintaining at the trial what he knew to be false, viz., that the plaintiff had in fact, not a shovel but a piece of copper; and
- d) by the circumstances in which the alleged assault had taken place.

106. The plaintiff succeeded on both causes of action before a jury in the High Court. On appeal, it was held by the Supreme Court

(Murnaghan, Geoghegan and O'Byrne JJ.; Black J. dissenting) that there was no evidence on which the jury could find that Mr. Noonan had not acted under honest belief in his actions, and accordingly the finding of malice was set aside and the claim for damages for slander dismissed.

107. Having considered the judgment, the Court must confess that it is much more persuaded by the dissenting judgment of Black J., who came to the conclusion that there was evidence to support the jury finding of malice and that the Court should not disturb that finding, rather than the decision of the majority.

108. That said, it appears to the Court that in any event the decision of the Supreme Court in that case can be distinguished. In that case the commissionaire continued to insist that the plaintiff had a piece of copper and not a shovel long after the company had stated that they were making no charge against the plaintiff [see. p. 452 of the judgment]. The Court held that the commissionaire's honest belief that the plaintiff had property belonging to the company was not evidence of malice and that accordingly the plaintiff had not discharged the onus of establishing malice so as to defeat the defendant company's reliance on qualified privilege.

109. In this case, as has already been pointed out, the only defence evidence before the Court is that the plaintiff stole items from Dunnes Stores. Nowhere in the correspondence, the pleadings nor the evidence is there an unequivocal statement from Dunnes Stores that it accepts that the plaintiff did not steal items from its store. In *Corcoran v. W. R. Jacob and Company Limited*, had the defendant maintained a position that the plaintiff had unlawfully taken an item from the company, then they could not have pleaded qualified privilege and would have been obliged to plead justification.

110. The reality of the position is that were this Court to allow the defendant to rely on qualified privilege in circumstances where the only evidence called suggests justification, a serious injustice would be done to the plaintiff who would leave this Court in effect branded a thief under the guise of a defence of qualified privilege. For these reasons and on the facts of this case, the Court therefore holds that the defence of qualified privilege has not been made out and accordingly the plaintiff is entitled to succeed in her claim for defamation.

Damages

111. While the Court is satisfied for the reasons set out above that the words and actions of the defendant, its servants or agents amounted to a defamation of the plaintiff, the Court is also of the view that the extent of publication of that defamatory matter was contributed to significantly by the reaction of the plaintiff upon being challenged. The Court accepts the evidence of Mr. Alam that the plaintiff was invited to return to the store. The plaintiff denied this repeatedly in her evidence in chief but tellingly in the course of cross-examination when asked whether Mr. Alam was shouting at her she replied:-

"He kept asking me to go to the back room. I was really embarrassed".

The plaintiff's response to being asked to return to the store appears to have been to proffer the Adams shopping bag for examination in full view of passers by. Mr. Alam is seen on video examining the contents of that bag. Such a public examination of her bag could have been avoided had the plaintiff taken the simple expedient of returning to the store with Mr. Alam. To this extent, it appears to the Court that the plaintiff must take some responsibility for the extent of the publication of the defamation.

112. The Court is also satisfied on the balance of probabilities that the plaintiff did utter abusive and potentially racist epithets about Mr. Alam. However, it appears to this Court, again on the balance of probabilities, that this occurred at a time when the defamatory encounter had concluded and as the plaintiff was leaving the shopping centre. It appears to the Court that the abuse was specific to Mr. Alam and it was open to Mr. Alam to take that matter further but it appears he has chosen not to do so. Such vulgar abuse emanating from the plaintiff while discreditable to her does not in any respect inure to the benefit of the defendant in respect of the plaintiff's defamation claim.

113. While the circumstances in which the plaintiff was defamed and the circumstances of the publication of that defamation were undoubtedly upsetting to her, there is no evidence before the Court of any particular damage to the plaintiff's reputation other than that which can be presumed. In particular the Court has had no evidence from any of the bystanders in the mall suggesting ongoing damage to the plaintiff's reputation.

114. In these circumstances, the Court considers that the plaintiff would be fully compensated by an award of €10,000 which sum the Court proposes to reduce by €2,500 to reflect the plaintiff's own contribution to the extent of the publication of the defamation by her refusal to return to Dunnes Stores to deal with the matter in private.

Aggravated damages

115. The Court considers that the injury to the reputation of the plaintiff has been aggravated by the conduct of the defendant in relation to these proceedings. The defendant was asked at an early stage to preserve the CCTV footage of the events. The CCTV footage was downloaded and recorded but was not preserved by the defendant. Having failed to do so, the defence chose to put forward one witness and one witness only, whose evidence in effect was that the plaintiff is a thief and that she had stolen items from Dunnes Stores. The initial injury to the reputation of the plaintiff has in the Court's view been considerably aggravated by the conduct of the defence which rather cynically gave evidence of justification while masquerading as a defence of qualified privilege.

116. The Court considers that an additional sum of €2,500 should be paid as aggravated damages arising from the rather cynical approach of the defendants to the defence which constituted a further insult to the plaintiff's reputation. Accordingly the Court awards the plaintiff the sum of €10,000 being €7,500 by way of damages for defamation and €2,500 by way of aggravated damages for the manner in which the defence was conducted.