Neutral Citation: [2014] IEHC 99

THE HIGH COURT

[2011 No. 9412P]

BETWEEN

DAMIAN JEFFERY

PLAINTIFF

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE COMMISSIONER OF AN GARDA SÍOCHÁNA, IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Barrett delivered on the 28th day of February, 2014

1. This case centres on whether the immunity from defamation that arises in court proceedings extends to other forms of action also.

Facts

2. On 9th December, 2010, the plaintiff, Mr. Jeffery, was convicted at Sligo District Court of certain road traffic offences. Before Mr. Jeffery was sentenced, a member of An Garda Síochána informed the Court that Mr. Jeffery had previously been convicted of a number of serious offences. In fact, the person who committed those offences was another person by the same name. The Mr. Jeffery who was before the District Court and who is the plaintiff in these proceedings had no previous convictions. Mr. Jeffery's solicitor indicated to the District Court that an error had been made and sentencing proceeded without regard to the mistaken information. The District Court therefore had publicly accepted the correction. Subsequently, the erroneous list of convictions was reported prominently in the local media. There is no suggestion that what occurred before Sligo District Court was done with any malice by the member of An Garda Síochána and the court accepts that it was not. Nor is it suggested that the State was in any way complicit in the media attention that followed the District Court proceedings.

3. Since 2011, the solicitors for Mr. Jeffery have variously sought that An Garda Síochána apologise for the error that arose at Sligo District Court, compensate Mr. Jeffery and clarify matters before a further sitting of the Sligo District Court. Eventually, on 20th October, 2011, Mr Jeffery's solicitors issued a plenary summons seeking damages for negligence, breach of duty and negligent misrepresentation on the part of the defendants, jointly and severally, their respective servants or agents. Correspondence continued between the parties and just over a year later, on 6th December, 2012, the Chief State Solicitor's Office issued a letter forwarding a 'Statement of Regret' from An Garda Síochána. It might perhaps be contended that this was too little, too late. Certainly the State's continuing refusal to provide a corrective statement before Sligo District Court in the particular circumstances that arose is suggestive of unbecoming obduracy. Indeed there seems no reason why the provision of such a statement might not yet be done or why such a course of action might not in the future be considered where a mistake of the sort in issue in this case leads to the acute embarrassment, anxiety and distress that Mr. Jeffery claims to have suffered. In any event, in the present case Mr. Jeffery does not consider that such private correspondence as issued to him from An Garda Síochána is an adequate response to the public injury that he claims has been done to him. So, he has continued his High Court proceedings.

Defamation

4. Given that the crux of the issue arising between the parties is the words spoken at Sligo District Court, it might perhaps be contended that it is surprising that, having decided to sue the defendants, Mr. Jeffery did not commence an action in defamation. A possible answer as to why he did not sue the State for defamation is that such an action would undoubtedly have failed. Section 17(2) of the Defamation Act 2009 establishes absolute privilege in circumstances where, *inter alia*, the offending statement is made by a party, witness or legal representative in the course of proceedings presided over by a judge. The Sligo District Court proceedings were clearly proceedings presided over by a judge and the member of An Garda Síochána who presented the purported criminal record did so, as the defendants' legal submissions put it, either as an agent of the Director of Public Prosecutions or as a witness. Thus, section 17(2) applies to what occurred and an action in defamation would fail. However, Mr. Jeffery is seeking damages for negligence, breach of duty and negligent misrepresentation and section 17(2) is only of relevance to a defamation action. Can an action for negligence and breach of duty succeed where an action in defamation would have failed? To answer this question the court has had regard to a number of cases that address the rationale for and the ambit of the privilege that arises within the ambit of court proceedings.

Case-law

5. Pre-eminent among recent Irish cases that deal with the issue of privilege is the Supreme Court decision in *Looney v. The Governor and Company of the Bank of Ireland and Morey* (Unreported, ex-tempore, Supreme Court, 9th May 1997). In that case Mr. Looney was suing for damages for an alleged libel uttered by a certain Ms Morey in an affidavit sworn by her as an employee of Bank of Ireland. His claim was unsuccessful in the High Court and, on appeal, in the Supreme Court also. Giving judgment in the Supreme Court, Hamilton C.J. stated:

> *"[T]he problem in this case is while the Court accepts Mr. Looney's constitutional right to vindication of his good name, this constitutional right must be balanced against the obligations of the courts to administer justice in cases coming before it and in order to enable the courts to properly function, to properly ascertain all the facts in the particular case before it and the necessity in many cases to have witnesses free to give evidence before it without fear of consequences provided they do not traverse the line and make allegations which are not relevant to the issue before the Court if they avail of the opportunity to make allegations maliciously or in relation to matters which are not of the concern of the court".*

6. O'Flaherty J. amplified the principle in issue thus:

> *"[T]here is at issue a far more fundamental point which is the need to give witnesses (and also indeed, the judge) in court, a privilege in respect of oral testimony and also with regard to affidavits and documents produced in the course*

of a hearing. Such persons either witnesses or those swearing affidavits, are given an immunity from suit. Otherwise, no judge could go out on the bench and feel that he or she could render a judgment or say anything without risk of suit. Similarly, witnesses would be inhibited in the way they could give evidence…I would concur with setting [a]…boundary to the immunity. If someone for a malicious purpose, or in order to abuse what he might have thought was a situation of immunity that he enjoyed in Court simply used that situation to make defamatory or malicious statements against others, in a manner that had nothing to do with the particular proceedings in which he was engaged, then it might well be that he would have no answer in an action for defamation or malicious falsehood, or whatever."

7. Barrington J. echoed the other Supreme Court judges, holding that:

"[T]here is possibly some bound to the so called absolute privilege of the witness in a case of flagrant abuse but this case is not that particular case and as Mr. Justice O'Flaherty said it's a long way from it."

8. In short, all the Supreme Court judges were agreed that absolute privilege generally applies to what is said in court proceedings. All of them were agreed also that there is likely some limit to this privilege; so that if a witness was to say something malicious and wanton such a witness might be exposed to an action in defamation. What occurred in the present case does not even begin to approach the type of "*flagrant abuse*" envisioned by the Supreme Court judges in *Looney*. What happened here was a mistake.

9. It might perhaps be contended that the *Looney* case was concerned with an action for libel whereas the current proceedings are concerned with negligence and breach of duty. However, the principles that informed the Supreme Court decision in *Looney* cannot but have equal application in an action for negligence or breach of duty. Two English cases, both of which are of striking relevance in the context of the present proceedings, suffice to demonstrate the validity of this. The reasoning in those cases is obviously not binding on this court, but it is certainly persuasive.

10. In *Marrinan v. Vibart and Others* [1963] 1 Q.B. 528, the Court of Appeal refused to countenance an action for conspiracy to make defamatory statements *inter alia* at a criminal trial, Sellers L.J. (with whom Diplock L.J. agreed) holding, at 535, that:

"Whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given."

In the present case one cannot get around the fact that regardless of any negligence or breach of duty that occurred, if it occurred, the crux of the issue between the parties derives from what was said in the course of the Sligo District Court proceedings. Consequently, those alternative causes of action must, to paraphrase the Court of Appeal, suffer the same fate of being barred by the rule which protects witnesses in their evidence before the courts and in the preparation of that evidence. Why should these alternative causes of action also be deemed incapable of being litigated successfully? A comprehensive answer to this question is provided in the English case of *Evans v. London Hospital Medical College and Others* [1981] 1 All E.R. 715. In that case the plaintiff alleged that the negligence of certain pathologists in carrying out a post-mortem investigation had led to her being charged with a murder of which she was subsequently acquitted. The plaintiff conceded that the defendants would have been immune from liability for anything said in court but contended that there was no immunity in respect of negligent acts or omissions prior to the prosecution even being commenced. Drake J. held that this argument would fail and that the action would be struck out, stating at pp. 719 - 720:

"It seems to me that this immunity would not achieve its object if limited to the giving of evidence in court and to the preparation only of the statements or proof of evidence given by the witness. Any disgruntled litigant or convicted person could circumvent the immunity by saying he was challenging the collection and preparation of the evidence, to be taken down as a statement or proof of evidence later, and not challenging the statement or proof itself. In other words he would seek to base his claim on things said or done by the witness at some time prior to the statement or proof being given by him. In my opinion this would largely destroy the value of the immunity…It remains, of course, a question to be decided on the facts of each case (or, in the present instance of an application to strike out, on the alleged facts) whether or not the negligent act or omission arose during the course of preparation of the evidence."

11. In this case the negligent act or omission, if such it was, would presumably have been the procuring of the criminal records by the member of An Garda Síochána, an act that clearly arose during the course of preparation of the evidence later given at Sligo District Court. It is perhaps worth noting in this regard that it is a longstanding feature of the Irish law of defamation since at least the time of *Kennedy v. Hilliard* (1859) 10 Ir. CLR 195 and *MacCabe v. Joynt* [1901] 2 I.R. 115, that there are acts done prior to court proceedings which attract the same privilege that clothes those later proceedings. This is a feature of defamation law because of the public policy cogently identified by Pigot C.B. in the earlier case whereby:

"It is of far less importance that occasional mischief should be done by slander…than that the whole course of justice should be enfeebled and impeded."

The court sees no reason why the same principle should not also apply to an action, such as the present proceedings, in which negligence and breach of duty are alleged, or indeed in any other form of action that it is sought to construct on the basis of what was said or done at or in preparation of court proceedings.

12. It appears to the court that the following key principles can be gleaned from the above cases:

- first, any perceived damage that appears to arise for an individual as a result of what transpires at or before court proceedings must be balanced against the obligation of the courts to administer justice in cases coming before them, an obligation which requires that witnesses be free to give evidence without fear of consequences;

- second, in instances of "*flagrant abuse*", to borrow from the judgment of Barrington J. in *Looney*, there may be some bounds to the privilege; however, this requires malicious and wanton behaviour of a type that was not present in the *Looney* case and also does not arise in the present case;

- third, whatever form of action is sought to be derived from what was said or done in the course of judicial proceedings is generally barred by the long standing rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given.

Conclusion

13. The courts are temples of truth. That, at least, is the ideal. Within their confines there should be a minimum of circumspection on what can be said so that the truth can be determined and justice done. Were matters to be otherwise, were witnesses to be exposed to the threat of any form of litigation for what they said in court, truth would soon be the victim of unreal expectations and our system of court-administered justice would quickly founder. For this, and for the reasons identified above, the plaintiff's action in this case must fail.