THE HIGH COURT

[2011 No. 604 P]

BETWEEN

JOHN McAULEY

PLAINTIFF

AND

BRENDA POWER

AND

TIMES NEWSPAPERS LTD

DEFENDANTS

JUDGMENT of Kearns P. delivered on the 27th day of April, 2012.

This is a defamation action brought by the plaintiff in respect of the publication of an article written by the first named defendant in the Sunday Times Newspaper in its edition dated 1st March, 2009. In the application presently before this Court the defendants seek by motion to have the plaintiffs claim struck out or dismissed, either under O. 19 of the Rules of the Superior Courts or under the inherent jurisdiction of the court or on the basis that the words published are not reasonably capable of having the defamatory meanings ascribed to them in the statement of claim.

Order 19, rule 28 provides:-

> "The court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

This case is one which pre-dates the commencement of the Defamation Act 2009 which contains a provision in the following terms:-

"14.- (1) The court, in a defamation action, may give a ruling-

> (a) as to whether the statement in respect of which the action was brought is reasonably capable of bearing the imputation pleaded by the plaintiff, and
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> (b) (where the court rules that the statement is reasonably capable of bearing that imputation) as to whether that imputation is reasonably capable of bearing a defamatory meaning, upon an application being made to it in that behalf.
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> (2) Where a court rules under subsection (1) that-
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> (a) The statement in respect of which the action was brought is not reasonably capable of bearing the imputation pleaded by the plaintiff, or
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> (b) That any imputation so pleaded is not reasonably capable of bearing a defamatory meaning, it shall dismiss the action insofar only as it relates to the imputation concerned."

In *Griffin v. Sunday Newspapers Ltd* [2011] IEHC 231, this Court accepted the contention of the parties in that case that this particular section in the Defamation Act 2009 did nothing more that codify existing legal principles and did not, of itself, constitute any significant extension of those principles.

This is evident from decisions such as *McGarth v. Independent Newspapers (Ireland) Ltd*. [2004] 2 I.R. 465, in which Gilligan J. also dealt with a preliminary issue as to whether an article was capable of having a defamatory meaning or any of the defamatory meanings pleaded in the statement of claim so that he might dismiss the claim m circumstances where he concluded the article or words were not so capable.

The present application may thus be best understood as one of a *sui generis* character peculiar to the law of defamation. While Order 19 has been invoked on the basis that the claim is frivolous or vexatious, that case has not been pressed on behalf of the defendants.

THE ARTICLE

The article in question appears under the by-line "A Star is born, but not on Camera". The article was accompanied by a large photograph of the plaintiff and his partner, Ms. Jurgita Jachimaviciute.

The article was written in the aftermath of certain proceedings brought by the plaintiff in the Circuit Court in which he claimed damages for breach of contract against Iris Halbach, a midwife, and Mount Carmel Hospital after being asked to stop filming the labour of his partner, Jurgita Jachimaviciute in that hospital in December 2006.

The original Irish Times account of the court proceedings records that in evidence the plaintiff told the Circuit Court that the couple's private consultant, Mr. Gerry Rafferty, had told them months before the birth that he saw no problem with filming the birth of their child. The plaintiff also gave evidence to the effect that he had obtained permission for this purpose from hospital staff. While he had no filming contract in writing, he considered he had a legal agreement with the hospital to permit the filming to proceed. However,

while claiming that he had been prevented from filming, the plaintiff in the course of cross examination conceded that all Ms. Halbach, who was assisting with the baby's birth on that occasion, had said was: "Maybe we could hang on a little with the filming until the baby is all recovered, if you don't mind."

This remark was made apparently in the context that Ms. Jachimaviciute was undergoing a caesarean delivery and a complication had arisen. Ms. Halbach had asked for a momentary stop in filming while she carried out a procedure to clear the baby's airways after delivery. A further contemporary account of the Circuit Court case in the Irish Independent recorded that, about 40 minutes later, the plaintiff was filming his daughter in the hospital créche when Ms. Halbach entered the room and again allegedly asked him to stop filming.

At the conclusion of the plaintiff's case in the Circuit Court, the trial judge, his Honour Joseph Matthews, acceded to a defence application that the case be dismissed and this application was successful. The learned Circuit Court Judge in the course of his ruling characterised the events as being an "emergency medical procedure" and further held that the plaintiff's evidence was entirely incapable of being considered as amounting to a breach of contract. It is difficult to see how he could have found otherwise.

In the course of her article Ms. Power wrote:

> "If a man in the delivery room has any purpose, which is debatable anyway, it's to help to reassure and offer his hand to be squeezed, not to stick a camera in your face and ask if you're ready for your close-up. John McAuley confirms every suspicion I ever had about the kind of man who films a birth. Last week McAuley failed in a law suit to win compensation after a midwife dared to interrupt him as he attempted to record 'every precious moment of the first minutes of his baby's life'. McAuley brought the claim against Iris Halbach and Mount Carmel Hospital after being asked to stop filming the labour of Jurgita Jachimaviciute in December 2006. A judge threw out the €38,000 claim for breach of contract. McAuley argued that he didn't want any money, and his beef was that Halbach gave no explanation for filming to stop. But he didn't include in his action the consultant who had given approval for the filming and who, as the most senior member of the medical team, would have been accountable had anything gone wrong.
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> McAuley aside, I've always suspected that there is a type of man who just can't get his head around the fact that he is not, actually the most important person in the room when his wife or girlfriend is having a baby. He can't face being an extra, there on sufferance. He has to be the director, the producer, the star. So he takes in a camcorder to film the birth. This is not, trust me, because friends and family are gagging to view the gory details, but because it wrests back control for him. It puts him at the centre of the action, and turns the event into another episode in his personal drama, in which women are bit-players.
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> McAuley's daughter Simone was born by emergency section, and she needed emergency intervention to get her breathing. You've got to wonder how many more 'emergencies' would have been required to merit McAuley's full attention. There would have been silence in the theatre when she emerged, no sound of a cry because her airways were blocked with mucus and needed suctioning. Her mother would have been listening anxiously for the baby's first wails and her father, you'd imagine, would have had more on his mind than camera angles and zoom positions - like comforting and reassuring her, for a start. But McAuley kept filming.
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> He says he wasn't getting in the midwife's way, as she hastened to get the baby breathing, but he was definitely getting up her nose. Her polite request that he 'hang on a little with the filming until the baby is all recovered, if you don't mind' - which he couldn't dispute, since he'd recorded it himself- was probably prompted more by astonishment at his behaviour than medical necessity. In the circumstances I'd say she was commendably restrained. Yet he claimed this remark proved she was 'irrational'. Presumably a 'rational' person would have realised that this occasion was all about McAuley, and not about the tiny girl struggling to breathe, or the woman on the operating table with five layers of skin and muscle tissue sliced open.
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> Midwives work too hard, and their task is too important, to concern themselves with tiptoeing around the sensitivities of a father with a lawyer on speed-dial. The award of her legal costs won't compensate the midwife that McAuley sued for the trauma of that trial. The midwife on duty really should have absolute power to evict anybody from the delivery room with no fear of legal consequences.
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> Most men come away from witnessing their child's birth humbled, moved and in awe. The majority of chaps, given the choice, would rather wait outside with a box of cigars and a mobile phone to call the grannies.
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> But a small number of men clearly can't accept the lowliness of their role in such a monumental enterprise, and do their damnedest to project themselves centre stage. For the sake of staff, and babies, and women who may not feel able to resist the will of such men, they may have to be run out of delivery rooms by the midwives in charge.
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> They won't be hard to spot: they'll be the guys with the laminated birth plans, the store of high energy bars - for themselves- and those goddamned camcorders."

In the statement of claim it is contended that these words published by the first and second named defendants were in their natural and ordinary meaning and/or by way of innuendo, meant or were intended to mean the following:-

> "(a) That the plaintiff showed no consideration or care for his partner;
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> (b) That the plaintiff was insensitive and/or had no concern for his partner or their new born baby in an alleged life threatening situation;
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> (c) That the plaintiff failed to reassure or comfort his partner during an alleged medical emergency;
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> (d) That the plaintiffs newborn baby had failed to breathe while the plaintiff continued filming;
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> (e) That the plaintiff acted immorally and irresponsibly;
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> (f) That the plaintiff was motivated by selfish self interests with no appreciation of his role at the delivery of his baby."

It is further contended that the article caused the plaintiff extreme distress, embarrassment and humiliation and brought him into

odium, ridicule and contempt by right thinking members of society, and gravely injured his character, credit and reputation.

DECISION
The test on an application of this nature has been outlined in a number of English cases, notably, *Lewis v. Daily Telegraph Ltd* [1964] A.C. 234, *Charleston v. Newsgroup Newspapers Ltd* [1995] 2 A.C. 65 and *Mapp v. Newsgroup Newspapers Ltd* [1998] Q.B. 520. Rather than extrapolate passages from those cases I propose instead to refer to the passage in the judgment delivered by Gilligan J. in *McGarth v. Independent Newspapers (Ireland) Ltd.* [2004] 2 I.R. 465, referred to above, which to my way of thinking set out the legal position in admirably lucid terms. At p. 433 the learned Judge stated as follows:-

> "The issue which I have to determine is whether the words are capable of bearing a particular meaning and counsel for the defendant has conceded that he is not entitled to re-argue this issue again before the trial judge if unsuccessful in this application. Counsel for the defendant accepts that he asks the court to determine the issue as a preliminary issue and that that has put the issue in the same position as if it was being determined during the course of the trial by the trial judge. At the trial it is for the judge to decide as a matter of law whether the words are capable of bearing a defamatory meaning on the principle that it is for the court to say whether the publication is fairly capable of a construction which would make it libellous and for the jury to say whether in fact that construction ought, under the circumstances, to be attributed to it. In determining whether the words are capable of a defamatory meaning the court is obliged to construe the words according to the fair and natural meaning which would be given to them by reasonable persons of ordinary intelligence and will not consider what person setting themselves to work to deduce some unusual meaning might extract from them. The court should avoid an over elaborate analysis of the article because the ordinary reader would not analyse the article in the same manner as a lawyer or accountant would analyse documents or accounts. In deciding the issue I am satisfied that I am entitled to consider the impression that the article has conveyed to me personally in considering what impact it would make on the hypothetical reasonable reader and lastly, the court should not take a too literal approach to its task."

Applying those principles to the instant case I am satisfied that the meanings contended for para. 6 of the statement of claim are in some respects clearly incapable of having a defamatory meaning. The assertion that the words meant that the plaintiffs newborn baby had failed to breathe while the plaintiff continued filming cannot be characterised as importing a defamatory meaning. Nor in my view can it seriously be argued that the article suggested or meant that the plaintiff acted "immorally".

However, it does seem to me that in the overall context the remaining meanings contended for are capable of having a defamatory meaning, although of course it will ultimately be for a jury to determine if in fact the words ought to have or do have the meanings contended for on behalf of the plaintiff. Beyond so holding, I do not feel it is my function to add anything further by way of comment or otherwise.

In the course of submissions to the Court, Mr. Dermot Gleeson, S.C. for the defendants, argued that, even if the Court found that the article or parts of it were capable of a defamatory meaning, that his application should nonetheless succeed on the basis that the contents of the article were either privileged as a report of court proceedings or were matters of fair comment. Various passages from *Gatley's Libel and Slander*, 11th Ed. were cited to this effect.

The first contention can be quickly dealt with. The article in the Sunday Times, unlike the contemporaneous accounts of the court case in the press generally, was not and did not purport to be an account of those proceedings. Rather it was a piece of commentary on the plaintiff which was prompted by the information disclosed by the bringing of the proceedings themselves. It can not therefore enjoy the privilege attaching to a contemporaneous report.

Insofar as any defence of fair comment is concerned, this contention raises the interesting point as to whether, on an application of this nature, the Court can go further than to hold that the article and words are capable of a defamatory meaning to hold further that a defence of fair comment must necessarily succeed. I do not believe that is the Court's function at this point in the proceedings. The defence of "fair comment" is precisely that: a defence. In much the same way as the Statute of Limitations can be raised as a bar or defence to a good cause of action, it seems to me that the defence of fair comment in a defamation case is in much the same position.

Perhaps more importantly, I do not accept the contention advanced by counsel on behalf of the defendants that the article was all part of a piece with the court case which claimed damages for breach of some supposed contract. It was, to say the least of it, an extraordinary claim to have brought and, as pointed out by counsel for the defendants, there was no appeal from the ruling and decision of the learned Circuit Court Judge. However, any comments made about the wisdom or otherwise of bringing such a legal claim must be distinguished from commentary on the propriety of the plaintiff’s actions and behaviours while attending at the birth of his child. It is Ms. Power's commentary on the latter which is the subject matter of the plaintiff’s complaint. What might be fair comment in the case of the former may not be such when applied to a father who is present at the birth of his child and who, with the consent of his partner and medical personnel, is permitted to record the birth of his child. Quite why such filming was permitted by the hospital to the degree it was is quite beyond me but that is not an issue with which this Court is concerned.

Furthermore, a defence of fair comment may in turn be defeated by malice or an absence of *bona fides* and, while a reply was not delivered to the defence in this case, it is clearly pleaded at para. 5 of the statement of claim, that the article in question was "malicious". For that reason and notwithstanding that no reply to the defence has been delivered in this case, I do not regard such omission or failure as undermining the plaintiffs capacity to join issue with the defendants on any defence that may be raised during the course of the trial to the effect that a defence of fair comment must succeed. In the course of argument before this Court, counsel for the plaintiff suggested that the journalist in question had an agenda of gender bias when writing the article sufficient to defeat any claim of fair comment. He suggested that the purpose and intention of the article was to make a category of men, and in particular this plaintiff, look like 'idiots'. The Court has no intention of expressing any view in relation to any such contention, other than to say that the mere fact that such areas of dispute may arise at trial strongly reinforces my view that the Court, on an application of this nature, should confine itself strictly to the issue as to whether the words complained of are capable of bearing a defamatory meaning.

The Court will therefore strike out those portions of the statement of claim which, as already indicated, it regards as incapable of bearing a defamatory meaning, but will otherwise decline to grant the relief sought by the defendants.