Neutral Citation Number: [2006] IEHC 71

THE HIGH COURT

2003 11812 P

BETWEEN

BRENDAN BYRNE AND PAUL BYRNE

PLAINTIFFS

AND
RADIO TELEFÍS ÉIREANN

DEFENDANT

Judgment of Mr. Justice John MacMenamin dated the 3rd day of March, 2006.

1. The plaintiffs (who are respondents in this application by way of notice of motion for particulars) assert that in the course of a television documentary broadcast by the defendant on 27th March, 2003, on disreputable and fraudulent personal injury claims, a Bus Éireann claims official was shown perusing a file in which a document, bearing the defendant's letterhead could be seen. Thereby the plaintiffs contend it is alleged or imputed that the plaintiffs were disreputable solicitors engaged in the facilitation of disreputable or fraudulent personal injury claims.

2. The plaintiffs through their own solicitors wrote to the defendant by letter dated the 20th June, 2003, setting out a claim for libel in respect of the broadcast. Enclosed with the said letter was a sample of the plaintiffs headed notepaper which sets out their names and in smaller lettering their avocation as solicitors practising in partnership.

3. The defendants contend that the period of time in which the notepaper in question was on view in the course of the programme was very short indeed, perhaps one second, or 25 frames in the video equipment. They contend further that the period of time in which the complete top part of the page, which bears the letterhead, was in vision, was even shorter. The length duration and visibility of the notepaper is not however a matter in issue in this notice of motion for particulars.

4. By notice for further and better particulars dated the 9th November, 2004, to the solicitors acting for the plaintiffs, the defendants sought the following particulars.

> 1. Please state whether the plaintiffs alleged publication to particular persons.
>
> 2. If the plaintiffs alleged publication to particular persons, identify such persons.
>
> 3. Identify the relationship of each such person to each of the plaintiffs.
>
> 4. In the case of each such person state when they:
>
> a. First saw the publication and,
>
> b. Identify the plaintiffs or either of them from the publication.
>
> 5. In the case of each such person, state those facts which caused or contributed to their identification of the plaintiffs, or either of them from the publication.
>
> 6. If the plaintiffs do not allege publication to specified persons, confirm that the plaintiffs will ask the court to infer publication in general by reason merely of the fact and content of the broadcast impugned.

5. By reply dated the 11th July, 2005, the solicitors acting for the plaintiffs responded as follows:

> 1. The plaintiffs allege, and it is a fact, that the defendant broadcast the programme in question to the public at large. However, the plaintiffs accept, and it is a fact, that not every person who saw the programme would have identified the plaintiffs letterhead and thereby identify the plaintiffs therefrom. The plaintiffs plead that the plaintiffs letterhead as depicted in the programme in question was a distinctive letterhead and recognisable by a wide range of persons (but clearly not everyone) who viewed the programme including existing and former clients, colleagues, persons with whom the plaintiffs firm would regularly do business including Counsel, engineers, doctors, accountants, insurers and persons with whom the plaintiffs would regularly be in correspondence, as well as the family and friends of the plaintiffs.
>
> 2. See reply to No. 1 above. The categories of persons who would have recognised the plaintiffs letterhead are set out at No. 1 above. The plaintiffs are obviously not in a position to name each and every member of each of such categories of persons who saw the programme and recognised the plaintiffs letterhead and indeed the request in this regard is entirely unrealistic and unreasonable. However the plaintiffs will call a number of witnesses representative of such categories who did see the programme and recognised the plaintiffs letterhead and took the offending portion of the programme to be referred to the plaintiffs.
>
> 3. See categories of persons set out in reply to number 1 above.
>
> 4. (a) On the date of this broadcast
>
> (b) On the date of this broadcast
>
> 5. They will be well acquainted with the letterhead of the plaintiffs and able to easily recognise same.
>
> 6. The plaintiffs position has been clearly set out above.

6. By letter dated 8th August, 2005, the defendant responded to the replies dated the 11th July, 2005, making the following points:

1. That the plaintiffs appeared to accept that though this was a publication by an element of the mass media, the presumption of publication to the public at large is not to be made in the particular circumstances of this case.

2. That the defendant "accepted" that the plaintiffs are not in a position to name each and every person who recognises the plaintiffs letterhead.

3. That however the plaintiffs had stated their intention to call witnesses to testify specifically that they recognised the letterhead and took the offending portion of the programme to be referring to the plaintiffs.

4. That this statement amounted to a specific plea of publication to particular persons. That evidence of such witnesses might also be probative of a publication to a class, did not detract from the fact that in substance the evidence of those witnesses would amount to an assertion of publication to each, individually, of such persons.

5. That the plaintiffs seemed to be trying to "ride two horses" for the apparent purpose of refusing to identify to the defendant the persons to whom the alleged publication was made. They asserted both publication to a class and publication to specific persons and relied on the former to refuse identification of the latter.

6. That the defendant was not concerned, in a primary sense, to identify the plaintiffs witnesses. However it was entitled to have identified in the pleadings the persons to whom publication was made insofar as such publication is relied upon by the plaintiffs.

7. The defendants assert that what arises here is the question of identification by innuendo. They contend that the vast majority of viewers of the programme did not identify the plaintiffs as referred to therein. They suggest further that only a limited number of people who had prior knowledge of the letterhead could possibly have understood the alleged meanings to refer to the plaintiffs. The plaintiffs have pleaded innuendo.

8. Mr. David Holland S.C. on behalf of the defendants further submitted that the phrase "identification by innuendo" can arise because certain readers have knowledge of particular matters which lead them to understand the statement to refer to the claimant. The defendants contend further that the plaintiff had shown by direct evidence or inference that there are readers who have the necessary knowledge (in this regard the applicants rely on Gatley on *Libel*, 26.25 footnote 99; and Price on *Defamation*, 3rd Ed. 2004, 4-03).

9. Whether or not the plaintiffs rely on innuendo, the defendant asserts entitlement to the particulars. They rely on the proposition set out in Browne, Law of Defamation a Canadian text that the very starting point in requiring particulars is in order to protect the defendant against surprise: "What is to be avoided is some form of 'tactical exercise resembling a sport' in which the adversary is kept in the dark" (see Browne, Law of Defamation in Canada 20.3(1) citing *Waterhouse v. Station 2 GBPTY* Limited [1985] 1 NSWLR 58). The defendants assert that, although the proceedings herein are in libel the ordinary rules of pleading apply, absent a rule special to libel. In this regard they rely first on the judgment of Ackner L.J. in the case of *Lucas-Box v. Newsgroup Newspapers Limited* [1986] 1 All E.R. 177:

> "It is axiomatic that the function of pleadings is to define the issues between the parties so that both the plaintiff and the defendant know what is the other side's case and thus everyone, counsel, judge and jury are able to focus on the real nature of the dispute. Although to some it may seem a startling observation we can see no reason why libel litigation should be immune from ordinary pleading rules."

10. The plaintiffs also rely on the judgment of Hamilton J. (as he then was) in the libel case of *Cooney v. Browne* [1985] I.R. 185 HC to the following effect:

> "The ordinary use and purpose of particulars is to define the issues between parties to any action or proceeding and thereby to prevent either party from being taken by surprise and incidentally to limit as much as possible the length and expense of trials. Each party is entitled to know precisely what case the other party is going to make at the trial and be entitled to prepare accordingly."

11. Henchy J. deciding the issue on principle on appeal stated:

> "The object of particulars is to enable the party asking for them to know what case he has be meet at the trial and so to save unnecessary expense, and avoid allowing parties to be taken by surprise."

(cited in *McDonagh v. Sunday Newspapers Limited*, High Court, Macken J., 10th May, 2005.

12. The defendants say that it is appropriate that a defendant should be enabled by particulars to weigh quantum in the case against him. Relying on the decision of the Supreme Court in *Cooney v. Browne* add that the right to fair procedures identified in Article 40.3 of the Constitution of Ireland and article 6(1) of the European Convention on Human Rights provides for a fair and public hearing within a reasonable time by an independent tribunal. Such right to a fair hearing requires that a party to the proceedings should have a reasonable opportunity at presenting his or her case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent. Relying on this contention they say that a principle of "equality of arms" involves striking "fair balance" between the parties.

13. It is recognised that article 6 may be relied upon by parties to a defamation action. In *DeHaes & Gijsels v. Belgium* [1997] 25 EHRR 1 the European Court of Human Rights found a violation of article 6 where the defendants were denied the equivalent of discovery of documents relevant to their defence. The defendant/applicants herein submit that the plaintiffs failure to furnish the requested particulars placed them at a substantial disadvantage vis-à-vis the plaintiffs as, in the absence of replies to particulars, the defendant does not know the precise case it has to meet, is deprived of essentials for the purpose of pleading its defence and is unable properly to prepare for trial.

14. However as a matter of principle, the defendants accept that a party may not seek particulars of witnesses or evidence. In this connection they refer *to Doyle v. Independent Newspapers* [2001] 4 I.R. 594 (dealt with below). However they contend that it is no objection to the furnishing of particulars otherwise required, to say that by furnishing such particulars witnesses will be identified. A number of persuasive authorities are cited, which while worthy of great respect are difficult to assess when divorced from their own general procedural context with regard to the right to particulars, and witness identity disclosure in the jurisdictions in which they were decided.

15. The defendants rely on the New South Wales authority of *Moore v. Australian Broadcasting Corporation*, Hunt J., Supreme Court of New South Wales 5th July, 1985, where that judge cited the authority of *Sims v. Wram* [1984] 1 NSWLR 317 which stated:

> "There is often a fine line between giving particulars of a case… and disclosing the evidence by which that case is to be proved. It all depends on what is necessary to guard the other party against surprise. If the other party cannot otherwise be so guarded it may sometimes be necessary for a party to disclose broad outline. The starting point is what is necessary to guard the other party against surprise: the starting point is not what can be said without disclosing the evidence to be lead."

16. Hunt J. added:

> "The principal reason why the defendants application is resisted that the plaintiffs object to identifying their witnesses in advance. However it has been law since at least 1886 that where those names are relevant, such information must be disclosed notwithstanding that the plaintiff is thereby required to disclose the names of his possible witnesses: *Marriott v. Chamberlain* [1886] 17 QBD 154 at 164-165 see also Fullam's case at 656."

17. It is now necessary to consider a number of further persuasive authorities cited in the course of argument. These must be considered in the context of the contention what where publication is *limited* the claimant should generally identify the publishees as well as subject to the careers set out earlier. The first of these is the English case of *Jameel v. Dow Jones* [2005] EWCA Civ 75; [2005] 2 WLR 1614.

18. In that case *Dow Jones* posted on the worldwide web servers of the "The Wall Street Journal on line" in New Jersey an article which enabled subscribers around the world and in England in particular to draw down that article. This remained on the website until the 22nd March, 2003, when it was moved into an archive where it remained until July of that year. By proceeding through a box of text on the website and followed by hyperlink, which would enable readers of the article to read a list of donors, there was contained a reference to the plaintiff in those proceedings. It was pleaded that the words therein were defamatory of the plaintiff and that in particular that they meant he was a supporter of the Al-Quaeda movement.

19. In the course of that judgment in the Court of Appeal had to deal with the extent to which the action as brought would even if successful vindicate the claimant's reputation. That court considered that even if the action were to consider on the facts the damages would be minimal. Thus, allowing the appeal, and striking out the claim as an abuse of process, the court considered that adopting a proactive approach required by the overriding objective under the U.K. Civil Procedure Rules of dealing with cases justly, and keeping a proper balance between the Convention right to freedom of expression and the protection of individual rights, the court was required to stop as an abuse of process, defamation proceedings that were not serving the legitimate purpose of protecting the claimant's reputation which included compensating the claimant only if that reputation had been unlawfully damaged. The defendants contended that on foot of a finding of "no substantial tort" there is a possibility of having proceedings struck out as an abuse of process where for example all, or almost all the publishees were in the plaintiffs "camp". They raise the question as to whether this is the position in this case.

20. The defendants submit that this reasoning was expressly approved in the case of *Lazarus v. Deutsch Lufthansa AG* [1985] 1 NSWLR. In that case a member of air crew called the plaintiffs a coward in the presence of other passengers – whom the plaintiffs could not identify. It was held that in cases of limited publication, the plaintiff is obliged to disclose the names of the persons to whom the publication is alleged to have been made.

> "The identity of those persons (either general or precise) is of vital importance to a defendant in almost every defamation action …. The defence of qualified privilege will depend upon the defendant being able to establish that those persons to whom he is alleged to have published the matter complained of, had a legitimate interest in the matter so published. The difference between substantial or trivial … will depend upon the identity (general or precise) of those to whom the matter was published."

21. This question was also considered by Scarman L.J. (as he then was) in the case of *Fullam v. Newcastle Chronicle* [1977] 3 All E.R. 32 considering an application for particulars of publishees:

> "If such facts have to be pleaded and such particulars given, it would constitute a departure from the usual practice of not pleading particular acts of publication where the matter complained of is in a book or newspaper…yet a good case can be made for such a departure since such particulars may be of great value in assisting a defendant to measure the weight of the case against him… Justice requires in this case that the plaintiff should fully particularise the publication relied on so that the defendants may understand the nature of the case they have to meet; especially whether it is one which, if successful, will be likely to result in award of substantial or trivial damages. The defendants are entitled to know so that the may decide whether to defend or to settle, whether to pay into court and if so how much, and generally what course they ought to follow." (This authority is considered further below).

22. The further persuasive authority of *Williams v. Radio T2 UE Sydney* 1 MLR 33-NSW Supreme Court, 3rd December, 1993, is relied on in relation to a broadcast where clearly reference was made to a person not named who was described as being the son of two persons who were named by way of a nickname and who had recently lost an election to a "Board". The plaintiff was the son of persons identified by nickname only and had recently lost an election to the Board of the Paramatta Rugby League Club. Levine J. ordered the plaintiff to particularise by name and address the persons knowing the particulars of identification to whom the broadcast was published. Where he was unable to nominate any particular person he was ordered to nominate any group or class of persons by description, specifying the facts and matters relied on and asserting that that class or description of persons had knowledge of the facts relied on. The defendants particularly rely on the fact that the plaintiff was called on to identify all persons knowing the particulars of identification insofar as known to the plaintiffs and that the option of nominating a group or class of persons by description was available only where he was unable to nominate any particular person.

23. In the course of judgment in *Williams* Levine J. stated:

> "… However even in mass media cases a plaintiff would be ordered to give particulars identifying the persons to whom the publication is alleged to have been given where the plaintiff relies upon the knowledge of extrinsic facts in order to give the matter complained of a secondary or extended meaning for which the plaintiff contends as a true innuendo (*Fullam v. Newcastle Chronicle and Journal …*)."

24. The defendants also rely on *Moore v. The Australian Broadcasting Corporation* (Hunt J., Supreme Court of New South Wales) 5th

July, 1985), in which the plaintiffs were not named in an article but asserted that those who knew they had conducted an interrogation in question would identify them as criticised persons. The plaintiffs furnished particulars referring to "members of the police force" and "friends and relatives of members of the police force" and "shopkeepers, trades people and the like with whom the plaintiffs came in contact" the defendants sought and was granted particulars identifying the viewers who knew they had conducted the interrogation. There, Hunt J. stated:

> "Whether a plaintiff relies upon extrinsic facts which are known only to a very few people or whether he relies upon extrinsic facts which are known to a lot of people the defendant is clearly entitled to know just precisely what is the nature of the case which has been made against him."

25. In *Fullam v. Newcastle Chronicle* [1977] 3 All E.R. 32 a former priest and applicant for a teaching position sued for libel a newspaper which alleged he had left his parish "about seven years ago". In fact he had left much earlier and married and had a child. He pleaded the article meant that he had fathered an illegitimate child whist still a priest serving in a parish; had wrongly continued to serve as a priest after his marriage; had wrongly withheld the fact of his marriage from his ecclesiastical superiors and parishioners, and accordingly was unfit to be deputy headmaster of a school. The defendant sought particulars of the identity of the readers who knew that he had married and had a child more than seven years before.

26. It was held that although it is not the usual practice in libel actions to plead particular acts of publication, if the words complained of had been published in a newspaper, in cases where the action was based on a legal or "true" innuendo and where the ordinary readers of the paper would not have derived from the words complained of, the innuendo alleged, the plaintiff on those facts was required to particularise not only the special circumstances alleged to give rise to the innuendo, but also the identity of the readers of the paper who were alleged to know of those special circumstances, since the identity of those readers was a material fact on which the plaintiff relied in support of his cause of action. Denning M.R. considering the innuendo cases stated apparently as a general principle:

> "… he must in his statement of claim specify the particular person or persons to whom they were published and the special circumstances known to that person or persons… there is no exception in the case of a newspaper…"
>
> "In such cases as those, the identity of the person (who has knowledge of the special circumstances) is a most material fact in the cause of action. It is the publication to him which is the very foundation of the cause of action. So he should be identified in the pleading itself or in particulars under it."

27. As a matter of principle the defendants assert that a particular should let the other side know the precise case it has to meet, the seeking of particulars does not necessarily mean that the party seeking them does not know such case. To use the phrase of Barron J. in *Shepperton Investment v. Concast* (Unreported, High Court, 21st December, 1992):

> "… it may wish and probably does so, to tie its opponent to a particular case so that it will not be taken by surprise at the trial."

The Defendant's Case Summarised

28. In essence the defendant's case is maybe put this way. First, they contend that the fact that the presumption of general media publication did not apply in the instant case. Second, that the defendant was entitled to know sufficient information to allow it to meet the case, to know how to plead its defence and also to assess whether and/or how much to lodge and/or whether to settle. Third they assert the defendant is entitled to know the identity of those viewers who knew the special circumstances (i.e. the plaintiffs notepaper) which allegedly rendered the plaintiff recognisable. Fourth that the names of the publishees are particularly within the plaintiffs knowledge and are known to the defendant. Finally they contend that it would be no burden or injustice on the plaintiffs to ask them to identify the publishees in order to avoid trial by ambush.

The Case as Pleaded

29. In the context of this application, however, it is necessary to go back to the claim as advanced by all the pleadings. Having referred to a general hypothetical category of solicitors allegedly responsible for bringing bogus or unmeritorious claims and in respect of whom Dublin Bus had special rules and whose word could not be accepted as being reliable or truthful, the plaintiffs claim a specific reference was made by the interviewer to headed notepaper. Thereafter there follows a series of remarks derogatory and defamatory of solicitors who deserved a rap on the knuckles. In the course of the interview a Dublin Bus employee was pictured going through a file in which a sheet of the plaintiffs headed notepaper was stated to be visible. The plaintiffs rely upon the entire content both audio and visual of this section of the programme.

30. While an unsustainable objection was made to my viewing the video excerpt by the plaintiffs, in fact it was unnecessary to do so. Reference had already been made to the notepaper. It was exhibited. It sets out the plaintiffs names and also, in smaller print, their profession as solicitors. Its prominence and transience or lack thereof will undoubtedly be in issue at trial. But thereafter the following exchange is stated to have taken place in the course of the interview during which time the plaintiffs notepaper was shown:

"Presenter
Pat Kelly blames one sector in particular for fuelling the conversation culture.

Pat Kelly – C.I.E. Claims Investigator
The legal fraternity out there, the solicitors in particular with their advertising, it is the biggest section of advertising in the Golden Pages. I am convinced that it has encouraged a lot of people to make claims, particularly when they are promised that there is no risk, no win no fee. It is openly encouraging people to make claims whether as little or no injury.

Presenter:

> What you make of them when you see these claims coming in?

Pat Kelly:

> Well I think that the firms of solicitors who take these cases on have a lot to answer for and I think there should be a serious rap of the knuckles for any body wasting Court time.

Presenter:

Do you have a view on whether or not there is a particular solicitor out there who is focusing on this?

Pat Kelly:

Absolutely, within my department we would have a list of these people who are very well known to us and we would watch their claims very carefully indeed.

Presenter:

Solicitors?

Pat Kelly:

Yes.

Presenter:

So if a name comes in on headed notepaper you would think this could be a problem?

Pat Kelly:

Yes, we have rules for dealing with claims from particular solicitors and their staff.

Presenter:

What are the rules?

Pat Kelly:

Just watch it very carefully, leave no stone unturned, don't accept a verbal piece of information, every thing must be secured and nailed down."

31. The innuendos pleaded by the plaintiffs in relation to these words and pictures say they were meant and were understood to mean -

(a) That the plaintiffs were responsible for bringing bogus personal injury claims;

(b) That the plaintiffs firm was on a list kept by Dublin Bus in respect of solicitors who were responsible for bringing bogus claims;

(c) That the plaintiffs firm was a firm in respect of which Dublin Bus had special rules;

(d) That the plaintiffs and each of them deserved a rap on the knuckles;

(e) That the plaintiffs and each of them were dishonest;

(f) That the plaintiffs and each of them were guilty of unethical conduct to solicitors;

(g) That the plaintiffs and each of them were guilty of unprofessional conduct to solicitors;

(h) That the plaintiffs and each of them were untrustworthy;

(i) That the plaintiffs and each of them were parties to fraudulent claims;

(j) That the plaintiffs and each of them were not fit to be solicitors.

32. Therefore, and even while expressly stating my reservations as to context and applicability of such authorities, there is a fundamental distinction between such authorities cited by the defendant and the facts of the instant case. It is in the nature of the libel itself. The defendants seek to contend that the plaintiffs are "riding two horses" and that the plaintiffs will resort *either* to a class of persons who have special knowledge of their identity or alternatively as a fall back upon members of the general public or persons who have some knowledge of them and will testify on their behalf.

33. However whether applicable or not, and whether or not they should be followed at all in the light of Irish precedent referred to below, the authorities cited are ones where reliance must in any case be placed on extrinsic facts in order to establish innuendo by identity. This arises in circumstances where the identity of the plaintiffs would not be apparent to an ordinary reader but to a particular class. It is questionable whether *extrinsic* facts may arise in this case at all. Assuming for a moment the correctness of the plaintiffs contentions, the real essence of the plaintiffs case is that it was said of them that they were dishonest solicitors who brought bogus claims. Mr. Hugh Mohan S.C. on behalf of the plaintiffs submits that the plaintiffs will not be relying on extrinsic facts and that the defendants will know the case being advanced by the plaintiff. Furthermore he says the identity of the witnesses cannot assist the defendant in the preparation of any aspect of its defence which as yet has not been filed.

34. It is important again to recollect that this is not a case which will run in the context of rules which may delimit the identity of witnesses. It is also not denied that the plaintiff would be at liberty in any case to call such witnesses as he may choose at the hearing of the action. He would not be delimited by any response which was given in the reply to particulars on this point.

35. Moreover as pointed out in a further Australian authority of *Hughes v. Mirror Newspapers* [1985] 3 NSWLR where, in support of a pleaded imputation, a plaintiff relied on *extrinsic* facts alternatively *as being within the general knowledge of the community* (and thus within the natural and ordinary meaning of the matter complained of), and of supporting a true innuendo, he will *not* be ordered to supply particulars of the persons having knowledge of those facts, unless it is obvious that the first possible alternative *must* fail. Such particulars, that authority states, would be ordered only where the class of readers having such knowledge may be sufficiently limited in size or composition to enable the defendant to rely upon some defence which would not have been applicable to a

publication to a wider class or a different class, or where the size of the composition of that class may dictate to the defendant the amount which it should consider paying into court. In *Hughes*, Hunt J. relied on *Fullam v. Newcastle Chronicle and Journal Limited* and *Lazarus v. Deutsch Lufthansa AG* to which reference has been made earlier. An examination of the case as pleaded by the plaintiff demonstrates what arises here is not simply a question of a publication to a particular class of persons. This is essentially a "mass media" case; thus the plaintiff is entitled in the first instance to rely on the natural and ordinary meaning of the matters complained of as supporting an innuendo. It is not open to the defendants to contend that the plaintiff must elect between the general effect of the imputations and the effect upon a particular class of person when, as here, there is a *prima facie* mass media case and where publication has taken place to the general public on matters within the general knowledge of the community. This case is distinguishable from *Fullam v. Newcastle Chronicle*. There the ordinary readers of the newspaper would not have derived from the words complained of the innuendo alleged. Thus the plaintiff was required to particularise not only the special circumstances alleged to give rise to the innuendo, but also to the identity of the readers of the paper who were alleged to know of those special circumstances, since the identity of those readers was a material fact in which the plaintiff relied in support of his cause of action. But, on the facts, that is not the case here, and one need go on further than considering the nature of the words complained of, the imputations in their context, and the surrounding circumstances, to see that this is so.

36. Moreover as was pointed out by Chief Baron Palles in the case of *Keogh v. Dental Hospital* [1910] I.R. at p. 166 quite different considerations arise in regard to actions for slander as contrasted to libel. In that decision the Chief Baron relying on a decision of Pollock B in *Gouraud v. Fitzgerald* 37 W.R. 55 based his judgment on this well settled distinction. In the former it may be necessary to know the occasions of the alleged speaking to enable the defendant to be prepared to show (if the fact be so) that he was not present on those occasions. But this is not so in the instant case. The case of *Bradbury v. Cooper* referred to in *Keogh* was also an action of slander and it was pleaded that the remarks in question were made "to a certain customer of the plaintiff in the way of his business". This shows the distinction and its rationale.

37. The principle is further illustrated in the context of the decision of the Supreme Court in *Doyle v. Independent Newspapers (Ireland) Limited* [2001] I.R. at 595 where the defendant published of the plaintiff, a former coach of the Irish rugby team that he had become "ostracised by the decision making core among the players". The defendants pleaded justification in their defence. The plaintiffs sought particulars in relation to the plea including, *inter alia*, the identity of the players and manner in which the plaintiff was allegedly ostracised. The defendants stated that the particulars were matters for evidence. The High Court judge ordered replies to the particulars be given.

38. In allowing the appeal the Supreme Court refused to direct that the required particulars should be replied to, and held that while the issue of direction of particulars may be a matter which falls within the discretion of a High Court Judge, it was generally wrong in principle to require a party to furnish and advance to the other party the names of the witnesses he is going to call in relation to any specific plea in his defence, or in a *statement of claim*. This decision was taken in the context of a finding that the pleadings in question could not be described as being so general or imprecise that the plaintiff could not know what case he would have to meet.

39. Keane C.J. speaking on behalf of the court stated at p. 598:

> "The cases in which a court will actually order a defendant to say what witnesses he is going to produce at the trial are extremely rare and unusual and, even allowing for the somewhat unusual features of the law of defamation, it does not appear to me that this is a case where a party must be ordered to say precisely what witnesses he is going to call. It should be observed that these would not necessarily be players, members of the squad. If the defendants are, as they say they are, going to prove the manner in which the coach was being ostracised by his players, that could be somebody at a restaurant, somebody at a hotel, somebody who happened to be in the same room as him who was not a player himself or herself but who thought he saw some conduct which would amount to ostracism or shunning of the manager, closely relating to a poor performance by him as a coach.
>
> That is what the evidence may be, obviously the court does not know the plaintiff does not know at this stage what specific witnesses are going to produced, but then *that is in the nature of adversarial litigation* and there is certainly no general principle requiring one party to furnish in advance to the other the names of the witnesses he is going to call in relation to a specific plea in his defence or in a statement of claim as the case may be…"

40. The issue arises even more clearly in the decision of the Supreme Court in *Fannin and Company Limited and Surgical Distributors Limited and Brian Desmond Murray and P. Kevin Maughan* a judgment delivered on the 27th February, 1975, by Walsh J.

41. In the High Court the defendants in this libel action brought a motion seeking an order that the plaintiff should furnish particulars of the names and addresses of the persons to whom they alleged the libel complained of was published. The plaintiffs resisted the application: in the High Court, Gannon J. made an order that such particulars should be furnished.

42. In the course of the judgment of the court Walsh J. speaking on behalf of the court stated:

> "It is well established that a plaintiff will not be compelled to furnish particulars of the names and addresses of the persons to whom publication was made save in special circumstances. The principle underlying this is the view that the defendant is usually in a better position than any body to know to whom he published the alleged libel. I am satisfied that no special circumstances had been shown to exist in the present case which would warrant a departure from the established practice. Counsel for the defendants have submitted that the publication complained of was a private publication and that in such cases particulars of the nature sought or ordered to be furnished. In my view the submission by counsel for the plaintiffs to the effect that the publication concerned and complained of in this case, while it may be regarded as a restricted publication in that it was sent to persons interested in a particular trade, surgical instruments etc., that differs very markedly from a private communication. It is of course conceivable that private communications, which would not in themselves amount to publications, may achieve publication through negligence or some other misadventure. However there is nothing in the present case to indicate anything of that nature. The publication of the plaintiff here was to a fairly wide circle even though not to the world at large. Insofar as the area of publication or the number of persons to whom they alleged libel may have been published affects damages in the case, it is of course a matter for the plaintiffs to establish this as part of their ordinary proof and I cannot see the forces of submission made by counsel on behalf of the defendant to the effect that failure to provide such particulars would make the defence difficult for them."

43. Where defamatory meaning only arises because of facts which are known to the recipients there is said to be an innuendo. This has two principal consequences. First the plaintiff must plead the special meaning he contends the words have and prove that the facts upon which this meaning is based were known to at least one other person to whom the words were published. Second the

meaning resulting from those words may give rise to a cause of action separate from that (if any) arising from the words in their ordinary and natural meaning, because it is an *extended* meaning not present in the words themselves. Where the plaintiff relies on such a meaning:

> "… there is one cause of action for the libel itself, based on whatever imputations or implications can reasonably be derived from the words themselves, and there is another different cause of action, namely, the innuendo based not merely on the libel itself but on an extended meaning created by a conjunction of the words with something outside them. The latter cause of action cannot come into existence unless there is some extrinsic fact to create the extended meaning (per Pearce L.J. in *Grubb v. Bristol United Press* [1963] 1 QB 309 at 327) (a)."

44. "True" or "Legal" innuendo in this sense only exists where the extended meaning arises from facts passing beyond general knowledge. If the defamatory meaning arises indirectly by inference or implication from the words published without the aid of *any* extrinsic facts there is said to be a "false" or "popular" innuendo. This does not give rise to a separate cause of action (cf. judgment of Lord Devlin in *Lewis v. Daily Telegraph* [1964] A.C. 234 at p. 278)."

45. Primarily the latter is the situation here, where there is a publication to the general public at large on matters which by the very context and circumstances of the publication, demonstrate an imputation defamatory in nature, that is, to publish allegedly of the plaintiffs, that they had been guilty of sharp practice or other disreputable or dishonest or incompetent conduct in their profession.

46. As is pointed out in *Mahon v. Celbridge Spinning Company Limited* [1967] I.R. the purpose of pleading is to allow the parties to know in broad outline the case which they will have to meet at the trial.

47. While in certain circumstances the question may arise as to whether particulars of the type sought in this application should be granted, the defendant is not entitled to the relief sought in the instant case for the reasons outlined.

48. The application therefore will be dismissed.