

THE HIGH COURT

[2018 No. 5903 P.]

BETWEEN

BEN (OTHERWISE BERNARD) GILROY

AND

VINCENT BYRNE

PLAINTIFFS

AND

FIONA O'LEARY

DEFENDANT

JUDGMENT of Mr. Justice Allen delivered on the 1st day of February, 2019

1. This is an application by the first plaintiff, who represents himself, for an interlocutory injunction requiring the defendant to remove from social media and all other platforms a video said to be defamatory of him.
2. On or shortly before 23rd June, 2018 the defendant made a fifteen-minute homemade video recording which she posted on YouTube under the title *"the Sovereign Movement and its links to MMS Bleach"*.
3. The plaintiffs took the view that the video was defamatory of them and on 29th June, 2018 issued a plenary summons claiming damages for defamation and an order requiring the defendant to take down the video and some unidentified *"offending blogs"*.
4. By notice of motion issued on 10th August, 2018 the first plaintiff, only, applied for a variety of interlocutory orders, principally an order directing the defendant to remove the video from YouTube.
5. The notice of motion seeks orders in relation to both plaintiffs. The first plaintiff is not entitled to do that and I will deal with the motion on the basis that it is the application of the first plaintiff, and the first plaintiff alone.
6. Besides an order for the removal of the video, the notice of motion asks for a number of impossibly broad and vague orders, such as restraining all persons with notice of the making of the order *"from contacting any person known or unknown or doing business with the plaintiffs, if the purpose of such contact is to further defame or cause harm to the plaintiffs"* and *"directing the defendant, her servants and/or agents and all other persons having notice of the making of the said order and their servants or agents, to remove immediately, all videos ... where she speaks about the plaintiffs or other videos where she indicates, implies or where it could be construed that she is referring to the plaintiffs"* and an order for the publication of an apology and retraction. At the hearing before me, however, the focus was on the particular video.
7. The plaintiffs each describe themselves as *"one of the people of éire (sic.) and a businessman"*. The defendant describes herself as a *"carer and voluntary autism and rights activist"*.
8. MMS is an acronym for *"miracle mineral solution"*. It is made by mixing a 28% sodium chlorite solution with citric acid. Miracle mineral solution is held out by its proponents as a medicine, capable of treating the entire spectrum of conditions and illnesses ranging from the common cold to HIV and cancer. In particular, as far as the defendant is concerned, it is held out as a cure or treatment for autism. Users are advised to take the solution orally or by enema.
9. Far from conjuring a panacea, the concoction of sodium chlorite and citric acid produces chlorine dioxide, which is a bleach. Unsurprisingly, MMS has been the subject of warning notices from the U.S. Food and Drugs Administration and the Health Products Regulatory Authority in Ireland.
10. It is common case that for some years the defendant has been campaigning on television, radio, newspapers, and on social media against MMS, and in particular against the propaganda that it is a treatment or cure for autism. The defendant's strongly held view is that the product is not only ineffective but harmful.
11. The defendant's declared object in making and posting the video recording was to establish a connection between the Sovereign Movement and MMS.
12. The defendant's case is that the plaintiffs are part of, or associated with, a loose organisation or movement known as the Sovereign Movement. The Sovereign Movement is said by the defendant to be a fringe group who reject the law of the State and believe that they are governed by their own set of rules and laws known as *"common laws"*. Members or adherents of the Sovereign Movement are said to espouse pseudo law.
13. The first plaintiff denies that he is a member of, or has any knowledge of, the Sovereign Movement. His complaint, however, is not that the video links him to the Sovereign Movement per se but that the video links him, through the Sovereign Movement, to MMS and to *"what is going on"*.
14. The first person mentioned in the video is the first plaintiff who, with another named man, was said to prey on vulnerable people in crisis situations *"... like for example if someone was losing their home they can fight the courts ..."*. The defendant goes on to identify a man, said to be a member of the Sovereign Movement, who was prosecuted and convicted of manufacturing and selling MMS; then to identify the second plaintiff, who is said to advocate the product on an internet radio channel; then to identify a man said to have been selling MMS as a cure for autism; then to identify a woman said to have been *"basically one of the worst quacks out there"*; then to identify a man from Northern Ireland said to have been selling MMS as a treatment for autism; then a man called Reverend Rashers, said to be *"the big peddler of this bleach product"* and to be part of the Sovereign Movement; then to identify a man said to be involved in the Sovereign Movement, and said to be using MMS and advocating it for other conditions; and then a man called Reverend Carey. These so-called reverends are associated with the so-called Genesis II Church which, is said to be a non-

religious church, whatever that is supposed to mean.

15. From time to time during the video the plaintiff is heard to recapitulate the names she has already mentioned. She does not on any occasion recall the name of the first plaintiff, although she frequently names the second plaintiff.

16. Along the way, the defendant suggests that everything those involved in the Sovereign Movement believe is based on quacks, conspiracy theory and paranoia and goes on to say that *"when you start torturing children with bleach then you need to be exposed so that's why I am making this video tonight"*. Later she is heard to say that the second plaintiff *"... and his cohorts enjoy that, and I mean that, they actually enjoy it ... and we have the Sovereign Movement aiding and abetting this criminal behaviour, helping people to torture children and even probably involved in the making of this product."*

17. The first plaintiff's case is that the words used meant and were understood to mean:-

- (a) That he is engaged in child torture;
- (b) That he is engaged in child abuse;
- (c) That he is engaged in the practice of procuring and distributing MMS;
- (d) That he is engaged in the administration to children of MMS by forcibly putting bleach up children's back passages;
- (e) That the first plaintiff enjoys and takes pleasure in harm and damage caused to children;
- (f) That the first plaintiff is a child abuser and actually enjoys such depraved practices.

18. The first plaintiff's case is that he has nothing to do with MMS, and never had. As previously observed, he does not complain that the suggestion that he was involved with or a member of the Sovereign Movement, by itself, is defamatory of him.

19. The defendant's case is that the words she used did not bear and were not capable of bearing the meanings alleged by the plaintiff or any meaning defamatory of the plaintiff. She pleads that she is honestly of the opinion, and that is amounts to fair comment to suggest, that the Sovereign Movement is a cult and/or manifests cult-like characteristics and that the first plaintiff has rejected the laws of the State and the authority of the courts in representing adherents of the Sovereign Movement in repossession cases.

20. The first plaintiff submits that this application can be dealt with by simply applying the test laid down by the Supreme Court in *Campus Oil v. Minister for Energy (No. 2)* [1983] I.R. 88. There is, he argues, a fair issue to be tried. The defendant, he argues, could not possibly suffer any loss if she were ordered to take the video down but the damage to first plaintiff's good name, and the risk to his personal security, would be thereby limited. The first plaintiff offers an undertaking to pay damages to the defendant in the event that the action were to fail, but does not address the adequacy of an award of damages against the defendant as a sufficient remedy if the action were to succeed.

21. The law governing the making of orders prohibiting the publication or republication of defamatory statements is now to be found in s. 33(1) of the Defamation Act, 2009, which provides:

"33. - (1) The High Court, or where a defamation action has been brought, the court in which it was brought, may, upon the application of the plaintiff, make an order prohibiting the publication or further publication of the statement in respect of which the application was made if in its opinion—

- (a) the statement is defamatory, and*
- (b) the defendant has no defence to the action that is reasonably likely to succeed.*

(2) Where an order is made under this section it shall not operate to prohibit the reporting of the making of that order provided that such reporting does not include the publication of the statement to which the order relates.

(3) In this section 'order' means -

- (a) an interim order,*
- (b) an interlocutory order, or*
- (c) a permanent order."*

22. Counsel for the defendant, citing the judgment of Barrett J. in *Philpott v. Irish Examiner* [2016] IEHC 62, submits that before granting an injunction which would curtail the defendant's constitutional right to freedom of expression, the court must be *"forcefully of the opinion"* that the statement is defamatory and that the defendant has no defence.

23. In *Philpott v. Irish Examiner Limited* [2016] IEHC 62, Barrett J. compared and contrasted the statutory test and the common law test. He suggested, on the one hand, that the Oireachtas appeared to have lowered the bar for the granting of an interlocutory injunction restraining the publication of a defamatory statement and on the other that the test prescribed by s. 33 might be more exacting than that at common law. Barrett J. emphasised the requirement that the court be of the opinion that the statement *"is"* defamatory.

24. Barrett J. (citing *Mercury Engineering v. McCool Controls and Engineering Limited* [2011] IEHC 425 and *Cogley v. RTE* [2005] 4 I.R. 79) noted that at common law injunctive relief would only be granted where the court was satisfied that the material complained of was unarguably defamatory. He suggests that the requirement under s. 33 of the Act of 2009, that the court must be of opinion that the statement *"is"* defamatory might be a higher bar. Respectfully, I cannot see the difference between a statement that *"is"*

defamatory and a statement that is “unarguably” defamatory.

25. The foundation of the defendant’s submission in this case was an observation by Barrett J. that, in a case in which the s. 33 criteria were satisfied, the court might be possessed of the necessary opinion but not be sufficiently confident of that opinion to “wield the hammer of injunctive relief”. I am not sure that I follow. The court, applying the *Campus Oil* guidelines, will not look at the strength of the plaintiff’s case beyond deciding whether there is a *bona fide* issue to be tried. Nor, as I understand the law, will the court when applying the *Maha Lingham* test, go beyond deciding whether the plaintiff’s case is a strong case, to assess the prospects of the plaintiff succeeding at trial.

26. In *Philpott* Barrett J. was invited to formulate the test to be applied on an application for a s. 33 order. Having carefully examined the newspaper articles complained of, Barrett J. concluded that neither of the articles, however viewed, and no statement contained in either of them, was defamatory of the plaintiff. In those circumstances, it seems to me, the court did not need to decide any issue as to the nature or strength of the opinion that would engage the jurisdiction to make an order under section 33.

27. The Defamation Act, 2009 was an Act to revise in part the law of defamation; to repeal the Defamation Act, 1961; and to provide for matters connected therewith. It did not in terms abolish the torts of libel and slander but provided that they should cease to be so described and should instead be collectively described as the tort of defamation. By s. 3(2) the Act does not affect the operation of the general law in relation to defamation, except to the extent that it provides otherwise, either expressly or by necessary implication.

28. The Act of 2009, in s. 33, sets out the test to be applied on an application for an order prohibiting the publication of a defamatory statement. To my mind, the Oireachtas, when providing for the threshold to be met before such an order can be made, could not have contemplated that such an order might be made by reference to any lower common law threshold. By the same token, it makes no sense to contemplate that since the coming into force of the Act of 2009 any court might be concerned with whether the plaintiff had met any higher common law threshold. It seems to me, therefore, that since 1st January, 2010 the law which theretofore applied was replaced.

29. Dr. Cox and Mr. McCullough S.C. in their very valuable work on *Defamation Law and Practice (2014)* (Clarus Press) at paras. 12-09 to 12-15 look at the common law rules in relation to interlocutory injunctions and suggest that there may be some difficulty in reconciling the authorities. “Given this uncertainty”, it is said at para 12-16, “it is helpful that the rules governing the grant of injunctive relief have been given a statutory footing in the 2009 Act.”

30. For my own part, I would have thought that the pre-2010 law was tolerably clear. I do not see any difference between decision of Clarke J. in *Cogley v. RTE* [2005] 4 I.R. 79 and those of Kelly J. in *Reynolds v. Malocco* [1999] 2 I.R. 203 and *Foley v. Sunday Newspapers* [2005] 1 I.R. 88.

31. I respectfully agree with *Cox and McCullough* that in *Cogley* Clarke J., in considering an application for an interlocutory injunction in respect of a publication claimed to be defamatory, justified the very onerous burden on the plaintiff by reference to *Campus Oil* principles, specifically the very great difficulty at the interlocutory stage of weighing the likelihood of the plaintiff ultimately succeeding or failing at trial, or the likelihood of the defendant succeeding at trial in maintaining any defence in defamation proceedings. What I am unconvinced of is the suggestion that Kelly J. in *Reynolds* and *Foley* held that the court should not have recourse to “normal principles” in deciding whether or not to grant an interlocutory injunction in a defamation case. The learned authors, at para 12-15, quote a sentence from para. 32 of the judgment in *Foley* where Kelly J. said:—

“A good example of this is the rule that save in truly exceptional circumstances a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at trial.”

32. The immediately preceding sentence in *Foley* is:—

“Over the years since the decision in *American Cyanamid Co. v. Ethicon Ltd.* [1975] A.C. 396, a number of special categories of cases have been identified where the *American Cyanamid* guidelines, even if satisfied, do not result in an interlocutory injunction being granted.” [Emphasis added.]

33. It seems to me that there is an important distinction to be drawn between the guidelines and the principles laid down by *American Cyanamid*, and endorsed by the Supreme Court in *Campus Oil*. As Kelly J. pointed out in *Foley*, at para. 30, Lord Diplock acknowledged that in addition to the three questions making up the guidelines, there might be many other special factors to be taken into consideration in the particular circumstances of individual cases.

34. In *Cogley*, the test applied by Clarke J. was whether, on the evidence available at the interlocutory stage, it was clear that the plaintiff would ultimately succeed at trial. The plaintiff, he said, would fall at the first hurdle if it appeared to the court that there was any reasonable basis for contending that the defendant might succeed at trial. As I understand the judgment, Clarke J. referenced the principles established by and developed since *Campus Oil* to explain why the guidelines ordinarily applicable were not appropriate in the case of an application for prior restraint: which it seems to me was precisely what Kelly J. did in *Reynolds* and *Foley*.

35. If I am wrong in the view I take of the pre-2010 law, the Defamation Act, 2009 was certainly an opportunity to clarify it.

36. Part 4 of the Act of 2009 provides for remedies which are (s. 28) a declaratory order; (s. 30) a correction order; (s. 31) damages; (s. 32) aggravated and punitive damages; and (s. 33) an order prohibiting the publication of a defamatory statement. That Part also makes provision for the lodgment and acceptance of money in settlement of an action for damages for defamation (s. 29) and for the summary disposal of defamation actions (section 34).

37. On the making of a declaratory order under s. 28, the court can go on to make a correction order under s. 30 or to grant an injunction under s. 33, but may not award damages. An application under s. 28, whether successful or unsuccessful, is a bar to any other proceedings arising out of the statement the subject of the application.

38. Section 28 of the Act of 2009 requires that before making a declaratory order the court must be “satisfied” that the statement is defamatory of the applicant or plaintiff, and that the defendant has “no defence” to the application or actions.

39. The requirements for a correction order are that there should be a “finding” that the statement was defamatory, and that the defendant has “no defence” to the action.

40. The conditions for the making of an order prohibiting the publication of a defamatory statement are expressed differently. Such an order may be made where the court is of the "*opinion*" that the statement was defamatory and that the defendant "*has no defence to the action that is reasonable likely to succeed*".

41. The Act of 2009, then, uses different words in different places. There is a presumption in statutory interpretation that different words should be given different meanings. A variation in terminology is taken to denote a different legal meaning. (See for example *Bennion Statutory Interpretation*.)

42. *Cox and McCullough*, at para. 12-23, canvas the possibility that the requirement in s. 33 of the Act of 2009 that the court should be of the "*opinion*" that a statement is defamatory, might be less exacting than the requirement under the common law rules that the plaintiff must show that there was "*no doubt*" that they were.

43. To my mind it is difficult to contemplate that a court might be "*satisfied*" of a fact without going on to make a "*finding*" to that effect, or that a court might make a "*finding*" without first being "*satisfied*". In principle, it seems to me that if the court can make a correction order or an order prohibiting publication ancillary to, or consequential upon, a declaratory order, the threshold test for a declaratory order cannot be any less onerous than the test to be applied on an application for a correction order or an order prohibiting publication, on its own. If that is so, the requirement in s. 28 that the court be "*satisfied*" must be the same as a "*finding*" in section 30.

44. On an application under s. 28 or s. 30, the court must be satisfied, or make a finding, that the defendant "*has no defence*". The test in s. 33 appears *prima facie* to be different. On such an application, the court must be of the "*opinion*" that the "*defendant has no defence to the action that is reasonably likely to succeed*." Apart from the issue as to whether there is any difference between the court being of the "*opinion*" and being "*satisfied*", an issue arises as to whether there is any difference between the reference in ss. 28 and 30 to the defendant having no defence, and the reference in s. 33 to the defendant having no defence to the action that is reasonably likely to succeed.

45. In construing s. 33, it is useful to look at s. 34, where the requirement is also expressed in terms of the court being satisfied that "*the defendant has no defence which is reasonably likely to succeed*". *Lowry v. Smyth* [2012] 1 I.R. 400 was an appeal to the High Court from a decision of the Circuit Court refusing an application under s. 34(1) of the Act of 2009 for summary relief. The language in s. 34 for the granting of summary relief is a mixture of the language used in sections 28 and 33. On an application under s. 34 the court must be "*satisfied*" that the statement in respect of which the action was brought was defamatory and that "*the defendant has no defence to the action that is reasonable likely to succeed*", as opposed to simply "*no defence*" to the action.

46. Kearns P. in *Lowry v. Smyth* characterised the relief available to either party under s. 34 as "*nuclear*". Noting the reluctance of the court to strike out proceedings and thereby deprive either a plaintiff or a defendant of access to the courts, he accepted the argument made on behalf of the defendant (albeit an argument that was unchallenged on behalf of the plaintiff) that the test on an application for summary judgment under s. 34 of the Act of 2009 was the same as the test applicable to applications for summary judgment generally.

47. Kearns P. in *Lowry* at para. 29, adopted the formulation of the test by Hardiman J. in *Aer Rianta cpt v. Ryanair Ltd.* [2001] 4 I.R. 607 where Hardiman J. said, at p. 623:

"In my view, the fundamental questions to be posed on an application such as this remain: is it 'very clear' that the defendant has no case? Is there either no issue to be tried or only issues which are simple and easily determined? Do the defendant's affidavits fail to disclose even an arguable defence?"

48. At para. 30 of his judgment in *Lowry* Kearns P. continued:-

"30. The test of 'arguable defence' is that which is argued before judges of the High Court on a daily basis to persuade them to allow contested cases to proceed to plenary hearing, notwithstanding assertions by a plaintiff that he is entitled to summary judgment. A refusal to accede to such an approach in all but the clearest cases would altogether deprive a defendant of his legal and constitutional rights to defend himself, either in accordance with article 6 of the European Convention on Human Rights 1950 or by reference to the principles laid down in In Re Haughey [1971] I.R. 217.

31. By the same token, an application brought under s. 34 of the Act of 2009 by a defendant to dismiss a plaintiff's claim would also require to measure up to a test as to whether or not the plaintiff had demonstrated a stateable cause of action and not one which is merely frivolous or vexatious."

49. Kearns P. found that the high threshold required by law could only mean that the plaintiff must satisfy the court that the defendant has no arguable case to suggest that his defence is reasonably likely to succeed. He noted that s. 28 provides for relief whether there is "*no defence*", and s. 34 provides for relief "*where the defendant has no defence which is reasonably likely to succeed*" but said that in practical terms, the test under both sections was a high one, though that under s. 28 must be at the very highest, being that of no defence at all.

50. I confess difficulty understanding why, in principle, the test applicable to an application for a declaratory order and that applicable to an application for summary disposal might be different. For that matter, I confess difficulty in understanding the practical difference between a declaratory order and an order for summary relief. A successful applicant under s. 28 will obtain a declaration that the statement is false and defamatory of him or her and, perhaps, a correction order and/or an order prohibiting further publication. A plaintiff who succeeds in an application under s. 34 will secure "*summary relief*", that is, a correction order or an order prohibiting further publication. *Cox and McCullough* in their commentary on summary disposal suggest, at para. 11-81, that the use of the word "*or*" in s. 34 may mean that a successful applicant is confined to one or the other, but in their commentary on s. 28, which also uses the word "*or*" suggest, at para. 12-66, that the Circuit Court, on an application under that section may make a correction order and grant injunctive relief. It seems to me that in each case the court must either be confined to making one or the other order, or have power to make both and that, purposively construed, there must be in each case a power to make either or both. A declaratory order undoubtedly is valuable by itself, but it seems to me that a correction order or an order enjoining further publication necessarily conveys that the court has made a finding that the statement is defamatory of the plaintiff.

51. I digress. I have said earlier that in my view the test applicable on a s. 28 application for a declaratory order cannot be lower than that for a s. 30 or s. 33 order, which may be made upon the making of a declaratory order. Equally, it seems to me that the threshold test on an application by a plaintiff under s. 34 for summary relief cannot logically be lower than the test applicable for either or both of the orders which comprise summary relief. For the reasons given earlier, it seems to me that there is no difference

between the court being "satisfied" and "finding" that the conditions have been met. If, for the purposes of a free-standing correction order under s. 30 the court must be satisfied that the defendant "has no defence", it makes no sense to me to contemplate that the court might make such an order on a s. 34 application by reference to any lesser threshold.

52. There remains the issue as to whether there is any difference between an "opinion" and a "finding" or the court being "satisfied" that the conditions have been met. While I do not believe that the Oireachtas can have intended that a consequential or ancillary correction or publication order might be made on the basis of any lesser test than that applicable to a free standing declaratory or summary disposal order, it does not follow that the threshold for an order prohibiting publication must necessarily be as high. So logically, if "satisfied" is a higher bar, there is no reason why a plaintiff or applicant surmounting that bar should not have an order for which the bar is lower.

53. After careful consideration, I have come to the conclusion that there is no difference between an "opinion" and a "finding" or the court being "satisfied". It seems to me that the key to understanding what the test in s. 33 is, is that the same test is applicable to interim, interlocutory, and permanent orders. The jurisdiction of the court to make prior restraint orders is as delicate post 2010 as it previously was. I cannot conceive that the court would permanently interfere with free speech or the free expression of opinion unless in a case where it was satisfied and/or had made a finding that the statement was defamatory of the plaintiff and that the defendant had no defence.

54. The remedies available under ss. 28, 30 and 34 are all final orders. An order under s. 33 may be a final order. Traditionally, at least, the primary remedy for defamation was damages. An award of damages must be predicated upon a determination (usually by a jury) that the statement was defamatory. In principle, it seems to me that the threshold test on an application for an order permanently prohibiting a defendant from publishing a statement, or ordering a defendant to publish a correction, cannot be any lower than that for an award of damages.

55. For these reasons, I have come to the view that notwithstanding the difference in language in ss. 28, 30, 33 and 34, the test is the same for all four.

56. As, on the authority of *Lowry v. Smyth* [2012] 1 I.R. 400, it must be "very clear" that the defendant has no defence, the onus is on the plaintiff applying for a s. 33 order to establish that the statement "is" defamatory. That onus, in my view, is the same as the common law requirement expressed variously as a requirement that the plaintiff must show that it was clear that he would succeed at trial (*Cogley*) or it was clear that no defence would succeed at trial (*Foley*).

57. In considering the requirement for clarity as to the outcome of the action, it is useful to recall what was said by the Supreme Court in *Sinclair v. Gogarty* [1937] I.R. 377. O'Sullivan C.J., citing *Coulson v. Coulson* 3 T.L.R. 846 and *Bonnard v. Perryman* [1891] 2 Ch. 269 said at p.384 of the report:-

"I realise that in granting an interlocutory injunction to restrain the publication of a libel the Court is exercising a jurisdiction which has been described as a jurisdiction of a delicate nature.

The principle upon which the Court should act in considering such applications ... is this, that an interlocutory injunction should only be granted in the clearest cases where any jury would say that the matter complained of was libellous, and where if the jury did not so find the Court would set aside the verdict as unreasonable. It is unnecessary for me to decide whether that principle is applicable in all cases. I accept it as applicable in the present case."

58. For the reasons given, I have come to the conclusion that the threshold under s. 33 is the same as that which applied at common law.

59. It seems to me that the issue of what this video might convey to reasonable members of society is quintessentially a matter for a jury to decide. In my view, a jury might very well take the view that the case is greatly over pleaded. As I have said, the first plaintiff does not make the case that it was defamatory of him to simply associate him the Sovereign Movement or to have said, simply, that he might espouse the quackery and pseudo-science of MMS.

60. It seems to me that, at the very least, there is an issue to be tried as to whether the video conveys the alleged meanings. It occurs to me, indeed, that if this action goes to trial, there may very well be an issue as to whether all or any of the alleged meanings should go to the jury. For present purposes, however, it is sufficient if I say that I cannot conceive that the Court of Appeal would interfere with a verdict of a jury that the video was not defamatory of the plaintiff.

61. The first plaintiff having failed to satisfy the legal threshold for the granting of an order pursuant to s. 33 of the Defamation Act, 2009, his application for an order for the removal of the video must be refused.