

THE HIGH COURT

Record No. 2004 19780 P

BETWEEN

MARTIN FOLEY

PLAINTIFF

AND

SUNDAY NEWSPAPERS LIMITED

RESPONDENT

Judgment of Mr. Justice Kelly delivered the 28th of January, 2005**These Proceedings**

1. This action was commenced by the issue of a plenary summons on 16th December, 2004. On the same day a notice of motion was issued seeking interlocutory relief which is the subject of this judgment. That relief is as follows:-

"(1) An order by way of prohibitory interlocutory injunction restraining the defendant, its servants or agents, from publishing or causing to be published in any form or be broadcast in any sound or television broadcast or by means of any cable or satellite programme service or public computer network, any material relating to or concerning the plaintiff (whether referred to by name or by necessary implication) that;

(a) Encourages, advocates, promotes or predicts, explicitly or by necessary implication, an attempt to endanger the life and/or the health of the plaintiff;

(b) Suggests, explicitly or by necessary implication, that the plaintiff has acted or is acting as an informer to An Garda Síochána in respect of the activities of persons with criminal tendencies and/or persons engaged in drug dealing;

(c) Is intended to interfere with and/or is in reckless disregard of the plaintiff's right to life, privacy and bodily integrity pursuant to Article 40.3 of Bunreacht na hÉireann.

(2) Such further or other relief as to this honourable court shall seem just or appropriate.

(3) An order providing for the costs of and incidental to this application".

2. The notice of motion was grounded upon an affidavit sworn by James MacGuill who is the plaintiff's solicitor. In turn that affidavit was responded to by Colm McGinty. Two further affidavits were subsequently sworn by the same deponents and the motion for interlocutory relief was heard by me on 18th and 19th January, 2005.

The Plaintiff

3. In the plenary summons the plaintiff is described as unemployed and residing at 114 Cashel Avenue, Crumlin, Dublin 12. In the affidavit grounding the application his solicitor describes him as "a citizen who has had a number of criminal convictions but who is not presently (sic) serving any sentence". In the first replying affidavit the number of criminal convictions was put at in excess of 45, including convictions for crimes of violence and malicious damage. Neither the number nor the nature of those convictions recorded against the plaintiff is in dispute.

4. Over the last 10 years the plaintiff has been shot on three separate occasions. In December, 1995, he was shot in the arm and stomach. In February, 1996, he was shot in the back and the finger. He was again shot in the year 2000. He obtained judgment for IR£120,000.00 against a man called Charles Bowden in respect of the shooting in February, 1996. That sum was awarded by Kinlen J. on 15th November, 2000, but the judgment remains unsatisfied.

5. In the first replying affidavit at para. 5 the plaintiff is described as "a notorious and self professed crime lord and major drug dealer known as 'the Viper'". It gives details of some of his criminal convictions over many years. These are not denied either by the plaintiff who chose not to swear any affidavit or on his behalf by his solicitor.

The Defendant

6. The defendant has its registered office in Terenure, Dublin and is the publisher of the Sunday World newspaper. The editor of that newspaper is Mr. Colm McGinty. The crime editor of that newspaper is Mr. Paul Williams. Mr. Williams has written about the activities of the plaintiff on numerous occasions, not merely in the newspaper, but in a book which he authored called "Crime Lords".

7. The first edition of that book was published in August, 2003 and contained a chapter devoted to the lifestyle and criminal activities of the plaintiff.

8. In October, 2003, the Sunday World newspaper produced a twelve page pullout containing extracts from that book.

9. The plaintiff was animadverted upon again in the newspaper's edition of 25th April, 2004 in an article entitled "Sinn Féin: The Big Lie".

10. On 5th December, 2004, the paper published an article by way of a serialisation of a further book written by Mr. Williams called "Crime Lords Update". It is that publication in the Sunday World which has given rise to these proceedings.

11. It is the stated policy of the newspaper to expose and report on the criminal underworld and its principal figures.

The Nature of the Proceedings

12. The material published of and concerning the plaintiff by the defendant prior to the article of the 5th December, 2004, would, if untrue, be highly defamatory. But the plaintiff has never sued in defamation in respect of any article published of or concerning him by the defendant prior to 5th December, 2004, nor does he do so in respect of that publication either.

13. His solicitor has sworn that letters have been sent to the defendant concerning the publications prior to December, 2005,

complaining of "unsubstantiated allegations that have linked the plaintiff, quite incorrectly and unfairly, to various criminal activities and enterprises, these allegations accordingly being grossly defamatory of him and his reputation". The explanation given for not taking action in respect of the allegations identified as "being grossly defamatory of him and his reputation" is that the plaintiff is "a citizen whose reputation and character is blemished and who for that reason is unlikely to have an effective remedy available to him in the law of defamation even when matters that are materially untrue and highly prejudicial are published about him". It is said on his behalf that he has no effective conventional legal remedy available to him concerning such publications.

14. In a further affidavit the plaintiff's solicitor alleges that he is instructed that "in countless respects the plaintiff challenges the accuracy of the content of the first edition of 'Crime Lords' that relates to him". Again he gives by way of explanation for not suing in respect of such material the fact that the plaintiff has a reputation and character which is blemished.

15. No one has a right to a reputation which is unmerited. One can only suffer an injury to reputation if what is said is false. In defamation the falsity of the libel is presumed but justification is a complete defence. The plaintiff contends that even when matters materially untrue and highly prejudicial are published about him he is devoid of a remedy in the law of defamation, presumably because he does not have a reputation worthy of merit.

16. It is in these circumstances that he brings these proceedings which have as their basis not damage to the plaintiff's reputation but rather what is said to be an interference with his right to life and bodily integrity.

The Publication of 5th December, 2004

17. In its issue of the 5th December, 2004, the Sunday World newspaper published a lengthy article running from pages 63 to 66 inclusive. It was headed "Crime Lords Update". It purported to set out what were described as "new exclusive extracts from Paul William's exposé of Irish crime".

18. On the first page of the article it is said that the publication of the book "Crime Lords" infuriated several criminals who subjected Mr. Williams and his family to what is described as an appalling campaign of intimidation. That campaign it is alleged led to several death threats, an acid attack and the planting of an elaborate hoax bomb at Mr. William's home. Mr. Williams and his family were evacuated from their home along with 150 of his neighbours in the early hours of a November morning. The article alleges that the gangster who led that campaign was the plaintiff whom it calls (and not for the first time) "the Viper". On pages 64 and 65 under the heading "How the Viper tried to silence me" there is an extensive article pertaining to the plaintiff alleging inter alia that he has engaged in intimidation of Mr. Williams. The article continues to its conclusion on page 66. The heading on that page is "Foley's a Dead Man Walking". The sub-heading is "Viper isn't Trusted by Other Gang Members".

19. The plaintiff's solicitor in his affidavit of 16th December, 2004, identifies a section of the article which is contained at page 66 as being the one that has caused the plaintiff what is described as the greatest concern.

First Complaint

20. Apart from the heading on page 66 the first element of the article identified for criticism is the concluding sentences of it. They read "A retired detective who has known the colourful gangster for almost 30 years commented: 'no, that's not for Martin, he doesn't have the cop on to know when to quit and he can't help himself getting into trouble. I have always predicted that Foley will not die in his sleep and have told him this on many occasions. The only thing that amazes me is that he has lived for so long'".

21. In dealing with this aspect of the matter the plaintiff's solicitor swears as follows:-

"The plaintiff is deeply concerned to read in a Sunday newspaper that has a particularly wide circulation amongst his friends, family, associates, neighbours, acquaintances and general social class that his violent demise is effectively being predicted in a banner heading. In the context of he being a person who has already had the misfortune to be the subject of three violent attempts on his life, this aspect of the article is either intended to provoke a further attempt on his life or is reckless and irresponsible as to that possible effect. The banner headline in particular, is, in all the circumstances, amongst the most profoundly irresponsible journalism and editorship of a widely circulating national newspaper that I could conceive of".

22. Whatever about the criticism of the headline on page 66, the material concerning the retired detective and his views is a verbatim reproduction of the final few sentences of the article which appeared in the newspaper's 12 page pull out on October 26th, 2003. That in turn is a verbatim reproduction of the final paragraph of page 91 of the book "Crime Lords" which was published in August, 2003. The plaintiff did not bring any proceedings concerning this material when it first appeared in these two separate publications well over a year ago.

23. In dealing with this part of the plaintiff's case, the editor of the defendant has sworn as follows:-

"The portion in question is an understandable comment by a person familiar with the plaintiff's activities and the previous attempts on the plaintiff's life. It is not in any way an attempt to provoke a further attempt on the plaintiff's life. On the contrary the retired garda detective states that as the plaintiff is a violent criminal and given that his fellow criminals have already tried to kill him, if the plaintiff continues to engage in criminality he is likely to be the subject of further violence and attempts on his life. As indicated by Mr. McGuill there have been three previous attempts on the plaintiff's life. The plaintiff has also been abducted by the I.R.A. These incidents have all stemmed from the plaintiff's involvement in criminal activities. The plaintiff is a person who orchestrates and deals in terror and violence, it is therefore not surprising that his life has been threatened in the past or may again be threatened in the future. Any threat to the plaintiff's life is wholly attributable to his continued involvement in crime and association with other members of the criminal class".

Second Complaint

24. This complaint also relates to material which is contained on page 66 of the newspaper. The passage in question reads:-

"He has become a source of embarrassment to the likes of Sinn Féin/I.R.A. who Foley, by his own admissions, has effectively bought off. According to reliable sources, the Viper is no longer a target for the I.R.A.'s hit-men despite the fact that he has been on many of their murder lists in the past. It is widely rumoured in gangland circles that Foley broke the habit of a lifetime and decided to pay some of his drug money into the coffers of Sinn Féin, the I.R.A.'s political party who allegedly stand for social justice.

Violent

Garda intelligence has consistently categorised Foley as a 'dangerous, violent criminal'.

The Viper's charmed existence in terms of dealing with the I.R.A. and other gun attacks has been reflected in his dealings with the police".

25. Issue is now taken with this material and the plaintiff instructed his solicitor that it was entirely untrue to suggest

(a) that he has now or ever has had anything to do with drug money, or

(b) that he has paid drug money or any money at all, to Sinn Féin.

26. There was however nothing new in this allegation published on December 5th, 2004.

27. In the Sunday World of 25th April, 2004, on its front page the following statement was published:-

"Drug dealing is just one of the several rackets being used to fund Gerry Adams's party. The revelation came after the Independent Monitoring Commission revealed that Sinn Féin/I.R.A. are deeply involved in organised crime and murder".

28. That front page article was continued inside on pages 10 and 11. Amongst the material published on those pages was the following:-

"Today the Provos and Sinn Féin cannot afford to put drug dealers out of business because they are actually living off the proceeds of the rackets.

One of their benefactors is the country's best known drug baron, Martin 'the Viper' Foley who, by his own admission, has been paying of f the Provos for the past few years rather than suffer the same fate as his best mate Seamus 'Shavo' Hogan who was murdered three years ago.

Foley, a notorious miser, decided to help the 'cause' after a senior Sinn Féin representative visited his daughter's school.

During the visit the Sinn Féin/Provo told the kids, including the Viper's daughter, that the drug problem was 'being taken care of' in the area.

Astonishingly the Shinner told how Shavo was out of the way and then he named two other local drug dealers, Foley and another man.

Political Thugs

The Viper got a fright when he heard about the comments and ran to the police to complain about the Shinner. Local gardai then foiled what they believed to be an attempt by the Provos to shoot the Viper.

Since then Foley has been paying up to help fund the Sinn Féin election machine and he has had no more trouble from the Provos.

To quote Minister Michael MacDowell, it is vomit inducing hypocrisy that these political thugs are funding themselves from the coffers of an evil mobster who is poisoning thousands of our young people with heroin, ecstasy and cocaine.

These days Foley openly brags to his associates that he is 'well in' with named Sinn Féin politicians. Other times he claims the Provos are scared of him.

And of course it is a two way street.

Foley's close friends in Sinn Féin probably shared their knowledge in terrorism and showed him how to make the elaborate hoax bomb he placed under my car last November".

29. The plaintiff did not bring any proceedings concerning this material when it first appeared in April, 2004.

The Third Complaint

30. The complaint is made in respect of the following passage which also appears at page 66 of the newspaper.

"Foley's ability to avoid being caught has caused unease among many police officers, especially among those whose job it is to watch the Viper. Several reliable sources, both in the Garda Síochána and in the underworld, believe that the Viper is protected by a senior ranking member of the force. The theory is that Foley passes high grade information about the activities of other drug dealers to this officer. In the past twelve months since the bomb hoax Foley has miraculously managed to avoid at least three major drug busts where large amounts of cocaine and other narcotics were seized. In each case Foley had, astonishingly, left the scene where the drugs were found just a short time before the police came knocking".

31. The plaintiff has reserved his most trenchant criticism for this particular allegation. His solicitor has sworn as follows in relation to it:-

"It is impossible to over emphasise the damage that this aspect of the article is capable of doing. The plaintiff is accused of being an informer of An Garda Síochána in respect of the activities of drug dealers, although it is clear from the terms of the article that the allegation is based on speculation rather than evidence. I say and believe that the allegation necessarily presents a real and substantial risk to the safety and life of the plaintiff as the sort of person involved in the activity of drug dealing would very likely be indifferent to the right to life, privacy and bodily integrity of the plaintiff were they to believe that he was providing material information to the police about their activities. The court can take judicial notice of the unhappy trend of a large number of so called 'gangland killings' in recent times that evidence the very real nature of the threat that this aspect of the article poses to the plaintiff's safety and life.

I want to reiterate that I am categorically instructed by the plaintiff that the allegation that he is a police informer is without any foundation and is specifically denied.

But even assuming it were true, I say and believe that its publication still could not be justified at law given the grave threat to the life, privacy and bodily integrity of the plaintiff that its publication necessarily creates. Whilst I do not wish to labour this affidavit with matter that is more appropriate for subsequent legal argument, I say and believe that the plaintiff's constitutional rights under Bunreacht Na hÉireann must be such as to outweigh the rights of the defendant to freedom of expression and to carry out their lawful business".

32. This allegation of being a police informer had not been made prior to the article of 5th December, 2004. The attitude of the defendant in relation to it is not in doubt. It stands over it and says that it constitutes proper and responsible journalism in the context of its policy of exposing and reporting on the criminal underworld and its principal figures.

The European Convention on Human Rights Act 2003

33. The defendant contends that no injunctive relief can be granted to the plaintiff pursuant to the provisions of the European Convention on Human Rights Act, 2003. In the plenary summons declaratory relief is sought by reference to that Act. However, it was accepted by the plaintiff that the interlocutory injunctive relief which he seeks in this application is not being sought pursuant to this Act. Consequently it is not necessary for me to consider the defendant's submissions that the court has no jurisdiction to grant such an order.

The Constitution

34. The sole basis for the plaintiff's claim is by reference to the right to life and bodily integrity conferred on him under the provisions of the Constitution. Counsel on his behalf said that what is at issue in the proceedings is the right on the part of the defendant to publish material which carries a real and substantial risk to his life. In that context it is said that his reputation is irrelevant save as it might be raised to attack his credibility on the genuineness of his fear should there be any repetition of the material contained in the article of 5th December, 2004.

35. Prior to the institution of these proceedings the plaintiff's solicitor, by a letter of 8th December, 2004, sought an undertaking from the defendant that it would not in the future publish material of Mr. Foley which might in any way be construed as placing him at risk of attack from any source and that it would not violate his rights to privacy and the privacy rights of his family.

36. The defendant's solicitor's reply on 15th December, 2004, indicated that the defendant stood over the contents of the publication and the reporting of the plaintiff's activities. He pointed out that the plaintiff had a number of attempts made on his life which were well documented and reported in criminal trials and court actions and that they all arose from his criminal activities. He went on to comment that it was remarkable that the plaintiff should attempt to suggest that the passing of information to the Garda authorities concerning criminal activities was in some way improper. He denied, in categorical fashion, that the defendant had defamed the plaintiff or had done anything unlawful or had violated his rights. The final sentence of the letter was unequivocal - "*There will be no undertaking given to your client as demanded*".

Prohibitory Injunctions

37. The speech of Lord Diplock in *American Cyanamid Co. v. Ethicon Limited* [1975] A.C. 396 is considered by some commentators to have clarified and by others to have revolutionised the approach of the courts to interlocutory injunctions. Whichever view be correct there can be no doubt as to the guidelines which he laid down for the courts to follow on such applications. His views were endorsed by the Supreme Court in *Campus Oil v. Minister for Industry and Energy (No. 2)* [1983] I.R. 88.

38. In short, the guidelines provide that in order to obtain an interlocutory prohibitory injunction a plaintiff must demonstrate -

- (a) The existence of a serious question to be tried,
- (b) The inadequacy of damages, and
- (c) That the balance of convenience lies in favour of the grant of the injunction.

39. Whilst these issues, if resolved in favour of the plaintiff, will in many cases give rise to an injunction being granted (provided an appropriate undertaking as to damages is forthcoming) it is not always so. Indeed Lord Diplock acknowledged that in addition to these three questions there might be many other special factors to be taken into consideration in the particular circumstances of individual cases.

40. Over the years since the decision in *American Cyanamid*, 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. 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.

41. This is known as the rule in *Bonnard v. Perryman* [1891] 2 Ch. 269 and is of some relevance to this case.

42. In *Bonnard's* case Lord Coleridge CJ sitting with four other judges including the Master of the Rolls said that although the courts undoubtedly possessed the requisite jurisdiction to grant interlocutory injunctive relief, in all but exceptional cases they should not issue an interlocutory injunction to restrain the publication of a libel which the defence sought to justify except where it was clear that the defence would fail. He based this on the need not to restrict the right of free speech by interfering before the final determination of the matter by a jury save in a clear case of an untrue libel. He said:-

"The subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions".

43. The rule in *Bonnard v. Perryman* was approved and followed by the Supreme Court in *Sinclair v. Gogarty* [1937] I.R. 377.

44. It was authoritatively restated in England in more recent times in *Fraser v. Evans* [1969] 1 Q.B. 349 and *Herbage v. Pressdram Limited* [1984] 2 All E.R. 769. In that case Griffiths LJ restated the effect of the rule and then said:-

"These principles have evolved because of the value the court has placed on freedom of speech and I think also on the freedom of the press, when balancing it against the reputation of a single individual who, if wrong, can be compensated in damages".

45. He refused to dilute the principle and having summarised an argument by counsel which suggested that the decision of the House of Lords in *American Cyanamid v. Ethicon* justified a departure from the rule he said:-

"If the court were to accept this argument, the practical effect would I believe be that in very many cases the plaintiff would obtain an injunction, for on the American Cyanamid principles he would often show a serious issue to be tried, that damages would not be realistic compensation, and that the balance of convenience favoured restraining repetition of the alleged libel until the trial of the action. It would thus be a very considerable incursion into the present rule which is based on freedom of speech".

46. The rule in *Bonnard v. Perryman* has survived the enactment in England of the Human Rights Act, 1998. That Act incorporated the European Convention for the Protection of Human Rights and Fundamental Freedoms into the domestic law of England and Wales. In a decision of the Court of Appeal given on 5th November, 2004, in the case of *Greene v. Associated Newspapers Limited* [2005] 1 All E.R. 30, it was held that the Act had not changed the rule.

47. If the present case were an action in defamation it is clear that having regard to what is being said on oath by the defendant to the effect that it stands over the allegations which it has made concerning the plaintiff, an injunction would not be granted. It is the defendant's contention that the plaintiff should not be entitled to an injunction in the present case in circumstances where he has not brought libel proceedings and if he did so he would be refused an injunction. The injunction sought would be just as much an incursion into the freedom of the press and it is said ought not to be granted.

48. Although this argument was made as part of the defendant's case that there was no serious issue for trial, I prefer to deal with it when I come to consider the balance of convenience and the exercise of the undoubted discretion which a court has in the grant of any interlocutory injunction of the type in suit.

Serious Issue for Trial

49. Apart from the argument concerning the lack of jurisdiction under the European Convention on Human Rights Act, 2003 and the one to which I have just adverted, the defendant also contended that for a number of other reasons the plaintiff has not made out a serious issue for trial. I do not propose to rehearse them here as it is not necessary to do so having regard to the conclusion which I have reached on this application. I will therefore assume, although without deciding it, that the plaintiff has made out an issue for trial or, to use the words of Lord Diplock, that his action is not frivolous or vexatious.

Adequacy of Damages

50. Again under this heading I will proceed on the basis and assume that if the plaintiff is correct damages would prove to be an inadequate remedy for him since he contends his life is endangered by any repetition of the offending material.

Balance of Convenience

51. In *American Cyanamid*, Lord Diplock said:-

"It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. They will vary from case to case".

52. In the present case I have on the one hand the contention of the plaintiff that repetition of the matter which he has identified by the defendant between now and trial could give rise to a risk to his life and bodily integrity. On the other hand the defendant contends that it should be free to publish this material if it wishes to do so and that it stands over it as being true.

53. It is important to bear in mind that all of the material complained of consists of statements of fact or the expression of opinions. Nowhere is there any express exhortation made or encouragement given to anyone to harm the plaintiff. There is no evidence or reason to believe that the defendant will do so in the future. If there was a real and substantial risk of such an exhortation being made different considerations might apply.

54. In this country we have a free press. The right to freedom of expression is provided for in Article 40 of the Constitution and Article 10 of the European Convention on Human Rights. It is an important right and one which the courts must be extremely circumspect about curtailing particularly at the interlocutory stage of a proceeding. Important as it is however, it cannot equal or be more important than the right to life. If therefore the evidence established a real likelihood that repetition of the material in question would infringe the plaintiff's right to life, the court would have to give effect to such a right. That appears to be the gist of what was said by Finlay CJ in *SPUC v. Grogan* [1989] I.R. 753 at 765 where in the context of the facts of that case he said:-

"With regard to the issue of the balance of convenience, I am satisfied that where an injunction is sought to protect a constitutional right, the only matter which could properly be capable of being weighed in the balance against the granting of such a protection would be another competing constitutional right".

55. That case was decided in circumstances where the court had clearly established that the actual activity which the defendants in the case were claiming and intending to pursue as of right was unlawful having regard to the provisions of Article 40 of the Constitution.

56. I do not accept the contention made by counsel for the plaintiff that the passage which I have just quoted is of universal application regardless of the facts. On his argument once a plaintiff seeks an injunction to protect a constitutional right the balance of convenience is recalibrated so as to permit only the consideration of another competing constitutional right.

57. To apply this approach could give rise to injustice and abuses of process. A formulaic assertion of a claim to protect a constitutional right without any analysis of the background against which it was made being open to the court and an ability only to consider on the balance of convenience a competing constitutional right could give rise to considerable injustice.

58. I do not accept that the statement relied upon by counsel for the plaintiff was intended to or does in fact create a general principle applicable regardless of circumstances in all cases where an injunction is sought in the protection of a constitutional right. The court is not deprived of its ability to assess the evidence and its context and to consider fully the balance of convenience.

59. There are a number of matters which appear to me appropriate to take into account on this question of the balance of convenience.

60. First, all of the material which has been complained of is already in the public domain. Much of it has been in the public domain for a very long time. In the case of what I have described as the first complaint it was published in book form in August, 2003. It was repeated by the newspaper in October, 2003. Despite what is now said by the plaintiff he took no proceedings of any sort in relation to those publications. In my view it is altogether too late to seek an injunction restraining further publication of this material. It also calls into question the genuineness of his alleged belief concerning this material particularly when he has avoided swearing any affidavit himself in these proceedings.

61. Similar observations can be made in respect of the second complaint which deals with material first published in April, 2004.

62. The third complaint is undoubtedly new. No criticism on the grounds of delay can be made of the plaintiff in this instance.

63. I have already mentioned the argument made by the defendant to the effect that as the plaintiff would not be granted an injunction of this type in a defamation action so he should not be granted such in the present case. I do not think that that necessarily follows but I am quite satisfied that before an injunction of this type should be granted the plaintiff would have to demonstrate by proper evidence a convincing case to bring about a curtailment of the freedom of expression of the press.

64. This is particularly so having regard to the strongly expressed guarantees in the Constitution in favour of freedom of expression. The Irish (and indeed the English courts in the absence of a written constitution) have always shown a marked reluctance to exercise their injunction jurisdiction in a manner which would trench on the freedom of expression enjoyed by the press and the media generally. A good example of this is to be found in the judgment of O'Hanlon J. in *MM v. Drury & Ors.* [1994] 2 I.R. 8.

65. This approach is also justified having regard to the provisions of Article 10 of the European Convention on Human Rights and the jurisprudence which has built up on foot of it.

66. Article 10 of the European Convention on Human Rights is entitled '*Freedom of Expression*' and reads as follows:-

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

67. In the case of *Venables v. News Group Newspapers Limited* [2001] Fam. 430 Butler-Sloss P. held (admittedly on a trial) that by virtue of Article 10 of the Convention the freedom of the media to publish could not be restricted unless the need for such restrictions fell within the exceptions in Article 10(2) which were to be construed narrowly. She also held that the onus lay on those seeking such restrictions to show that they were in accordance with the law, necessary in a democratic society to satisfy one of the strong and pressing social needs identified in Article 10(2), and proportionate to the legitimate aim pursued.

68. In the course of her judgment she cited with approval the observations of Munby J. in *Kelly v. British Broadcasting Corporation* [2001] Fam. 59 where he said:-

"If those who seek to bring themselves within para. 2 of Article 10 are to establish 'convincingly' that they are – and that is what they have to establish – they cannot do so by mere assertion, however eminent the person making the assertion, nor by simply inviting the court to make assumptions; what is required... is proper evidence".

69. In the present case it appears to me that the evidence falls short of what would justify me in curtailing the freedom of the defendant to state facts and express opinions upon the plaintiff and his activities.

70. As I have already pointed out, I can find no evidence of any express exhortation or positive encouragement to persons to do violence to the plaintiff.

71. The three previous attempts on his life long antedate the publication of any material by the defendant which the plaintiff has identified as offensive. That fact is supportive of the view that any risk to the plaintiff's life or wellbeing comes not from any publication by the defendant but rather from his own involvement in criminal activities and the criminal underworld.

72. As the evidence stands I am satisfied that I would not be justified in restricting the defendant's right between now and the trial of this action to write of or concerning the plaintiff provided of course that they do not exhort anybody to do violence towards him. They have not done so in the past and there is no evidence that they intend to do so in future.

73. Whatever about the issues that fall to be determined at trial the evidence before the court does not justify the curtailment of the defendants rights which the plaintiff seeks.

74. Furthermore the information in question is in the public domain and the bringing of this action with its attendant publicity has given it a much wider circulation. An injunction restraining this defendant from repeating it would have little value. The plaintiff has of course by bringing this action obtained prominence for his denials of the allegations with which he takes issue.

75. I am also satisfied that the order which is sought is altogether too wide. If it were to be granted in the terms sought the task of the defendant in attempting to ascertain what would be permissible material to publish and what not would be very difficult indeed. Even if I were minded to grant an injunction I would not do so in those terms.

76. Accordingly the application for injunctive relief is refused. I will however direct an early trial of this action and will hear counsel on the question of the delivery of accelerated pleadings and the fixing of a trial date.