Neutral Citation Number: [2007] IEHC 223

AN ÁRD-CHÚIRT
THE HIGH COURT

RECORD NUMBER 2005, NUMBER 513P

BETWEEN

MONICA LEECH,

PLAINTIFF

AND
INDEPENDENT NEWSPAPERS (IRELAND LTD,

DEFENDANT

1. The plaintiff sued the defendant newspaper for damages for a news article published on the 17th December, 2004. That article reported on an incident during a live radio call-in programme the day before, where a caller unexpectedly broadcast an allegation of improper conduct between the plaintiff, a communications consultant, and a government minister, claiming that the work that the plaintiff was being paid to do for the minister and the relevant department arose out of this improper conduct. Two rulings were given during the course of the trial.

2. First set of issues before the court: did a defence of public interest exist in defamation proceedings; if so, how was it to be defined; could such a defence be raised in the context of this case; should such a defence be particularised when pleaded; if neither pleaded or subject to a notice for particulars, should counsel for the defendant be required during the trial to outline particulars prior to cross-examining the plaintiff.

Judgment of Mr. Justice Charleton given on the 27th day of June, 2007 (Ruling in the course of a trial)

3. My ruling on this, I think, should be given straightaway, because the jury is waiting and the parties are anxious to proceed with the case and that is the right position to adopt in those circumstances.

4. There are a number of issues I have to decide, but the first thing that I want to say is that I am dealing with an application that is very, very early on in the course of the case where I have not heard a screed of evidence. And secondly, I am dealing with an application in circumstances where my view at the moment, subject to any legal argument in the future, is that it is not up to me to decide this case. I have to step back, ensure that the trial is conducted properly and allow the jury to decide this case as to its facts.

5. Is there such a thing as a public interest defence? In my view, there is. The test as to qualified privilege involves a situation where a party has an interest in receiving information and another party has a duty to pass that information on to them. The classic case, which is often repeated in many of the textbooks, is that one has visitors to one's house, or one's business, and one knows that one's employee has a dubious reputation and one comes to the conclusion, perhaps wrongly, that he or she may steal and so the person informs his or her guests that the employee is a thief. Now, as it turns out, the information you have as to a dubious reputation is incorrect, the employee is not a thief and he or she takes a defamation action against you in relation to what you have said. In those circumstances, because you have a duty in protecting those who come into your home, or into your business premises, and because your guests have an interest in relation to receiving that information with a view to their own protection, a situation of privilege arises.

6. In *Reynolds v Sunday Times Newspapers* [2002] 2 AC 127 HL, that was developed so that an issue arose as to whether there was such a thing as a general interest in the public in favour of them receiving information, albeit incorrect. And it seems to me that, yes, there is. The public have an interest in many matters, as opposed merely to being interested in matters. Being interested in matters, it seems to me, would refer to matters which are merely titillating or salacious or gossipy. Matters which are of public interest, on the other hand, have to be matters which affect the public in terms of the governance of the country, their safety, their security, and their right to judge their public representatives fairly on the basis of real information. That is not an exhaustive list. I could not possibly formulate an exhaustive list, even if I had time to reserve judgment in this case.

7. In *Reynolds*, a number of tests were set out by Lord Nichols, which tests are helpfully set out at paragraph 14.83 of *Gatley on Libel and Slander* (10th edition, London, 2004). These are:

> 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
>
> 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
>
> 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
>
> 4. The steps taken to verify the information.
>
> 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
>
> 6. The urgency of the matter. News is often a perishable commodity.
>
> 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
>
> 8. Whether the article contained the gist of the plaintiff's side of the story.
>
> 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
>
> 10. The circumstances of the publication, including the timing.

8. And at the end of those, he says the following:

> "The list is not exhaustive. The weight to be given to these and to any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to [and here I would substitute the words 'a public interest defence'] is a matter for the judge. This is established practice and it seems to me to be sound. A balancing operation is better carried out by the judge in a reasoned judgment rather than by the jury. Over time, a valuable corpus of case law will be built up".

9. Since that time, as can happen and certainly has happened in England in relation to other areas of law, it seems that errors have been made by people referring to the ten separate indicia of the existence of public interest and by indicating that if one or other of them is absent, or if a decision as to fact might go against a newspaper in relation to one or other, that the entire defence is destroyed. I note with interest the judgment of the Court of Appeal of England and Wales in *Jameel and Another v Wall Street Journal Europe Sprl* [2005] QB 904 and I note, in particular, that the reporter in the All England Law Reports, at [2006] 4 All ER at 1279, when the matter went to the House of Lords, has managed to summarise a large number of judgments in the House of Lords down into what, it seems to me, is a cogent principle which, in the context of a jury case, where I as trial judge may have to instruct a jury as to what the law is and allow them to decide the issue or to formulate questions for them based on this test, is both simple, straightforward and easily understood.

10. I think in this context that any reference to the principle from which this is derived, namely ordinary qualified privilege, arising in private circumstances, is, as Lord Hofmann says, not necessarily helpful. It seems to me that one aspect of the test for qualified privilege, which is the issue of malice, is probably replaced in the test for a public interest defence, as set out in the head-note of the *Jameel* case, with another test which involves the issue of professional conduct by the reporting journalist or other party.

11. Therefore, I would rule that a public interest defence can arise where the subject matter of a publication, be it an article or radio or television report, considered as a whole, was a matter of public interest. As I previously indicated in this ruling, I would rule as well that there is a professional duty on the part of journalists to both seek out information that is of public interest and to impart it to the public and that while that is a matter of for professional skill and training, that it is also a matter of responsibility. And once a public interest is established in terms of the information the subject matter of the article, there is a second test to be met, which is as to whether on the evidence the steps taken to gather and publish the information were responsible and fair. The question may need to be put as to whether a newspaper, or a television channel or radio channel, on the evidence behaved fairly and responsibly in gathering and publishing the information. And that may indeed take into account some of the tests set out by Lord Nichols in the *Reynolds* case. In particular no. 8, whether the article contained the gist of the Plaintiff's side of the story, and whether the Plaintiff was contacted for comment.

12. I also agree that, as a third aspect of the test, that in considering whether there was fair and responsible conduct that the decision-maker, be it the court or the jury - that has yet to be decided in this case - has to have regard to the practical realities of news gathering. In that regard, I note what Lord Nichols says at paragraph 6 of the tests that he sets out, that urgency can be a matter of importance in news reporting, which is, of course, dealing with a perishable commodity.

13. Now, given that the public interest defence exists, on that ruling which I have just given, and given that it is up to me to decide whether it is to be put before this jury, the next issue is this: is this now a case where a public interest defence can be raised? The answer to that, to be perfectly frank about it, is that I do not know because I have not yet heard the evidence. My natural inclination is against shutting off persons who come to court from making the case which they wish to make, whether they are a plaintiff or a defendant.

14. But in circumstances where we have only started the case and where long experience indicates that many defences are put forward in all kinds of cases on a basis that is tenuous or perhaps irresponsible, and where many plaintiffs make allegations which are tenuous or exaggerated, I feel that the right thing to do in this case is to follow the ordinary course of an ordinary trial judge doing an ordinary case, which this is, and that is to hear the evidence and to listen to it and, in due course, to deal with an application as to whether a public interest defence has been properly raised in accordance with the test already set out. And that is what I am going to do before speeches are made to the jury in this case.

15. Now, the last matter in issue is this: What is the scope of the material in relation to which each side are entitled to rely on? Many articles were written concerning the plaintiff and her dealings with the Minister for the Environment prior to the article in question that is the subject matter of the statement of claim in this case. I must say that in that regard I am very heavily influenced by the statement in *Television New Zealand -v- Ah Koy* [2002] 2 NZLR 616, in which it was stated that there was a principle of isolating damages. That was explained as confining damage in a defamation action to that resulting from the words published by the defendant on a particular occasion while excluding evidence of damage to reputation caused by other publications. It seems to me that it is correct that what you do in any case is to confine your inquiry in relation to what is alleged on the pleadings and what the response is. Notwithstanding my natural inclination to allow people to make the case that they wish to make, it would be irresponsible of me to allow the Plaintiff to refer to a number of other newspaper articles, in respect of many of which she is, I am told, claiming damages. But having said that, it may be that the public interest defence can only be made out in circumstances where a genuine public interest is established, perhaps on cross-examination. And that may give scope to re-visit this issue by way of re-examination. If that happens, I will consider the matter at that time.

16. Then finally, I note that it is argued that particulars ought to have been given in relation to the public interest defence as pleaded in this case. It seems to me, insofar as this ruling may establish a precedent, that that is correct. A public interest defence, if pleaded, should be particularised in reference to the overall test, which I have approved, as set out in *Jameel* and, if necessary, with reference to the individual points set out helpfully by Lord Nichols in *Reynolds*. But these are not necessarily determinative. I do not know whether it was a matter of tactics, or what it was a matter of, but I note that the pleadings in this case were extensively followed by Notices For Particulars and by Replies to Particulars and I am told by the parties, and I accept it, that no Notice for Particulars was raised in relation to paragraph 7, which was the public interest defence. That being so, I do not think it is right in these circumstances to now require Mr. McCullough SC, counsel for the defendant, to formulate particulars and to be stuck with that formulation in the course of the case on his feet on the second day of the trial. The reality of the way that most cases work, and always have worked over the course of the last 25 years, is that people get a fair warning of what the nature of the case is and what the defence is. They may raise particulars if they wish. Notwithstanding the ruling that I have made earlier on, it seems to me that the right thing to do is to see what the course of the case is and to see whether, in those circumstances, any such defence as the public interest defence to this article arises on the evidence. But I am not shutting out any defence that the defendant wishes to make, either by reason of particulars or otherwise. That defence has been pleaded. But at the end of the day, I retain the responsibility of seeing whether or not a defence has been correctly raised on the evidence, as similarly I retain the responsibility of seeing whether or not a Plaintiff has a case which is fit to go before a jury. And I propose, therefore, to do this thing the old-fashioned way and to rely on those principles.

17. That is my ruling.

Second issue before the court.
18. At the close of evidence, at which the plaintiff alone gave evidence and no evidence was called for the defence, an application was made by the defendant to the court that the court rule that the public interest defence was made out and that the plaintiff's case should be withdrawn from the jury.

Judgment of Mr. Justice Charleton delivered on the 27th day of June, 2007. (Ruling in the course of a trial)

19. Well, this is, in effect, an application to stop the trial. It is an application which assumes that I have the responsibility of deciding whether there is a public interest defence, on the evidence in this case. When I made my ruling yesterday in relation to whether or not there was a public interest defence, I said that there were two aspects to it; firstly, a matter of public interest in respect of which a journalist, in pursuit of their duty to inform the public in relation to matters that were of interest to them, reports on a story, and secondly, that the manner in reporting the story was professional and responsible.

20. Now, I don't accept that in this country it would be right for me to decide these issues, and to, in effect, overturn the statute, which requires a jury trial of this defamation matter, by making a ruling. I can, of course, make a ruling in relation to whether or not the Plaintiff has made out a case. She clearly has made out a case of libel sufficient to be considered by the jury, and I am equally entitled to make a ruling as to whether a defence arises on the evidence that is fit to be considered by the jury. If this defence were to be put by the court, it would be put to the jury as a matter of fact, and appropriate questions related to the tests based on the two aspects of *Jameel*, would be put to them.

21. Now, the issue I have to decide, it seems to me now, is whether or not there is evidence to go before the jury based on that public interest defence. As to the first test, whether there is a public interest, I am looking at the article as a whole, and there clearly was an interest in the public in considering whether or not their money was being spent correctly, in relation to public relations services being provided to the State, and whether or not there was corruption in public life. But all of that is not an issue in this case because it is accepted on both sides here that what was published by RTÉ was incorrect. The residual aspect of public interest that is urged is this; as to whether or not a newspaper report about the national news broadcaster Radio Telefís Éireann, in running a programme which doesn't have a 10 second, or a 20 second gap, or whatever happens in some other countries, and which was made subject of a very nasty piece of black mischief by a man who has only been identified in this court as Norman, and which then had to apologise for it, and had to issue a press statement about it could, in those circumstances, be considered to be doing something that the public had a genuine interest in.

22. On the argument presented to me, it seems to me that, literally just about, that that test is met; for what happens on the national broadcaster is, in a small country as we are, a matter of importance, the manner in which they deal with their broadcasts is a matter of importance. The fact that they had apparently, if they did, made a mess by not having a ten second gap, is a matter of importance, and although it is not a matter of high importance, such as the matters discussed in relation to some of the English cases in relation to international terrorism, it nonetheless is a matter of sufficient importance to be of public interest.

23. The second aspect of the case though is this, and that is whether or not there was fair, professional, and responsible journalism? The ruling that I made yesterday indicates that once a public interest is established in terms of the subject matter of the article , that there is a second test which has to be met, which is as to whether or not, on the evidence, the steps taken by those who published the information were responsible and fair? Now, I can sense, in reading the English case law, that there is a very strong tension between those who believe that the *Reynolds* defence should never have been established, and those who believe that the press are the eyes and ears of the public before the State, the Fourth Estate as used to be said, and therefore should have a special defence which, in effect, establishes in their favour.

24. I am looking at this on the basis that this defence evolved from the ordinary qualified privilege defence, whereby you have to establish two things; an occasion of privilege, and the absence of malice. Maliciously publishing a defamatory matter on an occasion of qualified privilege, in the traditional sense, destroys the defence: for instance if you believe that the statement you make about someone on such an occasion is not true. The malice is presumed in libel, but the absence of malice in ordinary and traditional qualified privilege was, it seems to me, transmuted into a test of responsible and fair journalism. There could be circumstances, I don't know, where it might be possible to establish that on, as in this case, the plaintiff's case alone and without calling evidence in defence, but in looking at the indicia for the public interest defence, without taking them as being actual tablets of stone, and asking myself the question; ' what would a responsible journalist have said to themselves': they would say 'well, is this true before I publish it, that there was a lewd relationship between a Minister of Government and a professional person hired to do responsible work?'. They might ask 'would I be correct in saying that the source of the information, which is a malicious person, possibly even a mad man, who rings up a live programme, could be relied on? Could I take any steps to verify the information? Should I not ring the Plaintiff, and should I not put her side of the story?' On all of those, the matter fails.

25. I don't think that I would find it right to say that in circumstances where a man who may or may not exist, I don't know Mr. Frank Khan, who is down as having written this article, that he should be called into the witness box and publicly pilloried. However, I am struck very strongly by the fact that the plaintiff had to come here and give evidence. It is difficult, and it is embarrassing. It is always difficult, and in this circumstance perhaps a little more so then usual to come to court and to have to give evidence. If there is actually an issue as to malice transmuted, which I hold that there is, into the second test for public interest privilege of responsible and professional journalism in establishing the *Reynolds* test, then in order to establish it, the reality is that whoever took these decisions, be it the journalist, the editor and the sub-editor, have to be here to establish it. And therefore, in the circumstances of there being no evidence as to this, the defence of public interest will not to be put before the jury.

26. That is my ruling.