**THE HIGH COURT**

**CIRCUIT COURT APPEAL**

**[2016 No. 219 CA]**

**BETWEEN**

**LEONARD NOLAN**

**PLAINTIFF/RESPONDENT**

**AND**

**LAURENCE LOUNGE T/A GRACE'S PUB**

**DEFENDANT/APPELLANT**

**JUDGMENT of Mr. Justice MacGrath delivered on the 8th day of June, 2018.**

1. This is an appeal from a decision of Her Honour Judge Linnane of the Circuit Court made on 4th October, 2016. The plaintiff claims damages for defamation arising from an occurrence in a public house in Rathmines, Dublin, on the evening of 24th April, 2013 when the legality of a €10 note which he proffered for an alcoholic drink was called into question by a barman employed by the defendant. He alleges that his reputation was traduced on two occasions within approximately ten minutes by the words and conduct of the barman. It is pleaded that the words spoken by, and the conduct of, the defendant's barman were such as to infer in their natural and ordinary meaning that the plaintiff was guilty of fraudulent conduct, that he was guilty of an offence under the Criminal Justice (Theft and Fraud Offences) Act 2001, and that he could not be trusted.

2. The claim is denied. While the defendant accepts that the legality of the €10 was called into question; the words, the manner in which they were spoken and the actions of the defendant's barman are disputed. The defences of truth (formerly justification) and, in the alternative, qualified privilege are relied upon. Her Honour Judge Linnane in finding for the plaintiff awarded damages of €5,000. The defendant appeals from this award.

3. A number of legal issues have arisen including the ambit of the defence of qualified privilege in a case such as this and the extent to which the defence of qualified privilege may be pursued where the defence of truth, formerly justification, is also relied upon.

4. Mr. Nolan was born on 14th August, 1964. He is a fast food delivery driver by occupation, making deliveries in the Harold's Cross, Rathgar and Donnybrook areas. In April, 2013 he resided at Leinster Road, Rathmines.

5. The defendant is the proprietor of a public house at Rathgar Road, Rathmines, Dublin, which trades under the name "*Grace's*".

6. On the evening of 24th April 2013, Mr. Nolan had visited a licensed premises where he consumed one drink. On his way home, he went into the defendant's premises to purchase another drink. He had been a customer on the premises on two or three previous occasions and he lived nearby. He believes he would have been known in the area and may have been known to customers in the public house.

7. On entering he proceeded to the bar counter area. There were between eight and ten customers on the premises, two of whom were at the bar counter speaking to the barman. Another two customers were sitting at the counter and the remaining four to six people were at tables within eight feet of the bar. Mr. Nolan believes that he may have known one of the two men speaking to the barman but was unsure whether he was known to that person.

8. As he approached the counter, the barman, Mr. Bond was directly in front of him. Mr. Nolan did not have to attract his attention. He ordered an alcoholic drink, being a pint of lager. As he placed his order, he put a €10 note on the counter. According to Mr. Nolan, rather than dispensing the drink the barman picked up the €10 note, held it aloft and said, "*I can clearly see that that is a fake*" or "*dud*". On further questioning, Mr. Nolan believed that the barman used the word "*fake*", rather than "*dud*". He said that those words were uttered in a loud manner and in the presence of other persons who were sitting on bar stools at the counter. Mr. Nolan felt nervous. He believed that he was being called a cheat and found the incident quite upsetting. He protested and informed Mr. Bond that the note had come from a reliable source; that it was a good note. Mr. Bond reiterated that it was not a good note. Mr. Nolan informed Mr. Bond that he had obtained the note from either the post office or a bookmaker, but Mr. Bond was "*not having any of it*" and reiterated "*I can see clearly that that is a fake*". According to Mr. Nolan, this was said once more, in a loud voice. Mr. Nolan gave evidence that there was a quiet area in the pub to which Mr. Bond could have brought him to discuss the matter.

9. The plaintiff requested Mr. Bond to return the note, which he did. Thereafter Mr. Nolan decided to go to the nearby Rathmines Garda Station because he took offence at being called, in his own words, "*a cheat*". He entered the public area of the garda station and waited for approximately a minute for a member of An Garda Síochána to attend him. He had a conversation with a member of An Garda Síochána, explained his predicament and showed him the note. He was advised by the garda that it was a civil matter. This garda took the note, went out of view, had a conversation with a colleague, returned and confirmed to Mr. Nolan that the note was good. Mr. Nolan described his feelings of relief and he decided to return to Grace's public house to vindicate himself. There were a number of members of An Garda Síochána in court during the hearing of the appeal, but he did not recognise any one of them as being the person with whom he spoke.

10. On his return Mr. Nolan approached the barman. The customers who had been on the premises earlier were in the same places. He put the note on the counter and informed Mr. Bond that he had been to the garda station, that the note had been checked and that it was legal tender. Mr. Nolan repeated his request for a drink. Mr. Bond replied that he did not care where he had been, that the note was not going to be accepted. He asked Mr. Nolan to leave. Mr. Nolan requested the barman to sign the note, to prove that this was the note that had been produced. Mr. Nolan did not understand why Mr. Bond refused to sign it. To him it beggared belief that twice within the space of ten minutes he had such discussion with Mr. Bond and on the second occasion, in a raised voice, was asked to leave. Mr. Nolan's evidence is that customers also overheard this conversation. He left the premises.

11. On the following morning at 9.30 a.m., Mr. Nolan attended a solicitor. He wished to "*get it off his chest*" because he was upset by what had occurred. He explained the history to his solicitor and showed him the note. The solicitor requested him to obtain the names of the two gardaí on duty in the public office on the previous evening. He telephoned the garda station and informed the person to

whom he spoke of the previous evening's incident. He was given the names of two gardaí who were in the public office of the station at the time. He passed these names to his solicitor.

12. On cross-examination, while Mr. Nolan accepted that it is reasonable to query whether a note is valid if one suspects its authenticity, he would not have held it aloft for all to see. He also accepted that it was part of Mr. Bond's duty to consider whether a note was real or fake, but he objected to the manner in which this task was performed by Mr. Bond. He reiterated that Mr. Bond had insisted that the note was clearly a fake and this was done "*not in a nice fashion*". It was put to him that Mr. Bond had in fact pulled the alcoholic drink, placed it in front of him, and it was only when he was taking the note to the till and when Mr. Bond felt the note that the query was raised. Mr. Nolan disputed this, as did he dispute the defence case that at that stage he had already taken a "*sip from his pint*". As far as he was concerned, the barman had not reached the stage of dispensing the drink.

13. An issue arose as to whether and in what circumstances Mr. Nolan came to disclose in evidence in the Circuit Court the name of the garda to whom he thought the report was made. In replies to particulars delivered on 28th June, 2016 he had stated that he could not recall the names of the gardaí. Mr. Nolan said in evidence that at some undetermined date, but prior to the date of the Circuit Court hearing, he recalled the name of one of the gardaí as being Garda Aran Lawlor. He gave evidence that he telephoned Rathmines Garda Station to inquire whether Garda Lawlor was stationed there. He was informed that Garda Lawlor was on patrol. Counsel for the defendant suggested that this garda's name only emerged when "*a light bulb went on*" while the plaintiff was in the witness box in the Circuit Court.

14. The mentioning of Garda Lawlor's name by the plaintiff in the Circuit Court led thereafter to further inquiries being conducted by the defendant's advisers on this aspect of the plaintiff's evidence for this appeal. On the basis of these inquiries, it was expressly put to Mr. Nolan that he had not attended at the garda station and that the alleged conversation with the garda had not taken place. It was also put to Mr. Nolan that there was no device for checking currency in the station at that time. Statements had been obtained from members of An Garda Síochána who, according to the station duty roster, were on duty on the night in question, none of whom had a recollection of the plaintiff or the incident. Garda Lawlor, who was one of three members of An Garda Síochána called to give evidence by the defence, stated that he had no doubt that the first time he had seen Mr. Nolan was on the day of the hearing of this appeal.

15. In so far as he had requested Mr. Bond to sign a blank piece of paper, it was suggested to Mr. Nolan that the reason for this was the immediate contemplation to take these proceedings, further evidenced by his attendance at his solicitor on the following morning. Mr. Nolan's reply, however, was that if he had been taken to one side in a discreet fashion, no issue would have arisen, and no proceedings would have been instituted. If Mr. Bond had admitted his mistake, matters would have ended there.

16. Mr. Bond gave evidence of the plaintiff entering and approaching the counter. Mr. Nolan ordered an alcoholic drink. Mr. Bond poured the drink and brought it to Mr. Nolan, who tendered the €10 note. He took possession of the note, turned around and took it to the till which was directly behind him. He did not think the €10 note felt right; it felt too heavy. When he had his back turned to Mr. Nolan, he examined the note by tearing it. He did not see silver lining and he concluded that it was a fake note. He denied holding the €10 note up to the light. He then returned the note to Mr. Nolan and said to him that it was a fake note and inquired from where he had obtained it. Mr. Nolan informed him that he got it at the bookies, or "*his*" shop or "*a*" shop. He said that he told Mr. Nolan that he, Mr. Nolan, should have known where it came from and that he should take it back. According to Mr. Bond, at this stage Mr. Nolan had consumed some of the drink. Mr. Bond said that he did not seek the return of the drink because Mr. Nolan told him that he had no more money and he took the view that there was no point in causing a scene.

17. Mr. Bond informed the Court that such an incident did not happen often. In fact, he had no previous experience of such an incident. He disputed that the €10 note which was produced in court was that which was presented at the bar on the night in question, because that produced in court was intact and not torn. He also denied that he had held the note up to the light, but he agreed that he did say to the plaintiff that it was a fake note, and that he had asked him where he had got it. He denied that he spoke in a loud fashion. Mr. Bond could not remember how many people were in the bar but accepted that there may have been between eight and ten.

18. Having told him to take back the note, Mr. Bond stated that Mr. Nolan "*started moaning about his rights*". Mr. Bond returned to serving other customers. Some moments later, as he was washing glasses, Mr. Nolan once again approached him, this time with a piece of paper in hand and requested his name and address. Mr. Bond declined to give him his address. He disputed that the plaintiff requested him to sign the €10 note, and he stated that he did not see the note again. He believed that the piece of paper was in fact a bookmaker's docket. Mr. Bond declined to sign it, but he ultimately provided his name with an address "*care of Grace's Pub*".

19. Mr. Bond agreed that the plaintiff informed him that he intended going to the gardaí. In fact, he told Mr. Nolan that the garda station was across the road. At this stage of his evidence, Mr. Bond introduced a new aspect – that the plaintiff started "*getting on about watching your back*". This part of the exchange occurred before Mr. Nolan went to the garda station. On further questioning, however, Mr. Bond was not 100% sure that the words "*watch your back*" were used but he took whatever was said as a threat. This is why he also told Mr. Nolan that he, Mr. Bond, should have contacted the gardaí.

20. Approximately five minutes later, Mr. Nolan returned to the counter and approached Mr. Bond. Mr. Bond stated that he was not at precisely the same position at the bar as he had been earlier. He accepted that Mr. Nolan informed him that a garda had said that the note was legal tender to which Mr. Bond responded that he should "*bring the garda over and that if he says that it is OK or gave him clearance I would accept it*". Again, he denied that this was said in a loud manner. It was suggested to him that he should have had no difficulty in telephoning the gardaí. He replied that he did not know why he had not contacted them. Earlier in his evidence he stated that he did not think that this step was necessary.

21. Mr. Bond confirmed that he had received neither training in relation to the identification of counterfeit tender, nor instruction as to how to deal with concerns relating thereto. While confirming that it was his habit to tear notes, in his earlier evidence he confirmed that this was the first occasion on which he had to deal with an incident such as this.

22. Mr. Bond denied that he asked the plaintiff to leave and denied that he took an instant dislike to him or his appearance. He had never before seen the plaintiff.

23. No person who was on the premises at the time of the exchange was called to give evidence. The defendant in its submissions has highlighted this fact, although it seems to me that such observation might be made in respect of both parties. The name of one person who was stated to have been sitting, not at the bar counter, but in the body of the premises, was given in the replies to particulars and mentioned in evidence. The Court was informed that she was unavailable to give evidence because of ill-health.

24. The only other witness called on behalf of the plaintiff was a Mr. Thomas Rowley, the plaintiff's former solicitor. He stated in evidence that he had mislaid a small note which he had been given to him by Mr. Nolan at the time of the initial consultation. He could not remember the names of the gardaí. He could not recall whether the plaintiff had shown him the bank note and confirmed that he met the plaintiff approximately twice. He transferred the file to the plaintiff's current solicitor.

25. Mr. Maher S.C., on behalf of the plaintiff, sought to introduce a letter dated 9th October, 2015 written by Mr. Rowley to the plaintiff to which objection was taken by Mr. Ward B.L. representing the defendant. In the letter, Mr. Rowley confirmed that at the time of the attendance on 25th April, 2013, Mr. Nolan had given him a note with the names and details of two gardaí who were present in Rathmines Garda Station. The note had been mislaid in the office and a copy had not been retained.

26. Mr. Ward B.L. on behalf of the defendant objected to this evidence as being an impermissible attempt to self-corroborate. It should be noted that the letter contains a statement referring to "*the evening that you filed a complaint with them regarding the incident in Grace's pub*". It is not my understanding of the plaintiff's evidence that he in fact made any formal complaint, rather that he sought clarification as to whether the note was legal tender.

27. Mr. Maher S.C. submits that this letter is admissible to corroborate the evidence of the plaintiff, because of the suggestion that there had been recent fabrication by him. In my view, given the timing of this letter, some two and a half years post the initial consultation of 25th April, 2013, even if admissible, the letter is of little evidential value. The lapse of two and a half years since the date of attendance, particularly in the absence of a contemporaneous note, renders such evidence fragile. I am also mindful of the fact that by 31st January, 2014 at the latest, when the letter of claim was written, the plaintiff had already changed his solicitor. I therefore do not propose to take this letter into account in determining the issues between the parties.

28. On behalf of the defence, evidence was adduced from members of An Garda Síochána who were on duty at Rathmines Garda Station on the evening of 24th April, 2013. They were contacted by the solicitor representing the defendant after the Circuit Court hearing. Two of the gardaí, Garda Lawlor and Sergeant Rothery, made statements in November, 2016. Sergeant Rothery had prepared an earlier report on the matter on 10th June, 2015 when it seems, the parties' advisers had been in contact with the garda station.

29. Another garda, Garda O'Sullivan, confirmed from station records that he was on duty in the public office on that night, but he did not recall meeting the plaintiff. The first time he saw the plaintiff was in court on the day of hearing of this appeal. He acknowledges that the station might have been busy, even though it was a Wednesday evening.

30. Garda Lawlor, who also had not seen the plaintiff before, had never previously experienced such an incident. To him, this was a strange occurrence. He did not believe that it would be a matter for him to check a currency note to confirm whether it was legal or otherwise. He was not trained to deal with such incidents. There was no "*currency machine*" in the station and if there was any suggestion of counterfeit currency, the note would have been seized and sent to a more specialist branch at Garda Headquarters, Phoenix Park. While there was no currency checking device in the station, he thought that he might look at a note suggested to be counterfeit. He expressed an opinion as to what might occur with a counterfeit note; however, he ultimately confirmed that he had never personally been involved in a prosecution relating to counterfeit currency.

31. Garda Lawlor also referred to the absence of a chain of continuity from the point at which the €10 note was presented at the defendant's premises to its production at the station. He confirmed, however, that he would not necessarily record in the occurrence book an incident of a civil nature. He also stated that he was made aware by Sergeant Rothery some time after the incident took place that Mr. Nolan contacted Sergeant Rothery inquiring as to who was working in the public office on the evening in question. Under robust cross-examination he stated that he felt that he had to defend himself because matters had been said on his behalf during the hearing in the Circuit Court – i.e. that his name had been used and information concerning the events unknown to him was given to the court and was incorrectly on his behalf by Mr. Nolan. He felt that his name and professional position had been used by Mr. Nolan "*to help secure a prosecution*".

32. Sergeant Rothery stated that approximately two years after the event, he was approached by a solicitor on behalf of the defendant about the incident. He checked the station allocation book and identified two members of An Garda Síochána who had been in the public office. He made inquiries in the garda station and no one could assist. He spoke to the two gardaí, Garda O'Sullivan and Garda Lawlor, who informed him that they did not have dealings with any person on the night regarding a counterfeit €10 note. If they had, they believed that they would have recalled it. In his statement he records receiving correspondence from the plaintiff's solicitors on 24th April, 2015.

33. On 22nd May, 2015, Sergeant Rothery made a phone call to Mr. Nolan requesting him to identify the names of the two gardaí. The response was a request from Mr. Nolan to identify who was working there on the night in question and the names of Garda Lawlor and Garda O'Sullivan were provided. He sensed that the plaintiff was writing the names down. Mr. Nolan confirmed to Sergeant Rothery that he was "*not making it up*". Sergeant Rothery also observed and noted in a report prepared by him for his superintendent at around that time that there had been a machine – perhaps one for checking driving licences – which was no longer working. He had never seen a counterfeit note in his time. It was not the practice to check a note in such a fashion and best practice would be to seize it and hand it into the Garda Depot. Sergeant Rothery also spoke to Mr. Rowley at that time, but he was by then no longer representing Mr. Nolan. Mr. Rowley recollected the incident. It seems that Mr. Rowley had also been contacted by Mr. Nolan at a time between the contact Sergeant Rothery had with each of them. On 23rd May, 2015, Sergeant Rothery spoke to the owner and manager of the public house, Mr. Eamonn Grace, who informed him of these proceedings. Having conducted inquiries into the incident and in the absence of CCTV footage, Sergeant Rothery expressed the opinion that there was no proof to confirm that Mr. Nolan reported the matter at Rathmines Garda Station on that night. There was no possible way of clarifying that the €10 note allegedly produced at the station was the same note tendered at the defendant's premises.

34. Sergeant Rothery nevertheless recorded that Mr. Nolan had at the time of his inquiries referred to the fact that the garda had used a counterfeit detection device. Sergeant Rothery could not confirm the existence of such a device as he had not been stationed there at the time – he was first stationed there in August, 2014. In the report prepared for his superintendent on 10th June, 2015, he stated his belief:-

> "*…that there is a device in the public office, which is not station issue, but I believe that this particular machine has not worked for some time. How Mr. Nolan was aware of this device in the station is not known.*"

35. Finally, the proprietor of the public house, Mr. Eamonn Grace gave evidence that neither he nor his father were ever members of An Garda Síochána. He was first informed of the incident some days after its occurrence. While he was not a witness to the incident he believed Mr. Bond, and believed that the plaintiff was attempting to pass a counterfeit note.

36. The plaintiff pleads that the words and accompanying actions, gestures and behaviour of the defendant were defamatory, that they referred to the plaintiff and meant and were understood in their natural, ordinary and inferential meaning that he:-

(a) was attempting to commit fraud;

(b) was prepared to and/or did engage in a criminal activity, and without prejudice to the foregoing, had committed and/or attempted to commit offences under s. 34 and/or s. 35 of the Criminal Justice (Theft and Fraud Offences) Act 2001;

(c) attempted to use illegal tender in payment for goods;

(d) was a person of unsound character who could not be trusted; and

(e) was of deceitful character.

37. The defendant submits that the plaintiff tendered a false €10 note and that the note produced in court was not the one tendered, as it was not torn. It is submitted on behalf of the defendant that the plaintiff had failed to establish its veracity, independently or otherwise. That it was fake had been established through Mr. Bond's testimony of his examination of the note. This showed that a security feature, being the silver strip, was absent. It is further submitted that the plaintiff's reliability and credibility was undermined in collateral but significant matters relating to his visit to the garda station.

38. Even if the Court is not satisfied the truth has been established, the defendant contends that it is entitled to rely on the defence of qualified privilege and that there is no rule of law which prohibits the pleading of qualified privilege as an alternative to the defence of truth. While the defendant challenged the authenticity of the note, this was a legitimate line of inquiry. Thus analysed, the defendant maintains that it is essentially the way the note was queried which is the only matter of complaint and further submits that such challenge was made as discreetly as possible. It is denied that it was made in a loud fashion as alleged by Mr. Nolan.

39. It is also submitted on behalf of the defendant that there is no evidence of publication because the conversation between the parties was at a quiet, discreet and low level. In any event, it is submitted that the presence of bystanders did not deprive the defendant of the defence of qualified privilege. In relation to the sequence of events, it is suggested by counsel for the defence that it is normal for a barman to provide drinks first and seek payment thereafter. Although this may very well be the norm, that is not to say that the transaction cannot happen in any other order. Indeed Mr. Bond referred to certain circumstances where this might not occur, such as where customers might run a tab.

40. While the plaintiff accepts that it is open to a defendant to plead justification (now the defence of truth) and qualified privilege in the alternative, it is argued that truth had not been established and any defence based on qualified privilege was defeated by malice, exemplified by the defendant's conduct before and during trial. Further, the plaintiff argues that the fact that the words were spoken in a raised voice when they might have been communicated in private afforded strong evidence of malice.

41. There is little dispute in respect of certain matters. Mr. Nolan attended at the defendant's premises where he tendered a €10 note, the authenticity of which was questioned by Mr. Bond. Mr. Bond concluded that the note was fake, although he did not have a particular expertise in, or previous experience of such an incident. It is not seriously in dispute that there were eight to ten people in the public house on the night in question, four of whom were seated at the bar counter. Further, what is also not in dispute is that there was a discussion between Mr. Nolan and Mr. Bond regarding the former's intention to attend the garda station and, following his return to the premises after five to ten minutes, his stated confirmation to Mr. Bond that he had been to the station and that a garda informed him that the note was legal tender.

42. The precise words alleged to have been employed by Mr. Bond, the circumstances and the volume at which the discussion took place all remain in contention. The Court cannot be certain of what occurred, but must attempt to resolve the conflicts of evidence on the balance of probabilities.

43. I find that Mr. Bond was somewhat unsure of his evidence in relation to the words spoken and the nature of the exchange between the parties. In his evidence initially tendered to the Court, Mr. Bond stated that he had said to Mr. Nolan that "*that's a fake note, where did you get it*". Later in his evidence, however, he stated that he never said that it was fake and that he "*just said to him … wherever you got it, just take it back … there was no shouting, there was no roaring".* Later again in his evidence he denied that he stated "*That's a fake note*", rather he said "*You have a fake note*".

44. Despite being challenged under cross-examination where his credibility was seriously questioned to the extent that one can only conclude that he was being accused of falsifying evidence about his attendance at the garda station, Mr. Nolan maintained a calm demeanour and was, in the Court's view, more convincing and far surer of the exchange than Mr. Bond.

45. A feature of the interaction between Mr. Bond and Mr. Nolan is that on Mr. Bond's own account, he was being presented with a counterfeit note and he was satisfied that it was not authentic. The exchange became somewhat heated, according to Mr. Bond, and Mr. Nolan expressed words about "*his back*" or "*watching his back*". While he may not have taken it as a serious threat, according to Mr. Bond the words were potentially threatening; yet no attempt was made by him, nor did he deem it necessary, to telephone the gardaí. Mr. Nolan informed him that he was going to go to the gardaí. The premises were relatively quiet, Mr. Bond had access to a telephone and on Mr. Bond's own evidence, the plaintiff was effectively inviting such contact.

46. Mr. Bond stated in evidence that Mr. Nolan could have obtained the note "*somewhere else*" and while he accepted that it was a serious matter to pass counterfeit currency, nevertheless, under cross-examination he maintained his view that it was a fake note, despite the fact that he had no training or instruction in identifying counterfeit currency or experience in dealing with a situation similar to that as presented in this case. In the light of such stated belief it is somewhat surprising there is no evidence that Mr. Bond sought to obtain Mr. Nolan's name, an inquiry that was made by Mr. Nolan of Mr. Bond.

47. The circumstances of the plaintiff's stated attendance at the garda station must be considered. There is no doubt that there was a discussion about the plaintiff attending the garda station; both before he alleges that he went to the garda station and afterwards, when he informed Mr. Bond that he had been there. The impetus for the involvement of the gardaí came from the plaintiff. There is no evidence that when the plaintiff had returned on the second occasion, Mr. Bond disputed that he had visited the garda station. The fact of the visit to the garda station is specifically pleaded in the civil bill which was issued just short of one year post the incident. The gardaí who were called in evidence either have no recollection of the incident, which they say they would have remembered, or state that the incident did not happen. The Court must take cognisance of the fact that the two gardaí who were stated to be the

only two on station duty on the evening, in a busy garda station, were not contacted about this matter for at least two years after its occurrence. On Mr. Nolan's evidence his attendance at the station was very brief. A formal complaint regarding the legality of the note was not being made and on his evidence the garda regarded it as a civil matter between the parties, which would not necessarily have been recorded. The evidence of the gardaí, albeit given in a *bona fide* manner, was based on requests for their recollection at a very considerable remove from the date of the incident, and must be viewed in that light with the attendant frailties brought by the passage of time.

48. The immediate and continued actions and reactions of the parties on the night to what was said and done, in my view, are more consistent with the plaintiff's description of the manner in which the exchange occurred, rather than the defendant's recall of a more discreet discussion. There is also the reference in Sergeant Rothery's report to the apparent knowledge of Mr. Nolan of the existence of a device in the station, which also appears more consistent with the plaintiff's stated actions on the night. While I cannot be certain of the plaintiff's attendance at the garda station, any uncertainty which I may have about this aspect of the case does not dissuade me from the conclusion regarding what, on balance, I accept as more likely to have occurred at the bar counter.

49. In light of the above, having had the opportunity to assess the demeanour of the witnesses, on the balance of probabilities, I accept the plaintiff's description of what occurred as being more probable.

50. I find as a fact on the basis of the evidence of both witnesses that there were at least four persons at the bar, in close proximity to where the exchange between the parties took place. Having found in favour of the plaintiff's description that the words in question were spoken in a loud manner and that the note was held aloft, I am satisfied that those at the bar could not but have heard and witnessed the exchange as described by the plaintiff. Nevertheless, publication was to a limited number of people.

51. The Court must not only consider the spoken words, but must also consider the manner of the publication in the context of the gestures and actions of the defendant. As the authors of Salmond & Heuston, *Law of Torts*, 21st Ed., (Sweet & Maxwell, 1996) observe at p. 138, a man may defame another by his acts no less than by his words.

52. Having considered the evidence of the parties, I am satisfied that the plaintiff has established that the words, spoken in the manner alleged and in the context of the actions and gestures of Mr. Bond, were likely to have been heard and seen by members of the public who were seated nearby at the bar counter. I am also satisfied that the publication was excessive in the circumstances. Mr. Bond had the €10 in his hand. It was open to him to either report the matter to An Garda Síochána or to approach the plaintiff in a less public way. It appears to me that this was not a heat of the moment situation as might arise where a person thought to be shoplifter or thief makes a seeming escape, and where another makes a statement in response to the exigencies of the situation and the requirement for immediate action. In a number of the cases opened to the Court and referred to below, the defendant had much less control of the situation. Here there was no question of an apparent attempt to escape or to bid a hasty retreat. In fact the plaintiff remained in the area and wished to discuss or correct the impression that he had attempted to pass a false €10 note.

53. In *McCormack v. Olsthoorn* [2004] 3 I.R. 632 Hardiman J. cautioned against requiring a defendant to exercise fine judgment or to employ a considered selection of words in situations that arise quickly and without notice. At para. 22 he stated:-

> *"The defendant had a legal right to protect his property and in doing so to 'tax' an individual whom he suspected of a theft. Situations such as that which arose between these parties in the Milk Market arise quickly and without notice. For this reason, I think it would be utterly unreasonable to require of the defendant any fine judgment or considered selection of the words which he used."*

I fully endorse those sentiments, and nothing in this judgment should be taken as detracting from Hardiman J.'s words of caution. On the facts here, however, I do not believe this to be one of those situations such as arose in *McCormack or McNamara v. Dunnes Stores (Parkway) Limited* [2017] IEHC 172, also discussed below.

54. Even if I am incorrect about this in so far as the initial exchange is concerned, the fact that Mr. Nolan returned to the premises again protesting that the note was valid legal tender, cannot be said to have been a situation which arose quickly and without notice. Given that the evidence which I accept establishes that the same parties were present on both occasions, the words and deeds of Mr. Bond on the second occasion effectively refuelled the defamatory accusations made on the first occasion.

55. The defence relies on the defence of truth and qualified privilege.

56. Section 15 of the Defamation Act 2009 provides, *inter alia*, that subject to ss. 17(1) and 18(1), any defence that immediately before its commencement could have been pleaded as a defence in an action for libel or slander is abolished.

57. Section 16 effectively replaces the defence of justification with the defence of truth. It is not suggested by the parties that the principles underlying the old defence of justification and the new defence of truth are materially different as they might apply to the facts and issues in this case.

58. Section 16(1) provides that it is a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought is true in all material respects. Section 16(2) provides that where there are two or more distinct allegations against a plaintiff, the defence of truth will not fail by reason only of the truth of every allegation not being proved, if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining allegations.

59. It has been stated that the defendant must prove the "*sting of the imputation*" – see *Edwards v. Bell* (1824) 1 Bing. 403. See also *Gatley on Libel and Slander*, 9th Ed., (Sweet & Maxwell, 1998) para. 11.10, p. 242 where the authors state that the plea of justification must be not only as broad as the literal language of the libel but as broad as the reasonable inferences necessarily flowing from the literal language:-

> *"Where the sting of the words lies in the inferences which would ordinarily be drawn from them, to succeed in his justification the defendant will have to prove the truth of the facts which would be so inferred, not merely the literal truth of what is expressly stated, for the defamatory imputation extends to reasonable inferences."*

It is not, therefore, sufficient for a plaintiff to justify or prove the truth of the literal meaning of the words but, as stated above, he/she must prove the *'gist'* of the reasonable and lawful inferences which they bear. If there are particular inferences pleaded which those words are capable of bearing as a matter of law, the law dictates that the defendant must go further than merely proving the literal truth of the words spoken but must prove the natural and ordinary implication of those words.

60. At the outset of this case, counsel for the defendant clarified, correctly in my view, that no issue was being taken in respect of the inferences as pleaded – the issue concerned whether the words spoken, and the manner of their speaking, were as alleged. Having come to the conclusion that the plaintiff's version of events is to be preferred over that of the defendant, it follows that the words are capable of having the inferences as pleaded and therefore are capable of being defamatory. In the circumstances, bearing in mind the entire transaction between the parties, I am satisfied that the words were defamatory of the plaintiff – *i.e.* that the plaintiff was in possession of and attempted to pass a counterfeit €10 note.

61. The defence has sought to establish truth by reference to the evidence of Mr. Bond and by calling into question the plaintiff's credibility in relation to his attendance at the garda station. With regard to the former, I have accepted the plaintiff's evidence. With regard to the latter, in my view, even if the evidence of An Garda Síochána was accepted that the plaintiff never attended at the garda station, this falls a long way short of establishing that the plaintiff did in fact have in his possession and attempt to pass counterfeit currency; or that his conduct was as pleaded. I do not accept, therefore, that the defence of truth has been established.

62. It is submitted on behalf of the defendant that it was repeatedly made clear that it was not being suggested by Mr. Bond that the plaintiff had knowingly tendered a false note; that the enquiry from Mr. Bond as to where the plaintiff had obtained a note was motivated by concern rather than being accusatory. I am not satisfied that such stated concern has been established on the evidence. Even if it had been, as Keane J. observed in *Murphy v. Times Newspapers Limited* [2000] 1 I.R. 522 at p. 529:-

> *"It has for long been the law that the intention of the publisher of the statement is irrelevant in considering whether it is defamatory. Any uncertainty as to this being the law was dispelled by the leading case of E. Hulton and Co. v. Jones [1910] A.C. 20, where Lord Loreborn L.C. said at p. 23:-*
>
> > 'A person charged with libel cannot defend himself by shewing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both. He has none the less imputed something disgraceful and has none the less injured the plaintiff. A man in good faith may publish a libel believing it to be true, and it may be found by the jury that he acted in good faith believing it to be true, and reasonably believing it to be true, but that in fact the statement was false. Under those circumstances he has no defence to the action, however excellent his intention. If the intention of the writer be immaterial in considering whether the matter written is defamatory, I do not see why it need be relevant in considering whether it is defamatory of the plaintiff … Just as the defendant could not excuse himself from malice by proving that he wrote it in the most benevolent spirit, so he cannot shew that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff.' "

63. In the context of unintentional publication, see now s. 19(2) of the Act of 2009.

64. The defence of qualified privilege has been placed on a statutory footing by the Act of 2009, s. 18 of which maintains the pre-existing common law defence of qualified privilege. It provides:-

> *"18.– (1) Subject to section 17 , it shall be a defence to a defamation action for the defendant to prove that the statement in respect of which the action was brought would, if it had been made immediately before the commencement of this section, have been considered under the law (other than the Act of 1961) in force immediately before such commencement as having been made on an occasion of qualified privilege.*
>
> *(2) Without prejudice to the generality of subsection (1), it shall, subject to section 19, be a defence to a defamation action for the defendant to prove that—*
>
> > *(a) the statement was published to a person or persons who—*
> > > *(i) had a duty to receive, or interest in receiving, the information contained in the statement, or*
> > >
> > > *(ii) the defendant believed upon reasonable grounds that the said person or persons had such a duty or interest, and*
> >
> > *(b) the defendant had a corresponding duty to communicate, or interest in communicating, the information to such person or persons."*

Section 18(3) makes specific provision for circumstances and occasions which statutorily are deemed to be occasions of privilege, none of which exceptions apply in this case.

65. Section 18(7) defines "*duty*" as meaning a legal, moral or social duty; and "*interest*" as meaning a legal, moral or social interest. This mirrors the pre-existing position at common law. In s. 18(2), emphasis is placed on the requirement for mutuality – the duty or interest in communicating, and the corresponding duty or interest in receiving the communication.

66. Section 19(1) of the Act provides that "*the defence of qualified privilege shall fail if, in relation to the publication of the statement in respect of which the action was brought, the plaintiff proves that the defendant acted with malice*".

67. Issues arise in this case as to whether a defendant may pursue the defence of truth *and* the defence of qualified privilege, and the requirements necessary to establish the latter in the context of a case such as this. As there is a correlation between these issues on the arguments, they will be considered together.

68. The Act of 2009 is silent in relation to the pleading of alternative defences of truth and qualified privilege.

69. Reference has been made in submissions to certain decisions, two of which have been cited in *extenso*. Both are decisions of the High Court on appeal from the Circuit Court – that of Hardiman J. in *McCormack v. Olsthoorn* [2004] 3 I.R. 632 and of Murphy J. in *McNamara v. Dunnes Stores (Parkway) Limited* [2017] IEHC 172. The plaintiff in particular submits that to the extent that the former decision contains *dicta* regarding circumstances in which the defence of qualified privilege may apply which conflicts with certain other authorities, it should not be followed. The defendant submits that the *McNamara* decision is a narrow one, confined to its own facts, distinguishable and is not authority for the proposition that justification and qualified privilege are mutually exclusive defences.

70. In *Horrocks v. Lowe* [1975] A.C. 135, Lord Diplock explained the rationale of duty/interest requirement necessary to establish an occasion of qualified privilege and the central role of the public interest and public policy in this regard. At p. 149 of his decision, he

stated as follows:-

> *"The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue … For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit–the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege".*

74. If this case concerned a communication between the defendant and An Garda Síochána, it is likely that it would attract qualified privilege. See for example *Kennedy v. Sheriff of East Baton Rouge*, 05-1418 (La. 7/10/06) 935 So. 2d 669 where privilege attached to a report to members of the police force that a person had produced or tried to pass counterfeit currency.

71. The situation is not as clear where the publication is to a person who has no expressly recognised mutual interest or duty, save such as may be enjoyed by members of the public in general.

72. Given that the parties have submitted that there is an inconsistency between the approach of this court in *McCormack and McNamara*, I now propose to refer to these cases.

73. In *McCormack* the plaintiff was a retired member of An Garda Síochána. He attended at the Milk Market Limerick on 13th April, 2002 where the defendant had a stall at which he sold potted plants. Mr. McCormack, who had an interest in horticulture, had previously purchased a tomato plant at a different shop. It was not packaged but "*stickers*" had been placed on it. He approached Mr. Olsthoorn's stall. There did not appear to be anyone in charge. He inspected various plants, picking them up and placing them back down. He did not make a purchase at the defendant's stall, which he then left. When he was approximately 25 yards away, the defendant confronted him. The plaintiff's evidence was that dozens of people were present, that the defendant had grabbed him by the arm with the intention of bringing him back towards his stall and that speaking in a loud voice, the defendant said "*you stole that plant from my shop*". On the plaintiff's evidence, this altercation occurred over an extensive period. When they were no more than five to six yards from the stall, the defendant realised that he had made a mistake. Correspondence exchanged and proceedings issued on 27th June, 2002. The defendant's solicitor wrote to the plaintiff's representatives on 9th July, 2002, acknowledging the plaintiff's good character and explaining that the defendant had made a mistake.

74. Hardiman J. observed that it was not claimed that the defendant Mr. Olsthoorn had acted maliciously or from improper motive. It was found that he had a *bona fide* but mistaken belief that the plaintiff had taken one of the plants. The plaintiff argued that his right to his reputation was superior to the defendant's legal interest in protecting his property; and that any privilege which the defendant might invoke extended only to inquiries, and not to express statements or accusations. Hardiman J. accepted that what he described as the "*occasion*" at the Milk Market was one of qualified privilege and that the defendant had a legal right to protect his property and in doing so to 'tax' an individual whom he suspected of a theft. He did not consider that the direct statement which he made deprived him of privilege. Furthermore he did not consider that the presence of bystanders in itself had that effect, because, as Gatley observed, *"[t]he law has been fairly liberal in allowing charges to be made in the presence of others."*

75. The law was such because of the hurried circumstances in which such accusations tend to be made. Hardiman J. was not satisfied that malice or improper motive had been established. He cited the seminal decision on qualified privilege, *Toogood v. Spyring* [1834] 1 Cr. M. & R. 181. There an allegation was made in the presence of a third party two days after the event. This was found not to displace the privilege.

76. Hardiman J. also referred to excessive publication and its effect on a statement that might otherwise attract qualified privilege, at p. 639:-

> *"Privilege is lost by malice, excessively wide publication or one of the other established causes."*

In *Adam v. Ward* [1917] A.C. 309, while the House of Lords held that reciprocity of interest and duty was essential, Lord Finlay L.C. observed at p. 318 that, in order to defeat the defence of qualified privilege:-

> *"…malice may be inferred from either the terms of the communication itself, as if the language be unnecessarily strong, or from any facts which show that the defendant in publishing the libel was actuated by spite or some indirect motive."*

77. On one view, even if qualified privilege is attracted to the events in the instant case, on the facts as found the publication was excessive and on the application of the reasoning of Hardiman J., and Lord Finlay L.C. in *Adam v. Ward*, this should be dispositive of issues in this case. Curiously, the plaintiff disavows reliance on aspects of Hardiman J.'s decision. It is further contended that the defendant cannot rely on a defence of qualified privilege once he pursues the defence of truth. Reliance is placed by the plaintiff on *McNamara* in this regard. To the extent that it is necessary, in view of the Court's finding that publication was excessive, I now address the issues so raised.

78. In *McNamara* the plaintiff bought a confirmation outfit for her twelve year old daughter. She then proceeded to the defendant's premises to purchase matching items. She was carrying two bags, one being a shopping bag from the store where she had purchased the outfit, the second being a large zipped handbag. On observing CCTV footage, one of the defendant's security men believed that he had seen her placing an item of clothing into her bag. The plaintiff and her daughter left the store. The security man pursued and then confronted her. CCTV footage showed the plaintiff's shopping bag being opened for inspection and the defendant security man lifting goods from the bag. Some moments later, on returning to the store from the car park the plaintiff made complaint. The manager of the store, having reviewed CCTV footage, apologised for the security man's behaviour. Later that day she telephoned the plaintiff to see how her daughter was faring in the aftermath of the incident. Approximately ten days after the incident an initiating letter was sent. In reply, the defendant maintained that it was entitled to take such reasonable means as were necessary to protect its property and to make inquiries as to proof of purchase. It was stated that the approach was discreet and reasonable. On this basis it was contended that there was no defamation. The plaintiff instituted proceedings claiming that the words "*you took something*", spoken loudly, and demanding that the contents of the bag be shown, together with the general circumstances of the search, meant and were understood to mean, *inter alia*, that the plaintiff was a shoplifter and had committed a criminal offence.

79. The defendant alleged that the words were spoken and actions taken were without malice on an occasion of qualified privilege.

Murphy J. held that, to any neutral observer, the defendant's security guard by his conduct and words had defamed the plaintiff. The entirety of the circumstances, both words and actions, conveyed that the plaintiff was suspected of shoplifting and that she had committed a criminal offence.

80. Regarding the defence of qualified privilege and noting the defendant's reliance on *McCormack* as establishing that the it had a legal right to protect its property by *'taxing'* a suspected thief, Murphy J. observed that in *McCormack* the defendant *bona fide* but mistakenly believed that the plaintiff had taken a plant in contrast to the position in *McNamara*. She concluded at para. 94:-

> *"In McCormack v. Olsthoorn the Court held that qualified privilege applied where a party genuinely but mistakenly accuses someone of theft. There is no evidence in this case that the defendant 'genuinely but mistakenly' accused the plaintiff of theft. The only evidence offered by the defendant is that she did in fact steal items from Dunnes Stores."*

81. Murphy J. in finding for the plaintiff stated at para. 103:-

> *"It is open to any defendant to plead justification should the circumstances allow. What is not permissible is to plead qualified privilege and then run the defence of justification. That in the Court's view is what occurred in this case."*

82. A considerable concern of Murphy J. was thus stated at para. 110:-

> *"The reality of the position is that were this Court to allow the defendant to rely on qualified privilege in circumstances where the only evidence called suggests justification, a serious injustice would be done to the plaintiff who would leave this Court in effect branded a thief under the guise of a defence of qualified privilege. For these reasons and on the facts of this case, the Court therefore holds that the defence of qualified privilege has not been made out and accordingly the plaintiff is entitled to succeed in her claim for defamation."*

83. Mr. Ward B.L. on behalf of the defendant submitted that the defences of truth and qualified privilege are logically not mutually exclusive but follow one from the other, *post alterem*, and that *McNamara* is distinguishable and is confined to its own specific facts. Thus, it is argued, that the learned judge's observations that it was impermissible for a defendant to seek to rely on qualified privilege but run a defence of justification should be read in that context; and that the decision in *McCormack* is as much binding on this Court as the decision in *McNamara*.

84. Counsel submits that the rationale of *McNamara* is that it proscribes the pleading of one defence, qualified privilege, but the advancement at trial of another, truth; and that in *McNamara* the attitude of the security guard did not demonstrate the required and necessary absence of malice to establish qualified privilege. Although I have already made a decision on the facts, it should be observed that in the context of this argument, counsel submitted that the behaviour of Mr. Bond was much less assertive, less aggressive and was more discreet than that of the defendant in *McNamara*; and that taken at its height, the evidence of the plaintiff was never that Mr. Bond or the defendant had accused the plaintiff of knowingly tendering a false note. The defendant did not at any stage suggest that the actions of the plaintiff had been calculated to defraud so that the defendant's *bona fide*s remained intact. Rather, the only time which the defendant openly challenged the credibility of the plaintiff was when it was faced with manifest evidence that the plaintiff had given an incorrect account of what had occurred – *i.e*. Mr. Nolan's account of his visit to the garda station. Unlike in *McNamara* where the defendant put the plaintiff on full proof of all matters, the defendant in this case accepted the "*bulk of the statement of claim*" and admitted most of the events described by the plaintiff. It was only where there was an actual difference between the two accounts that the plaintiff had been required to prove any aspect of his case.

85. Mr. Ward B.L. emphasises *dicta* of Hardiman J. to the effect that "*[p]rivilege is lost by malice, excessively wide publication, or one of the other established causes. It is not lost merely because the belief turns out to be erroneous*". Counsel argues that a defendant cannot reasonably be expected to concede its mistake before a court has reached its conclusion and a defendant may maintain a genuine but mistaken belief until such time as its error is demonstrated, even if that is by the court after hearing.

86. In response, the plaintiff without citing specific authority, refers to what is described as the general practice of the Circuit Court not to follow *McCormack* for a number of reasons:-

> (1) Judges of the Circuit Court in practice have tended to rely upon the decision of *Coleman v. Keanes Limited* [1946] Ir. Jur. Rep. 5, in which an accusation of theft was held not to be privileged because it was made with a desire to recover property, instead of a desire to bring a thief to justice.
>
> (2) *McCormack* has been criticised academically because none of the persons who witnessed what occurred or heard what was said had a sufficient legal interest in seeing the exchange or hearing what was said.

87. The plaintiff relies on *dicta* of Murphy J. that were the Court to allow the defendant to rely on qualified privilege where the only evidence suggested justification; a serious injustice would be done to the plaintiff. If the case were otherwise, the plaintiff submits that the "*law as stated in McCormack v. Olsthoorn would give a charter to defendants to engage in character-bashing and should that fail to succeed, a defendant could then sit back and rely on its defence of qualified privilege"*. Mr. Maher S.C. contends that the correct statement of the law is that set out in Coleman and *Corcoran v. W. & R. Jacob and Company Limited* [1945] I.R. 446. He argues that consistent with the reasoning in *McNamara*, the court should disallow the defence of qualified privilege where the defendant has effectively run a defence of justification or truth. Finally, he submitted that even if the court felt that a qualified privilege defence arises, it is defeated by malice, and malice was present in this case by reason of the "*cavalier attitude in which the defendant approached the issue of justification/truth".*

88. It is true that in the course of legal argument in *McNamara*, the plaintiff referred to academic criticism of the rationale of the decision in *McCormack*. In Cox & McCullough, *Defamation Law and Practice* (Clarus Press, 2014) at para. 8-74, the authors wrote that if qualified privilege in a "*stop thief*" scenario is rooted in a personal interest in the plaintiff's property, without any reciprocity on the part of the recipients of the publication, then there is no person with an interest to whom it is published, and it was difficult to see it as an act of incidental publication of a privileged statement. In *McCormack*, Murphy J. did not feel it necessary to address the apparent criticism of *Coleman*:-

> *"Fortunately, from the Court's point of view, on the facts of this case the Court is not required to choose between the conflicting decisions in McCormack v. Olsthoorn and Coleman v. Keanes Limited, because even if one accepts and applies the rationale in McCormack v. Olsthoorn, qualified privilege does not arise in this case."* (para. 94).

89. It is not clear whether in *McNamara* both defences were pleaded in the alternative, or whether only the defence of qualified

privilege was pleaded, but at hearing, the defence was simply conducted in an alternative manner. Murphy J. nevertheless observed that in *Corcoran v. W. & R. Jacob and Company Limited*, had the defendant maintained that the plaintiff had unlawfully taken an item from the company, it could not have pleaded qualified privilege and would have been obliged to plead justification.

90. In *Corcoran* the defence placed emphasis on the decision of *Couper v. Lord Balfour of Burleigh* [1913] S.C. 492, as supporting the proposition that the mere retention and reiteration of the honest belief in the truth of defamatory words did not amount to evidence of malice. It was argued that malice should be excluded unless expressly proved, where the communication was made under a duty and to a person entitled to hear it.

91. Murnaghan J. emphasised that the occasion was one in which, even if an untrue statement was made, the defendant would not be liable if the statement were made in such circumstances that the defendant's agent, known as a *commissionaire* whose job was to ensure that his employer's goods were not being pilfered, honestly believed them to be true. The case turned on whether the jury could reasonably infer from the evidence that the *commissionaire* was actuated by malice. Murnaghan J., delivering the majority judgment, on a construction of the facts, did not believe that there was no evidence on which the jury could say that the agent was guilty of malice.

92. At the trial there was no evidence of spite. The only suggestion of actual malice was in the course of cross-examination of the *commissionaire*. Regarding the *commissionaire's* demeanour in the witness box, Murnaghan J. did not think that there was anything substantial so as to justify a jury's finding of malice. While when pressed in cross-examination he stated that that the respondent witnesses were telling lies, Murnaghan J. considered that to be an asseveration that he was telling the truth on points on which he was contradicted.

93. It does not appear to me, however, that this case is necessarily authority for the proposition that the two defences are mutually exclusive. Nor is it my interpretation of what Murphy J. said in *McNamara* that it is never open to a defendant to pursue both defences at hearing, where they have been properly pleaded. When viewed in the context of the facts of the case with which she was dealing, it is my understanding of her observations that it is not permissible to plead one defence (qualified privilege) and then run the other (truth). The implication of an argument in support of an absolute prohibition is that by running a defence of truth, the defence of qualified privilege is thereby automatically undermined – presumably on the basis of an imputed malice on the part of the publisher in maintaining the defence of truth at hearing. It may be that it proves difficult and perhaps inconsistent in many cases to pursue both defences but that is not to say that, in an appropriate case, both defences may not be pursued, in the alternative. See for example Cox & McCullough at p. 293 at footnote 305 where citing *Horrocks v. Lowe* [1975] A.C. 135, the authors state that:-

> *"The point is made, however, that the fact that a defendant consistently pleads truth in respect of the statement is presumably evidence that s/he genuinely and completely believed the statement to be true".*

94. Further, in *Horrocks*, Lord Diplock, at p. 150 stated:-

> *"The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.*
>
> *Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief.' If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest the law must take them as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is, a positive belief that the conclusions they have reached true. The law demands no more."*

95. On the application of this rationale, it would seem strange that merely because a person honestly believed a statement to be true and thus pleaded and pursued a defence of truth, that he would be thereby deprived of the ability to put forward an alternative defence of qualified privilege at the heart of which is an honest belief in the truth of the statement, even if it transpires to be false.

96. That it is permissible to pursue both defences in an appropriate case appears to be supported by Gatley, 8th Ed., (Sweet & Maxwell, 1981), at para. 1102, in the context of alternative pleading:-

> *"The defendant may plead as many different defences as he thinks proper. He may deny publication, and alternatively plead that the words were published on a privileged occasion; or he may raise the three apparently inconsistent pleas of justification, fair comment and privilege, although it may be imprudent to do so."*

At para. 1354, the authors quote Willes J. in *Caulfield v. Whitworth* (1868) 18 L.T. (N.S.) at p. 528:-

> *" 'The rule is clear that when there are more issues than one, the pleadings on one of them cannot be used as evidence to establish the opponent's case on another.' "*

They further quote Davies L.J. in *Broadway Approvals v. Odhams Press* [1965] 1 W.L.R. at p. 825:-

> *"'It may be that in some cases an unsuccessful plea of justification may be evidence of malice (Simpson v. Robinson (1848) 12 Q.B. 511). But in many cases, as in the present, so to hold would be to deprive a defendant of the right to raise a twofold defence of justification and fair comment, since to fail on justification would destroy his defence of fair comment: indeed, to plead justification may point more to honesty than to malice (see Hayford v. Forrester-Paton*

*(1917) S.C. 740)'."*

On the face of it and as a matter of principle it does not appear to me to be impermissible for a defendant to plead and pursue both defences in an appropriate case. In my view, therefore, the defendant in this case is not prohibited by law from pursuing the defence of qualified privilege where he has not succeeded in the defence of truth.

97. On the issue of privilege, I have been referred to academic criticism of *McCormack* where privilege applied although there was an apparent absence of mutuality of duty or interest on the part of those to whom the statements and actions were published. Hardiman J. observed that privilege exists where a legally recognised duty or interest in speaking exists – in that case a legitimate desire to recover one's property. He did not expressly refer to the requirement of a corresponding duty or interest in the person hearing a statement. In Cox & McCullough, *Defamation Law and Practice*, (Clarus Press, 2014) the authors state at para. 8.74 (p. 276) as follows:-

> *"Hardiman J, in holding that the presence of bystanders did not deprive the defendant of the benefit of qualified privilege, referred to Toogood v Spyring [1834] 1 Cr M & R 181. In that case, one of the defamatory statements in issue had been made by the defendant to the plaintiff in the presence of a third party, and the Court held that the occasion was nevertheless privileged. Hardiman J said that he did not need to consider whether or not that decision should now be followed. But, as was pointed out in White v Stone [1939] 3 All ER 507, a troublesome aspect of that part of the decision in Toogood v Spyring was the fact that, in that case, no recipient of the statement had an interest in its publication, and, specifically, the victim of the defamation could not himself stand as the necessary recipient with a reciprocal interest in the publication. The same applies in McCormack: if the privilege is rooted in a personal interest in the plaintiff's property, without any reciprocity on the part of the recipients of the publication, then there is no person with an interest to whom it is published, and it is difficult to see it as a case of incidental publication of a privileged statement."*

The authors observe that in cases where allegations of theft are necessarily overheard by third parties, then it is arguable that the only legitimate approach for the courts, if the defence of qualified privilege is to apply, is to follow the logic in Coleman v. Keanes and to require the defendant to demonstrate a social interest in the prevention of crime (which, as the member of the public, the bystander would share) rather than a personal interest in the retrieval of property (see p. 277).

98. In McMahon & Binchy, *Law of Torts*, 4th Ed., (Bloomsbury, 2013), an alternative viewpoint is expressed. Where a defendant could demonstrate a social interest in the prevention of crime that would be shared with the bystanders, a statement might be privileged on that basis. Equally, if the defendant could demonstrate only an interest in protecting his or her own goods but made an allegation to a person with a legitimate interest or duty (such as a policeman) which was overheard by bystanders, publication to those bystanders could be legitimately deemed to be incidental publication. The authors observe at para. 34.214 (p. 1316):-

> *"It is true in some circumstances, however, that publication to the world at large may be justified on the grounds that the public has a sufficient interest in the matter in hand, or, for example, where the defendant is merely responding to an accusation through the same medium in which the initial attack was made (eg, newspaper, television, etc). Moreover, accidental or incidental publication to persons who would not normally have sufficient interest to attract qualified privilege will not destroy the defendant's privilege. Thus an accusation on a privileged occasion, against a suspected shoplifter, or employee, for example, will not involve the defendant in liability merely because it is incidentally overheard by others who do not have an interest in learning of the accusation."*

99. In the seminal decision on qualified privilege, *Toogood v. Spyring* [1834] 1 Cr. M. & R. 181 and [1824-34] All E.R. 735, Parke B. formulated what has come to be recognised as the definition of circumstances in which qualified privilege may arise, with emphasis being placed on the "*occasion*" preventing the inference of malice. In his celebrated *dictum*, he observed at para. 193:-

> *"In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."* [emphasis added].

100. It is arguable that on its facts, however, the circumstances of the publication there could never have come within the requirements giving rise to occasions of privilege as attributed to Parke B., yet privilege is said to have applied. That case concerned one of a number of publications being overheard by a third party. At the trial of the action, the jury was directed that this publication, not being a complaint to the plaintiff's employer and made in the presence of a third person, was not privileged.

101. Parke B. delivering the judgment of the Court of Exchequer and explaining that the overhearing of the communication by a bystander did not necessarily destroy privilege, observed at p. 193:-

> *"Among the many cases which have been reported on this subject, one precisely in point has not, I believe, occurred; but one of the most ordinary and common instances in which the principle has been applied in practice is, that a former master giving the character of the discharged servant; and I am not aware that it was ever deemed essential to the protection of such communication that it should be made to some person interested in the inquiry, alone, and not in the presence of a third person. If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed: Child v. Affleck, 4 Man. & Ryl. 590; 9 B. & C. 403)), the simple fact that there has been some casual bye-stander cannot alter the nature of the transaction. The business of life could not be well carried on if such restraints were imposed upon this and similar communications, and if, on every occasion in which they were made, they were not protected unless strictly private. In this class of communications is, no doubt, comprehended the right of the master* bona fide *to charge his servant for any supposed misconduct in his service, and to give him admonition and blame; and we think that the simple circumstance of the master exercising that right in the presence of another, does by no means of necessity take away from it the protection which the law would otherwise afford. Where, indeed, an opportunity is sought for making such a charge before third persons, which might have been made in private, it would afford strong evidence of a malicious intention, and thus deprive it of that immunity which the law allows such a statement, when made with honesty of purpose; but the mere fact of a third person being present does not render the communication absolutely unauthorised, though it may be a circumstance to be left with others, including the style and*

*character of the language used, to the consideration of the jury, who are to determine whether the defendant has acted* bona fide *in making the charge, or been influenced by malicious motives."*

The court concluded that the fact that the imputation was made in the presence of the third party did not of itself render the communication unwarranted and officious, but at most was a circumstance to be left to the consideration of the jury.

102. Expressed in bald terms, the plaintiff submits that the decision of Hardiman J. in *McCormack v. Olsthoorn* should not be followed and that there must, of necessity, be some inconsistency between the decision in *McNamara* and that of Hardiman J. However, it appears to me that this is not necessarily the case. What is quite clear about the approach adopted by the defendants in each case is the absence of malice as found in *McCormack v. Olsthoorn*, and the presence thereof as found by Murphy J. in McNamara. In my view the decisions in *McCormack* and *McNamara* are not irreconcilable.

103. To this end it is instructive to consider the central role of malice in the origins of the law of defamation in general and in the development of defence of qualified privilege in particular; and where the burden of proving malice lies.

104. Gatley observes, 8th Ed., at para. 6, that:-

*"There are dicta in some old cases to the effect that malice is 'the gist of an action of defamation'. But the word 'malice' in these cases is used in a technical sense as meaning the wrongful intention which the law always presumes when a wrongful act is done without legal justification or excuse. In the tort of defamation the law presumes malice in this sense from the mere act of the defendant in publishing the defamatory matter. 'From the mere publication of defamatory matter malice is implied, unless the publication was on what is termed a privileged occasion'."*

105. Academic analysis is of assistance and persuasive. Mitchell, "Duties, Interests and Motives: Privileged Occasions in Defamation" (1998) 18 O.J.L.S. 381, observed that until 1825 malice could correctly be said to be the foundation of the action for defamation at common law. Malice was presumed once the plaintiff proved that the defendant had published defamatory words of him. Through the development of the domestic servant reference cases, where masters wrote false and unfavourable references about servants for prospective employers, Mitchell observes that ordinary rules would suggest that a master publishing the defamatory words was presumed to be malicious, and would therefore be liable unless he could rebut the presumption of malice. He observed that consistent with the law as then understood, that should have placed the burden of proof on the master but taking into account the social context of the cases at that time, that is not what happened. In the servant reference cases, the court adopted the position that malice could not be implied from the occasion of speaking but had to be proved by the plaintiff, thus transferring the burden of proof from the defendant to the plaintiff. The "*occasion of speaking*" became crucial. Mitchell observed that in Hargrave v. Le Breton (1769) 4 Burr. 2423 at 2426, Lord Mansfield summarised qualified privilege as being that:-

*"No action lies for giving the true character of a servant, upon application made to his former master, to inquire into his character, with a view to hiring him: unless there should be extraordinary circumstances of express malice."*

106. Mitchell notes that cases decided at around that time provide proof that the exposition in *Toogood* was not intended to be definitive. He lays emphasis on *dicta* of the same judge, Parke B. *inter alia* in *Wright v. Woodgate* (1835) 2 Cr. M. & R. 573 as illustrating that there was no attempt to produce a list of criteria which would bring the defendant within the scope of a privileged occasion, with all reference to duty and interest being omitted. The focus was on rebutting the inference of malice. Parke B. stated at p. 577:-

*"The proper meaning of a privileged communication is only this; that the occasion on which the communication was made rebuts the inference prima facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact–that the defendant was motivated by motives of personal spite or ill-will, independent of the occasion on which the communication was made."*

107. Mitchell persuasively argues that what occurred thereafter, was that the authorities adopted the term "*privileged occasion*" to mean a "*privileged event*" and regarded Toogood as a definitive statement with emphasis being on whether a particular set of facts fell within or outside Parke B.'s categories. Thus, he concluded that what the learned judge had done in *Toogood* (1835) and *Wright* (1835) was to give the defence very wide scope. The defence of privilege could be raised whenever the situation in which words were spoken rebutted malice. Parke B. had given examples of this being to speak of duty, or one's own interest, or the interest of another. Later decisions came to regard the list as definitive and after more than half a century of debate it became established that there must be a duty or interest in the speaker and a corresponding one in the "*hearer*":-

*"A defence had thus crystallised out of the general idea that the defendant's non-malicious motive should be a defence, but it was limited to situations where the was an objective duty or interest. This limitation was not the product of rational development or argument, it had come about through mistaking an illustration of the principle for the principle itself, 'confus[ing] the thing to be proved with the thing that proves it'."* (p. 407)

108. On this reasoning, a statement made with the maker and the receiver having a corresponding duty and interest, legal social or moral, is deemed to be for a legitimate reason and made without malice. The absence of malice is assumed. The privilege can be destroyed if the plaintiff can establish malice or improper motive. What becomes central in other circumstances where privilege might be said to exist is determining whether the statement has been made for a legitimate purpose and, if so, whether otherwise an improper motive may be attributed to the defendant. It appears to me that in cases where there is no readily recognisable mutuality of interest or duty, as in *McCormack* and *McNamara*, as a matter of analysis judicial emphasis tends to focus on the conduct and the response of the defendant to utterances and or conduct which on their face are defamatory. Although in neither McCormack nor McNamara did the court expressly address the question as to upon whom the burden of proof lay, nevertheless it is instructive that in each case, significant emphasis was placed on the defendant's conduct, and in particular, whether the defendant maintained that it had acted out of a *bona fide* but mistaken belief in the truth of what occurred. In McCormack, Hardiman J. noted from the outset of his judgment that:-

*"The cross-examination of the plaintiff began with an unambiguous statement by counsel for the defendant that the plaintiff was a man of the highest character and that the defendant had been mistaken in what he did."*

109. In *McNamara*, Murphy J. noting that while qualified privilege was pleaded, observed that the circumstances giving rise to the invocation of the privilege were not set out, nevertheless she emphasised that, on the facts, in pre-trial correspondence, the pleadings, and the evidence, the defendant had not unequivocally stated that the plaintiff was accosted because of a genuine but mistaken belief that she had taken items, *"such as might attract a right to plead qualified privilege in accordance with McCormack v.*

*Olsthoorn*". In my view, these cases are reconcilable on the basis that in one the defendant adduced evidence which negatived malice, but in the other, it did not. It does not appear to me that the approach in these cases is inconsistent with a conclusion that effectively, the burden of proof lay upon the defendant to disprove malice which is otherwise imputed in a defamatory statement. If these cases were true examples of "*occasions of qualified privilege*", as historically understood, involving a reciprocity of duty and interest, then the onus of proof would have been on the plaintiff to establish malice.

110. It appears to me that this is consistent with the analysis suggested by Mitchell. Such analysis assists in reconciling those cases where publication is to an interested few (where malice is assumed not to exist) and non-malicious publications for a proper or legitimate purpose even to those who have no ostensible duty or interest in hearing the publication. Mitchell's analysis is appealing. Those many cases where communications were found to be privileged because there were corresponding duties and interests are only examples of circumstances where malice is assumed not to exist, thus reversing the burden of proof onto the plaintiff to establish malice; as opposed to attempting to prescribe a definitive set of circumstances in which privilege will apply.

111. Thus, the cases concerning excessive publication, where bystanders may hear the publication but have no particular interest or duty in receiving or hearing the publication are reconcilable on the above basis – *i.e*. the presence or absence of malice, rather than the requirement of a corresponding or mutual interest or duty. Such analysis is also consistent with the genesis of the law of defamation and the development of the defence of privilege and, in my view, assists in reconciling *McCormack*, where there was no evidence of malice or improper motive and *McNamara*, where the court held that there was.

112. It is also argued by the plaintiff that the Court should adopt the reasoning in *Coleman v. Keanes Limited*, rather than *McCormack* in so far as *motive* is concerned – *i.e*. the reason underlying the accusation. There, a butcher's accusation that a woman had stolen bacon from a shop was held not to be privileged because it was made with the desire of recovering property, rather than bringing a thief to justice.

113. Haugh J. accepted a submission by counsel for the plaintiff that, as the evidence of the defendant's servant indicated only a desire to procure the recovery of the goods or their money value and, therefore, as he was not performing his civic duty of apprehending a suspected thief, such was an improper motive sufficient to defeat any claim of qualified privilege. It is not clear whether the decision is based on a finding that qualified privilege did not arise, or was one where it was found to arise but was defeated by improper motive. Indeed, the headnote, in summarising the effect of the decision recites that:-

> "*…any qualified privilege which*, in the circumstances, might have attached, *was destroyed by the fact that they were spoken and published for the purpose either of recovering the article, or of obtaining payment, and not in furtherance of the servant's civic duty of procuring the arrest and prosecution of a suspected thief."* [emphasis added].

While several authorities are noted in the case report to as having been opened to the court, no particular authority is cited in support of the above proposition. Haugh J. placed reliance on *Fowler v. Homer* (1812) 3 Camp. 294 as authority for the legal principle, which he accepted, that if a person, with reasonable grounds to believe that a crime has been committed, uses spoken words in the course of taking steps to apprehend the suspected criminal, the law protects him from actions for slander. Because the servant in *Coleman* acted not for the purpose of arrest or prosecution but to secure the return of the goods or their value, Haugh J. concluded that the defendant "*was not exercising his civic duty, and hence I hold that the plea of privilege cannot prevail…".*

114. It must be recalled that Fowler was decided prior to *Toogood*, where Parke B. referred to privilege arising "*in matters where his interest is concerned*". On the face of it, it does not appear to me that Fowler is necessarily authority for the proposition expounded in *Coleman*, that the interest or duty must be one of a civic nature, unconnected with the aim of protecting one's own goods or possessions. In *Fowler* the court had to consider an allegation of shoplifting. Lord Ellenborough emphasised the absence of malice on the part of the defendant and in dismissing the case, stated, at p. 295:-

> *"When a servant represents to a master that his goods have been stolen by a particular individual, it is justifiable for the master, with a view to enquiry, to tax that individual with the theft; and although the suspicion turns out to be erroneous, the law gives no redress to the party accused. The accusation, though unfounded, was not malicious. No doubt it may prove very detrimental to the object of it; but this is one of the many instances where, there being a loss without an injury, the sufferer must consider himself not wronged, but unfortunate. If the defendant had continued to propagate the story to strangers, that would have furnished evidence of malice; but if he could not lawfully charge the person suspected on reasonable grounds, though innocently, of having committed the theft, it would be quite impossible for a man who is robbed to enquire with any safety after the stolen goods."*

In *McCormack* at para. 23, Hardiman J. disagreed with the reasoning in Coleman:-

> *"Privilege exists where a legally recognised duty or interest in speaking exists: in my view the legitimate desire to recover one's property is just as much a legitimate interest as the desire to bring a thief to justice. Very often, these desires will co-exist. Realistically, where there is a sudden theft or suspected theft, the owner or his agent will not pause to analyse his own motives in detail but will act immediately out of an instinctive and proper desire to stop a theft."*

115. I prefer the reasoning of Hardiman J. In the assessment of the legitimacy or purpose of a statement to distinguish the pursuit of one's own interest from a more general civil duty for the purpose of maintaining privilege would seem to run contrary to those authorities which establish the existence of an "*occasion*" of privilege where the requirements of mutuality of duty/interest are satisfied; and which include one's own or another's legitimate interests. It is true that Hardiman J. observed that the "*occasion at the Milk Market*" was one of qualified privilege. But I take this to mean that in his view the event there being considered was capable of being privileged, absent malice, rather than as a statement that it was an occasion where the traditionally required mutuality of interest and duty arose, and where the burden of proof transferred to the plaintiff to establish malice.

116. I do not see anything in the Act of 2009 which is inconsistent with such analysis. Section 18(1) continues defences that may have been in existence prior to the commencement of the Act. It seems to me that by expressly providing at s. 18(2) for the requirement of mutuality (now including circumstances where the defendant believes upon reasonable grounds that the person to whom the communication was made had such a duty or interest) it is implicitly accepted that the defence of qualified privilege is not excluded in circumstances other than those where mutuality of interest or duty exists. "*Interested person*" is defined in s. 19(5) as a person who has a duty or interest in receiving the information contained in a statement. Further, s. 19 places at the heart of the defence of qualified privilege, proof by the plaintiff that the defendant had acted with malice. It does not appear to me that it was the intention of the legislature to confine the defence of qualified privilege only to occasions of mutuality of interest or duty – otherwise there would not appear to have been any particular requirement to expressly maintain pre-existing defences of qualified privilege under s. 18(1).

117. Ultimately this case turns on the manner of the publication and its excessiveness. It is inevitable that in certain circumstances, the taxing of persons with theft, implied or express, or fraud like activity, will be overheard by others, particularly when the charge is made in a public place. The law makes allowances for this. It will always be a matter of reasonableness and degree as to whether the line has been overstepped in determining whether the publication is excessive such as may destroy any privilege that might otherwise exist. To this end the Court repeats the caution expressed by Hardiman J. against requiring a defendant to exercise fine judgment or to employ a considered selection of words in situations that arise quickly and without notice. Nevertheless, on the facts of this case as so found, the defence of qualified privilege has not been established. Even without attempting to reconcile *McCormack* and *McNamara*, any privilege that may have applied, in my view, is negatived by unreasonable and excessive publication.

118. While I accept that excessive publication took place it appears to me that any publication was to a limited number of people and I am satisfied that the Circuit Court judge's assessment of damages in the sum of €5,000 is appropriate.