Neutral Citation No. [2013] NIQB 126

Ref:	**GIL9076**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**6/12/13**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION

_____

GLENN IRVINE

Plaintiff;

-and-

SUNDAY NEWSPAPERS LIMITED
T/A THE SUNDAY WORLD

Defendant.

_____

Gillen J

INDEX TO JUDGMENT

Introduction

[1] In this action the plaintiff has sued the defendant for defamation arising out of an article published in the Sunday World on the 28 October 2012 under the heading "Fury over UVF's Nice Little Board's Earner ". A photograph accompanied the article with a caption "Muppet Show" in which there is depicted men standing on the balcony of Clifton Street Orange Hall four of whom have their heads circled in different coloured inks. One of the men circled was identified as "Glen Irvine". The other three were identified as Winston "Winky "Irvine, Mark Vinton and another man.

[2] The gravamen of the accompanying article was to the effect that Justice Minister David Ford was worthy of criticism for allowing alleged veteran Ulster Volunteer Force men such as Winston Irvine (an uncle of the plaintiff) and Mark Vinton to serve on District Policing and Community Safety partnerships. The article suggested that the individuals depicted on the balcony were monitoring a republican parade that had sparked three nights of rioting during which scores of police officers were injured.

[3] The plaintiff was not the man circled in the picture and he contended that the presence of his name led to the article constituting a defamation of him. In paragraphs 10.1-10.4 of his amended statement of claim the natural and ordinary meaning was pleaded as follows:

> "10.1 The plaintiff is a member of an illegal organisation namely the Ulster Volunteer Force.
>
> 10.2. The plaintiff is pictured on the balcony of Clifton Street Orange Hall along with other paramilitaries namely alleged members of the UVF Winston Irvine and Mark Vinton.
>
> 10.3 The plaintiff is part of a UVF "Muppet Show" pictured on the said balcony monitoring a republican parade.
>
> 10.4 The said parade which was being monitored by the plaintiff sparked off three nights of UVF

> orchestrated violence rendering scores of police officers injured."

The defendant contended that he had not been identified in the article and the defamatory meanings ascribed to the article were without foundation.

[4] The parties had agreed to have the liability issue determined by a judge alone with the issue of quantum, if it was still live, to be determined thereafter by the jury.

[5] At the end of the evidence and submissions of counsel on liability on the issues of identification and meanings I gave an ex tempore judgment in relatively short form so that the jury would not be detained or delayed longer than necessary. I undertook to hand down a written version of this judgment and this I now do. In passing I commend the industry and application of Mr Lavery QC, who appeared with Mr Bacon on behalf of the plaintiff and Mr Humphreys QC who appeared with Mr Fahy on behalf of the defendant, all of whom contributed to producing skeleton arguments and oral submissions of the highest calibre.

Legal principles

Burden of Proof

[6] I commence by reminding myself that it falls to the plaintiff to prove on the balance of probabilities that the words and picture identified him, have the meanings that he alleges, that the words were defamatory and that they were published about him.

The meaning of defamation

[7] I commence with the classic definition of defamation which is that it amounts to a publication which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule. The law recognises in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit. Do the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The words should not be regarded as defamatory unless they involve some lowering of the plaintiff's reputation or of the respect with which he is regarded. They must be disparaging of him. Are they likely to affect a person adversely in the estimation of reasonable people generally? The standard to be applied is that of right thinking members of society.

Publication

[8] No action can be maintained for libel unless there is a publication. That is a communication of the words complained of to some person other than the plaintiff. The burden of proving that the words were published rests on the plaintiff. There is no issue in this case that the impugned article was published by the defendant.

Identification

[9] This was a key issue in the instant case. To succeed in an action of defamation the plaintiff must not only prove that the defendant published the words and that they are defamatory but he must also identify himself as the person defamed. It is thus an essential element in defamation that the words complained of should be published of the plaintiff. There is a two stage process in determining the matter of identification. Whether the words are capable of referring to the plaintiff is a question of law for me as the judge .Thereafter it is for me, in the absence of a jury, as a tribunal of fact to decide whether on the balance of probabilities reasonable persons would and did reasonably believe that this mention of "Glen Irvine" referred to the plaintiff in the article of 28 10 12.

[10] Therefore the objective test for me as a tribunal of fact is whether the plaintiff may reasonably be understood to be referred to by the words or picture: are the words in their context such as reasonably in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to? That does not assume that those persons who read the words know all the circumstances or all the relevant facts. But although the plaintiff's name may not be correctly spelt e.g. in the instant case his Christian name is Glenn with a double "n" whereas the article described the person as "Glen "(or indeed even if he is not named in words), he may nevertheless be described so as to be recognised, if in the circumstances the description is such that a person hearing or reading the alleged libel would reasonably believe that the plaintiff was referred to. If so that is a sufficient reference to him.

[11] The question is not whether anyone did identify the plaintiff (although in this case the plaintiff's case is that persons did identify him) but whether persons who were acquainted with the plaintiff could identify him from the words used. Thus if a local newspaper in Cornwall publishes a false story to the effect that John Smith of 24 Acacia Avenue, Carlisle has been convicted of fraud that is actionable by John Smith even though no one who knew him read the story. However, where a common name and no more is included in the article, the name itself will not suffice to identify any individual who bears that name, though the context in which the name appears, coupled with the name may do so.

[12] In Jameel (Yousef) v Dow Jones and Co Inc [2005] EWCA 75 at paragraph 45 the court said:

> "Where a common name is included in an article, the name itself will not suffice to identify any individual who bears that name. The context in which the name appears, coupled with the name may, however, do so. Reference by the judge to passages from *Hulton v Jones* [1910] AC 20 has satisfied us that the judge

> attached significance not merely to the publication of the name Yousif Jameel, but to the context in which it appeared. He concluded that the two together would, or might, lead those who knew Mr Jameel to identify him as the Yousif Jameel in the Golden Chain list."

[13] The general rule is that a statement is to be understood in the way in which a reasonable recipient would understand it at the time it is published: subsequent knowledge which makes the recipient look back on it in a different light will not make it defamatory.

[14] It is immaterial that the defendant did not intend to refer to the plaintiff or did not even know of his existence. The question is "would the words complained of be understood by reasonable people who knew the plaintiff to refer to him?" If so, they are published of, and concerning the plaintiff no matter what the intention of the defendant may have been.

[15] Thus the issue as to identification is to be decided by an objective test – would reasonable persons reasonably understand the words that refer to the plaintiff? In substance therefore the question is "would reasonable persons reasonably believe that the words refer to the plaintiff". If reasonable persons would so believe, the defendant will not escape liability even if he had never heard of the plaintiff or intended to refer to someone else. Strictly speaking therefore the intention of the defendant is or should be regarded as irrelevant on the issue of identification in the same way as where the meaning of words complained of has to be decided. The question for consideration is whether I think the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that the entire world should understand the libel. It is sufficient if those who knew the plaintiff can make out that he is the person meant. If on the evidence I am of the opinion that ordinary sensible readers, knowing the plaintiff, would be of the opinion that the article referred to him, the plaintiff's case is made out. If there is a risk of coincidence, it ought in reason to be borne not by the innocent party to whom the words are held to refer but by the party who puts them into circulation (see Newstead v London Express Newspapers Ltd [1939] 4 All ER at 325).

[16] A court in deciding whether a reasonable person would understand the words to refer to the plaintiff does not expect such a person to consider the matter in detail. A reasonable man will not be envisaged as reading the article carefully. Regard should be had to the character of the article. The ordinary sensible man if he reads the article would be likely to skim through it casually and not give it concentrated attention or a second reading. It is no part of his work to read this article nor does he have to place any practical decision on what he reads there. The relevant impression is that which would be conveyed to an ordinary sensible man reading the article casually and not expecting a high degree of accuracy. If we take

the ordinary man as our guide, we must accept a certain amount of loose thinking. The ordinary man does not formulate reasons in his own mind. He gets a general impression and one can expect him to look again before coming to a conclusion and acting on it. But formulated reasons are very often an afterthought. The publishers of newspapers must know the habits of mind of their readers. What must be contemplated is a reading of a newspaper in what a jury would consider to be the ordinary way in which a newspaper would be read. The average reader does not read a sensational article with cautious and critical analytical care (see Lord Reid and Lord Morris in Morgan v Oldhams Press Ltd (1971) 1 WLRV at [1245] and at [1254] respectively).

[17] The plaintiff is entitled to call witnesses to prove that they in fact understood the words so to refer to him or call evidence that he has been identified as the subject of the article even though the means of identification or the reason why the plaintiff was connected with the libel is not established. This can be adduced as proof of the consequences necessarily resulting from its publication (see Gatley on Libel 11th Edition at paragraph 34.20). However if a reasonable reader would not have reached the same conclusion such witnesses can be disregarded. In Morgan's case Lord Donovan at [1264B] observed that identification required not merely a reasonable person but a reasonable conclusion.

The plaintiff's case on identification

[18] Mr Lavery's submissions can be summarised in the following manner:

- The context in which the plaintiff' name is mentioned, namely beside his uncle of the same surname who is allegedly a well-known member of the UVF, serves to identify him to people acquainted with him.

- There was clear evidence from the plaintiff and his partner Ms Davidson that others had identified the plaintiff from the article. The plaintiff's evidence was that the day after the publication on 28 October 2012 a work colleague in his team said to him in front of others "Do you know there is a guy in Woodvale from the UVF called Glen Irvine. Is that where you are from?" (the first occasion). About 4 months later the same man, who was from Lenadoon, said in the course of a conversation about parades "Glenn takes part in those because he is in the UVF" (the second occasion). Ms Davidson's evidence was that she had been visiting a friend named Rachelle "a few weeks after the publication "when she met a woman she identified only as "Gillian" who in the course of conversation said "What was your Glenn doing on the balcony recording the Republican parade ".

- The defendant has not put forward any case that the article refers to somebody else bearing the same name.

- The person identified as the plaintiff is placed beside the plaintiff's uncle and bears a resemblance to the plaintiff.

The defendant's case on identification

[19] On behalf of the defendant Mr Humphreys contended:

- The plaintiff was not identified in the body of the article.
- The person in the photograph is not the plaintiff.
- The person named is "Glen Irvine" whereas the plaintiff is "Glenn Irvine".
- The person in the photograph does not bear a likeness to the plaintiff.
- The evidence of the plaintiff and his partner of identification by others is not only hearsay (see below) but affords no evidence of identification from the newspaper.
- The credibility of the hearsay evidence of the plaintiff and Ms Davidson was flawed on a number of grounds. First he drew attention to the reference to the first occasion the plaintiff had raised this matter in the letter of claim sent to the defendant on 19 November 2012. It made no reference to the Woodvale area. Secondly the article makes no reference to Woodvale. Thus it is submitted the plaintiff is either lying about the reference or the information came from some other source outside the article. Thirdly counsel adverts to the evidence of the plaintiff that he did nothing about these comments in the workplace. Fourthly, in relation to Ms Davidson's evidence he attacks the credibility of this because she is unnamed save for her Christian name, the comment is made several weeks after the publication and no connection was made by "Gillian " to the impugned article.

[20] In addition Mr Humphreys invoked the terms of the Civil Evidence (NI) Order 1997 at article 5 which enjoins me to consider a number of factors relevant to the weight to be attached to hearsay evidence:

> "(1) In estimating the weight (if any) to be given to hearsay evidence in civil proceedings the court shall have regard to any circumstances from which any inference can reasonably be drawn as to the reliability or otherwise of the evidence.
>
> (2) Regard shall be had, in particular, to whether the party by whom the hearsay evidence is adduced gave notice to the other party or parties to the

proceedings of his intention to adduce the hearsay evidence and, if so, to the sufficiency of the notice given.

(3) Regard may also be had, in particular, to the following—

(a) whether it would have been reasonable and practicable for the party by whom the evidence is adduced to have produced the maker of the original statement as a witness;

(b) whether the original statement was made contemporaneously with the occurrence or existence of the matters stated;

(c) whether the evidence involves multiple hearsay;

(d) whether any person involved had any motive to conceal or misrepresent matters;

(e) whether the original statement was an edited account, or was made in collaboration with another or for a particular purpose;

(f) whether the circumstances in which the evidence is adduced as hearsay are such as to suggest an attempt to prevent proper evaluation of its weight."

[21] Counsel reminded me of what I said in Breslin –v- Murphy & Daly [2013] NIQB:

> "The Order recognizes the evidential problems created by such evidence the central weakness of which is that the opposing party is deprived of the benefit of cross-examination to test the correctness of evidence and the court is deprived of seeing and hearing the witness, to observe his demeanour and assess his veracity. It is essential to remember that although hearsay is thereby made admissible in more circumstances than it previously was, this does

> not make it the same as first-hand evidence. It is not. It is necessarily second-hand and for that reason very often second best. Because it is second-hand, it is that much more difficult to test and assess. Those very real risks of hearsay evidence, which under lay the common law rule generally excluding it, remain critical to its management and the weight to be given to it. There will be of course many cases where the evidence will not suffer from the risks of unreliability which often attend such evidence and where its reliability can be realistically assessed."

[22] Relying on the legislation Mr Humphreys submitted that:

- No notice was given that the Plaintiff intended to adduce hearsay evidence.
- There is no reason why the individuals were not called as witnesses.
- It is impossible to know what the motivations or otherwise of the witnesses were at the time they made the alleged statements.
- The reliability of the evidence cannot therefore be properly tested.

Conclusion on identification

[23] I have come to the conclusion that the plaintiff has satisfied me on the balance of probabilities that not only is the impugned reference to Glen Irvine capable of referring to the plaintiff but that reasonable persons would and did reasonably believe that this reference to Glen Irvine referred to the plaintiff in the article of 28 10 12. I am of this view for the following reasons.

[24] First, his name is invoked. I accept his evidence that he often uses the Christian name Glen with one "n" e.g. his email address has one "n". He is disposed in his workplace to adopt that spelling from time to time for the sake of convenience. In any event I do not consider the average reader would read this article with sufficient analytical care to observe the relevance of the different spelling or indeed to be even aware of it.

[25] By itself if there was nothing else to the article, the use of the plaintiff's name alone would not be enough to found liability. In most instances journalists who make a simple unwitting error in nomenclature will not incur any liability particularly where, as in this case, there are at least 8 people with an identical name in the Belfast area as evidenced by the researches in 192.com. Thus if his uncle had not been present or named in the article or photograph I doubt whether this case would have got off the ground. Were it to be otherwise cases such as this would

provide a charter for vigilant zealots to sue unwary journalists and the right of freedom of expression for the press enshrined in article 10 of the European Convention on Human Rights And Fundamental Freedoms would be fatally flawed.

[26] However the context in which the name appears is crucial. In the instant case the plaintiff's name is set in the context of him being cited, circled and allegedly located in close proximity to his uncle Winston "Winky " Irvine. How likely is it that those who were acquainted with the plaintiff and were casually reading the article would countenance the possibility of another person with the same name as his nephew being positioned close beside Winston Winky Irvine on this occasion? The ordinary reader imbued with a certain amount of loose thinking forming no more than a general impression of the article would likely, indeed in my view almost inevitably, conclude that this reference to Glen Irvine is a reference to the plaintiff.

[27] I have before me the actual article of the 28 10 12 and the photograph contained therein. It is a relatively small picture which is not sharp in outline and the man depicted as Glen Irvine circled in blue is not easy to identify at all because he is partly obscured by a camera. No challenge was made to the plaintiff's assertion that in fact it is not a picture of him but rather of another man whom he knew to see and was able to name in evidence.

[28] I am satisfied on the probabilities that the casual reader forming a general impression of what he is reading would not scrutinise the picture to any great degree because of the lack of clarity and would be more likely to have his attention arrested by the nomenclature. I did have before me the passport of the plaintiff and his electoral identity card and I observed that his hairstyle and length were similar to the man in the newspaper article (both being "baldy "as described by Ms Davidson) and the photograph could therefore lend itself to unwitting deception.

[29] Common sense alone did not lead me to my conclusion in this instance. The plaintiff and his partner gave evidence of what they asserted amounted to the fact he had been identified as the subject of the article. Whilst this evidence would not be conclusive nonetheless I find it a compelling adjunct to the other evidence in the case.

[30] I reject the criticisms of this evidence made by Mr Humphreys for the following reasons. First I note the assertion of Gatley 18 Edition at 34.20 note 79 that such evidence was admissible in cases even before the advent of the Civil Evidence legislation and thus the procedural safeguards and requirements therein do not have to be observed. I consider the effect of that assertion is probably diluted by the fact that the provisions in article 5 probably reflect the kind of points that would have been addressed to a jury by a judge in any event for many years before the introduction of the legislation. Thus the reasons why witnesses were not called to give first hand evidence, the absence of an opportunity to test the evidence,

motivation etc. are timeless issues which would inevitably have been addressed in the spirit of the concerns I voiced in Breslin's case.

[31] In the instant case I consider there are plausible reasons why the relevant witnesses were not called to give first hand evidence. "Gillian"apparently is in Australia and so is not available. I believed Ms Davidson's account in this regard and the reference to the balcony by "Gillian". The reference by this woman to "the balcony" on which she clearly believed the plaintiff to have been standing is a very telling one in the context of this article. The workmate of the plaintiff may not have been disposed to readily admit what he is alleged to have said and I believe it is reasonable for the plaintiff not to wish to involve potentially reluctant workplace colleagues in such contentious areas. The temporal connection between the comment of the workmate and the article is too much to ignore i.e. made the very day after the publication. Inaccuracy in recollection is not unusual over the passage of time and I did not find the discrepancy in the two accounts as indicative of mendacity on the part of the plaintiff.

[32] I watched both the plaintiff and his partner closely during the period when they were robustly but fairly cross examined by counsel. I believed their accounts in each case. As Lord Hoffman said in Biogen v Medeva plc [1996] 38 BMLR 149 at 165 "La verite est dans une nuance". They were spontaneous and assertive in their evidence on this matter. Both he and his partner could have dressed up the connection between the article and the comments made in much more concrete terms if they had been dissembling. If they were making this up why did they not invoke specific references to the newspaper article in the comments they were relating? Why did Ms Davidson say some weeks had passed before she heard the relevant comment? Neither of them struck me as sufficiently Machiavellian to have worked out that it would lend an air of verisimilitude to their accounts to understate the comments. The temporal connection with the account of the workmate and the reference to the plaintiff on a balcony are sufficient to persuade me that the on the balance of probabilities the two persons were referring to the impugned article of 28 10 12.

Meanings

[33] Once I am satisfied on the issue of identification it falls to the plaintiff to prove on the balance of probabilities that the words have the meanings that he alleges and that the words were defamatory. The first stage is for me to decide the issue as to what meanings the words complained of in the newspaper articles are capable of bearing and then, in the absence of a jury, what meanings they would have been understood to bear. I have to determine whether they bear the meanings for which the plaintiff contends in paragraph 10 of the statement of claim or the meanings contended by the defendant or some other meaning which the words are capable of bearing. Where there is a dispute, as in this instance, as to meaning, it is for the judge to settle on a single meaning (see Slim v Daily Telegraph (1968) 2 QB 157 per Diplock LJ at 173D/E).

[34] Words are normally construed in their natural and ordinary meaning i.e. in the meaning which reasonable people of ordinary intelligence with the ordinary person's general knowledge and experience of worldly affairs would be likely to understand them. The meaning which the editor or the journalist in the newspaper intended the words to mean and the sense in which the words were in fact understood by the plaintiff are all irrelevant. The natural and ordinary meaning may also include implications or inferences that do not require the support of extrinsic facts passing beyond general knowledge. The tendency and effect of the language, not its form, is the criterion [37].

[35] The approach to my task has been governed by the summary of principles given by Sir Thomas Bingham in Skuse v Granada (1996) EMLR 278 at 285-287:

> "(1) The courts have to give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable (reader).
>
> (2) The hypothetical reasonable reader … is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer, and may indulge in a certain amount of loose thinking, but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available …
>
> (3) While limiting its attention to what the defendant has actually written, the court must be cautious of an over-elaborate analysis of the material in issue …
>
> (4) The court should not be too literal in its approach …"

[36] I must not fall into the trap of over-elaborate analysis of the various passages in the articles relied on by the parties. The parties are entitled to a reasoned judgment but that does not mean that the court should overlook the fact that ultimately it is question of meaning which should be put on the words of the articles by an ordinary reader. The exercise is essentially one of ascertaining the broad impression made on the hypothetical reader by the articles taken as a whole. As Gray J said in Charman v Orion Publishing Group Limited and Others [2005] EWHC 2187 at paragraph 12:

> "It is well established that the tribunal of fact, whether judge or jury, must take the bane and antidote of the publication together."

[37] There is no doubt that a plaintiff must plead in the particulars of his statement of claim the defamatory meanings which it is claimed were borne by the words of which complaint is made. (See Lucas Box v Newsgroup Newspapers Limited [1986] 1 WLR 146 per Ackner LJ at 151-152).

[38] However a judge or jury is not confined to ruling whether the words are capable of bearing the particulars of the defamatory meanings contended before the judge. A judge's ruling on the issue may thus cover any lesser defamatory meaning that might possibly be conveyed by the words. In saying this I pause to observe that such a ruling is only likely where the lesser meaning is in the same class or range of meanings as that set out in the particulars of the statement of claim and not some wholly different meaning. (See Diplock LJ in Slim v Daily Telegraph (1968) 2 QB 157 at 175).

[39] Avoiding an over-elaborate analysis of the article and taking a broad impression of the article as a whole I consider the ordinary fair-minded reader would conclude that this article means that. The plaintiff took part in an activity conducted by two members of the UVF on the occasion depicted in the photograph. Despite the evidence of the workplace colleague I am not satisfied on the balance of probabilities that a reasonable hypothetical reader would go as far as to conclude as pleaded by the plaintiff that the article meant he was a member of the UVF notwithstanding that he has been circled with two other members. I believe the hypothetical reader acquainted with the plaintiff is much more likely to have reacted as "Gillian" did and to have concentrated on his presence and activity on the balcony with his uncle close by rather than inferring that he was a member of an illegal organisation. This is particularly the case where the article has made not the slightest reference to him being a member. The reference in the article to a previous picture in this newspaper seven weeks before described as "a Muppet show", which in any event did not name the plaintiff on that occasion, is very unlikely to have been recalled by the hypothetical reader because of the passage of time. The comments of the workplace colleague, including a reference to the plaintiff's address which he could not have obtained from the article, are indicative of a bantering type comment in which he embellished the impugned article's contents and thus dilutes the effect of any connection he made about the plaintiff's membership of the UVF and the article. I am satisfied that the meanings set out at paragraphs 10.2, 10.3 and 10.4 in the statement of claim are meanings a reasonable hypothetical reader would have derived from this article save that at 10.3 he/she would not have inferred it was a "UVF" Muppet show. I consider these meanings are so self-evident from the articles that it is unnecessary for me to dilate further upon them.

Are the meanings defamatory?

[40] A number of definitions have been given of what amounts to defamatory meanings. I consider that it is sufficient to say that a statement is defamatory if it tends to harm the reputation of another so as to lower him in the estimation of the community or to deter third parties from associating or dealing with her. The onus lies on the plaintiff to prove that the words are defamatory to him. The standard is again that of right thinking persons generally. Words are not defamatory however much they may damage a person in the eyes of a section of the community unless they also amount to disparagement of his reputation in the eyes of right thinking people generally. Words which merely injure the feelings or cause annoyance but which in no way reflect on his character or reputation or tend to cause him to be shunned or avoided or expose him to ridicule are not actionable as defamation.

[41] If I come to the conclusion that the meanings of the words were defamatory, then the law presumes that these words are untrue and in those circumstances the task of proving the defence passes to the defendant.

[42] I am satisfied that the meanings that I have determined in this case are defamatory of the plaintiff. To openly associate with and to take part in monitoring a parade (which subsequently sparked off three nights of orchestrated UVF violence) conducted by members of an unlawful organisation namely the UVF would lower the plaintiff in the estimation of right thinking people nowadays throughout Northern Ireland.