

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

**MADDEN V SUNDAY NEWSPAPERS
MADDEN V CENTURY NEWSPAPERS LTD
MADDEN V SUNDAY TRIBUNE NEWSPAPERS PLC**

MORGAN J

[1] The plaintiff is the principal in the firm of Madden and Finucane, a firm of solicitors practising in Northern Ireland. On 11 November 2005 he instituted proceedings against each of the defendants in respect of three separate articles published by them. The first of these was an article published in the News Letter of 5 November 2005 on pages 1 and 8 under the headings "Anger as MLA calls in Finucane lawyers", "Berry Faces Flak" and "Berry choice of defence team a terrible insult" The body of the articles contained the following:

"Paul Berry has called in lawyers who have defended IRA suspects to fight his disciplinary battle with the DUP. The MLA is employing Madden and Finucane solicitors, who also recently represented alleged IRA chief Thomas slab Murphy. Victims group FAIR said last night that it was outraged by the former DUP victims' spokesman's decision. Director William Frazer called it an insult. Mr Berry said he did not wish to offend. Madden and Finucane were experts in their field and best placed to help him 'with a strategy I have in place', he said. The firm will represent Mr Berry at a DUP disciplinary panel. Paul Berry has come under fire for employing lawyers who have defended IRA suspects to represent him in he is disciplinary battle with the DUP. The News Letter has learnt that the Newry and Armagh politician has called on the services of solicitors Madden and Finucane. The company is well known for handling

the cases of Sinn Fein members and other senior Republicans. Among its recent client list is alleged south Armagh IRA chief Thomas slab Murphy. The director of the victims group FAIR, William Frazer said: "This is a terrible insult to the people Paul Berry is supposed to represent, so many of whom have lost loved ones to the IRA's bombs and bullets '. Another source said: "It is bizarre. Madden and Finucane are so well-known for defending heavyweight republican figures. Now he is using them in his battle with the DUP". Mr Berry said he did not wish to offend IRA victims or Unionists. "I am and always will be an outspoken person in relation to the views of the decent victims and Unionists who have suffered so much" he said. "Who I employ to do a job for me has no bearing on that".Mr Berry said he had chosen the particular solicitors purely on the basis of who could do the best job for me in my situation and as part of a strategy I have in place. He said: "They are experts in their field. They were recommended and I met with them. Madden and Finucane have represented other unionists and also loyalists". It is a business arrangement.Mr Frazer said: "I would argue that Madden and Finucane have been involved in cases which have tarnished the good name of the security forces. I am disgusted by Paul Berry's relationship with Madden and Finucane". The solicitors are to represent Mr Berry in front of a DUP disciplinary committee.

A DUP spokesman said: "Our disciplinary committee will deal with the issues and, during the course of that, will be dealing directly with Paul Berry. He can be accompanied if he wishes by a solicitor of his choice and it is for Mr Berry to take responsibility for what ever choice he makes".

Madden and Finucane's offices where closed last night. A duty solicitor said he could not comment."

[2] On Sunday 6 November the Sunday Tribune published an article on the same topic at page 2 in the following terms:

"DUP man hires law firm well known for IRA clients"

"DUP politician and free Presbyterian gospel singer Paul Berry, who is embroiled in gay sex allegations, has hired a law firm well known for representing IRA suspects. Berry, who is facing an internal DUP investigation, is being represented by Madden and

Finucane, which has acted for hundreds of Republican clients over the years including, most recently, alleged IRA chief of staff Thomas slab Murphy. One of the partners in the practice, Pat Finucane, was shot dead by the UDA with security forces collusion."DUP sources said the party was shocked when correspondence was received from the firm on behalf of Berry a prominent orange man and assembly member for Newry and Armagh. Willie Frazer of the south Armagh victims group, Families Acting for Innocent Relatives (FAIR), said he was shocked and disappointed Berry had hired Madden and Finucane. "Paul was the DUP victims spokesperson. Many of his constituents have been killed by people that Madden and Finucane have represented. He needs to explain himself".A DUP spokesman said that during disciplinary proceedings, Berry could be accompanied by a solicitor of his choice. "And it is for Berry to take responsibility for what ever choice he makes".The Sunday Tribune was unable to make contact with Berry but sources believed he did not mean to antagonise anyone by hiring Madden and Finucane and that he simply wanted to have the best possible legal representation possible. It has been claimed Berry is a hypocrite for belonging to a party and church strongly opposed to homosexual activity."

[3] On the same day at pages 1 and 7 of its edition the Sunday World published the following articles under the headings "Berry hush hush" and "I'd be Berry happy to tell the DUP boss what really happened between me and Paul in that Belfast hotel room"

"It was also revealed yesterday that Berry had appointed solicitors Madden and Finucane to defend him at the hearing. The law firm includes IRA chief of staff Thomas slab Murphy as one of their clients. Berry has been widely criticised within the Unionist community after it emerged yesterday that the Tandragee free Presbyterian is using a firm of solicitors, who have frequently defended high profile Republicans, to fight his case against his own party. Now Paul Berry is sharing the same solicitors who boast IRA chief Thomas slab Murphy as one of their most high profile clients. The firm was also heavily involved in the Bloody Sunday Inquiry.A party

insider told the Sunday World Berry's decision to use the Belfast firm had baffled DUP chiefs. "It's a very strange move from Paul because it's sure to further anger members of the party" said the source. But Paul Berry said he did not intend to offend IRA victims. "I am and always will be an outspoken person in relation to the views of the decent victims and Unionists who have suffered so much" says Berry. "Who I employ to do a job for me has no bearing on that. They are experts in their field. They were recommended and I met with them. Madden and Finucane have represented other unionists and also loyalists. It's a business arrangement".

[4] The plaintiff alleges against each defendant that each of the articles in their natural and ordinary meaning meant and where are understood to mean:

- "1. That the plaintiff's relationship with the IRA went beyond the normal bounds of the relationship between a solicitor and client and was unprofessional in that the plaintiff identified with and associated with the IRA.
2. That morally the plaintiff was no better than a terrorist.
3. That the plaintive had brought himself and the solicitors' profession into disrepute.
4. That the plaintive was by reason of the foregoing a person of odious character and reputation"

[5] The defendants now apply by virtue of Order 82 Rule 3A for Orders determining whether the words of which complaint is made are capable of bearing any of the defamatory meanings and striking out those meanings which cannot be sustained. The legal principles to be applied are not in dispute and are helpfully set out in the case of Doherty and others v Telegraph Group Ltd (Kerr J 12 September 2000) in the following passage:

"Order 82 rule 3A

This rule (so far as is material to these applications) provides :-

(1) At any time after the service of the statement of claim either party may apply to a judge in chambers for an order determining whether or not the words complained of are capable of bearing a particular meaning or meanings attributed to them in the pleadings.

(2) If it appears to the judge on the hearing of an application under paragraph (1) that none of the words complained of are capable of bearing the meaning or meanings attributed to them in the pleadings, he may dismiss the claim or make such other order or give such judgment in the proceedings as may be just."

The English rule, which is in identical terms, was considered by the Court of Appeal in England in the case of *Skuse v Granada Television Ltd* [1996] EMLR 278. Sir Thomas Bingham MR set out the following principles for the application of the rule :-

"(1) The court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary reasonable viewer watching the programme once. [The case involved a television programme.]

(2) The hypothetical reasonable reader (or viewer) 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 said or written this court should be careful of an over-elaborate analysis of the material in issue.

(4) A television audience would not give the programme the analytical attention of a lawyer to the meaning of a document, an auditor to the interpretation of accounts, or an academic to the content of a learned article.

(5) In deciding what impression the material complained of would have been likely to have on the hypothetical reasonable viewer the court are entitled (if not bound) to have regard to the impression it made on them.

(6) The court should not be too literal in its approach.

(7) A statement should be taken to be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally, or be likely to affect a person adversely in the estimation of reasonable people generally."

These principles were adopted by the Court of Appeal in this jurisdiction in the case of *Neeson and Richardson v Belfast Telegraph Newspapers Ltd* [1999] NIJB 200.

It is clear that, in applying Order 82 rule 3A, the court must be careful not to pre-empt the function of the jury. While, as Sir Thomas Bingham said, there will inevitably be an element in the court's deliberations of the impression the words have made on the judge himself, that must be for the purpose of deciding what are the *potential* meanings of the words rather than concluding which meanings he would attribute to them. Over elaborate or zealous parsing of the words is not appropriate to the exercise that the judge must perform at this interlocutory stage. The impression created by the words rather than a close textual analysis of their import should be the touchstone for the application of this provision."

[6] On behalf of the defendants it is also submitted that it is important to focus on what is conveyed to the mind of the ordinary reasonable reader. In particular the fact that the passage may excite in some readers a belief or prejudice from which they proceed to arrive at a conclusion unfavourable to the accused does not satisfy the requirements of the test which the plaintiff must surmount (see *Mirror Newspapers Ltd v Harrison* 42 ALR 487). I accept this submission and will apply it in my consideration.

[7] Dealing with the applications in turn, for Century Newspapers Mr Good BL submitted that the thrust of the article was comment critical of the decision by Mr Berry to retain the plaintiff firm. The article supported the meaning that the plaintiff firm had been and continued to be retained by those charged with crimes associated with IRA violence but that did not sustain any of the meanings contended for by the plaintiff. Mr Good also pointed to those parts of the article where there was a reference to the plaintiff acting for other unionists and loyalists.

[8] For Sunday Tribune Newspapers Mr Millar BL submitted that the article in his client's newspaper reported that there was a perception by Mr Frazer, DUP and unionists in south Armagh that it was inappropriate for Mr Berry to retain the plaintiff firm. This section of the community could not determine the approach of the reasonable reader to the article. There was nothing to suggest a connection between the firm and the IRA such as the passing of information. One could not deduce from an allegation that a firm represented republican clients that the firm was thereby associated with the IRA.

[9] For the Sunday World Mr Colton BL submitted that the purpose of Order 82 was to introduce an element of reasonableness or objectivity to the question of meaning. The only assertion in the article relevant to the plaintiff is the assertion that the plaintiff's firm acts for high profile republican clients. But there is no inference that could properly be drawn that there is anything unprofessional about the provision of those services.

[10] Mr Michael Lavery QC appeared with Mr McCann BL for the plaintiff. He submitted that the sting of the libel was that people were disgusted and upset about the fact that Mr Berry had gone to the plaintiff firm. The impression was given that Mr Berry by doing so had got into bed with the IRA. In his final submissions after the amendment of the statement of claim to its present form Mr Lavery submitted that the bane of the libel was an allegation of an unprofessional association with the IRA.

[11] I must approach each of these cases individually. I accept the submission of the defendant in each case that to say of a solicitor that he provided professional services to a notorious client is not of itself sufficient to sustain any of the meanings for which the plaintiff contends. Against that background I turn first to the News Letter article to see whether it could bear any of the meanings alleged. I consider that the references to outrage and disgust together with the reference to the tarnishing of the good name of the security forces potentially could support a meaning that the plaintiff's firm had behaved unprofessionally to the advantage of its IRA clients. I do not consider, however, that the jury could conclude that the plaintiff had thereby identified with or associated with the IRA.

[12] In respect of the Sunday Tribune article I consider that the reference to the shooting dead of Mr Finucane, a partner of the plaintiff, by the UDA with security forces collusion gives rise to a possible inference in the context of this article that Mr Finucane was believed by the security forces in Northern Ireland to be connected with the IRA. I consider that the jury in this case will be entitled to consider whether that sustains the inference that the plaintiff has behaved unprofessionally in that he has associated with the IRA.

[13] In respect of the Sunday World article I do not consider that any of the meanings contended for by the plaintiff have been made out. I have not so far received submissions as to whether it is defamatory of someone to say that they boast of the IRA chief of staff as a high profile client. My preliminary view is that it is open to a jury to conclude that such a remark is defamatory but I will entertain further submissions from the defendant on that issue if it wishes to make them.

[14] In light of the conclusions which I have reached I will receive submissions as to the form of my order. I wish to make it clear that it will be for the jury in each case to determine the actual meaning to be given to each article.