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Judgment: approved by the Court for handing down | *Delivered:* **29/06/10**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

BRIDGET O'RAWE

Plaintiff;

-and-

WILLIAM TRIMBLE LIMITED

Defendant.

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GILLEN J

[1] This is an application pursuant to Order 20 Rule 5 of the Supreme Court Rules (Northern Ireland) 1980 under which the court may at any stage of the proceedings allow any party to amend his pleading on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

[2] The application in this instance raises a question of some importance to libel practitioners relating as it does to the extent to which evidence may be adduced in reduction of libel damages in light of the decision in Burstein v Times Newspapers Limited (2001) 1 WLR 579. The plaintiff in this matter was at all material times to the action the Director of Corporate Affairs with the Sperrin Lake Trust ("the Trust") which is the body responsible for the management of the Erne Hospital, Enniskillen. The defendant is the proprietor and publisher of the Impartial Reporter a weekly newspaper ("the newspaper") allegedly with a wide circulation particularly in counties Fermanagh and Tyrone.

[3] The plaintiff alleges that on the front page in the Impartial Reporter newspaper of 25 January 2007 and in an editorial article at page 8 of the same edition the defendant published articles headlined respectively "No Charges Over Death of Baby" and "Who is Accountable in a Democracy". Inter alia, the plaintiff alleges that the articles amounted to an allegation that

- she was part of a cover up by the Trust of the reasons for the death of a child,
- she was the subject of a police investigation and was interviewed regarding the child's treatment and alleged subsequent cover up,
- she was in some way wholly or partly responsible for inducing a senior paediatrician to produce a report on the death which covered up why the child had died, and
- a file of her involvement into the cover up of the death and the evidence implicating her in the cover up was compiled by the police and sent to the Public Prosecution Service with a view to prosecution of her.

[4] The plaintiff further alleges that between 5 April 2006 and 5 April 2007 the defendant published a series of articles which appeared in earlier editions of the newspaper making further defamatory statements of her.

[5] The defendant has served a defence, which was first amended on 12 May 2009, relying on the defence of qualified privilege on the grounds that the publication was in the public interest and that the words constituted fair comment on the matter of public interest. In a further proposed "amended amended defence" served on 28 May 2010 the defendant alleged that insofar as the relevant words meant or were understood to mean that there were grounds for investigating whether or not the plaintiff had been involved in a cover up following the death of Lucy Crawford, the words were true in substance and in fact.

[6] The issue now before me arises out of a further amendment to this amended amended defence at paragraph 18 which reads as follows:

> "The defendant would rely on mitigation or extinction of any compensation payable to the plaintiff upon the following matters which the defendant says are directly relevant to the contextual background to which any defamatory publication came to be made.
>
> 18.1 In April 2000 Lucy Crawford was a patient in the Erne Hospital, Enniskillen when fluids were administered in a wrongful manner, causing her death – the cause of death being hyponatraemia.
>
> 18.2 On 12 December 2003 the Attorney General, pursuant to the provisions of Section 14 of the Coroner's Act (Northern Ireland) 1959, directed HM Coroner for Greater Belfast to hold an inquest into the

death of Lucy Crawford. In February 2004 an inquest was held.

18.3 In November 2004 the Department of Health, Social Services and Public Safety set up a public inquiry into the deaths of three children – Adam Strain, Lucy Crawford and Raychel Ferguson – all of whom died of hyponatreamia. The inquiry was to have particular reference to three matters.

18.1.1 The care and treatment of Adam Strain, Lucy Crawford and Raychel Ferguson, especially in relation to the management of fluid balance and the choice and administration of intravenous fluids in each case.

18.1.2 The actions of the statutory authorities, other organisations and responsible individuals concerned in the procedures, investigations and events which followed the deaths of Adam Strain, Lucy Crawford and Raychel Ferguson.

18.1.3 The communications with and explanations given to the respective families and others by the relevant authorities.

18.4 The plaintiff was the Director of Corporate Affairs with the Sperrin Lakeland Trust, the body responsible for the management of the Erne Hospital, Enniskillen.

18.5 In that role she was involved in procedures, investigations and events which followed the death of Lucy Crawford and in communications with and explanations given to the family of Lucy Crawford.

18.6 In November 2004 the Police Service of Northern Ireland commenced an investigation into the death of Lucy Crawford which concluded in November 2006 with a decision by the Public Prosecution Service that there be no prosecution.

18.7 In 2005 there were published reports criticising, inter alia, the provision of services at the Erne Hospital.

> 18.8 In the same year a number of Directors of the Sperrin Lakeland Trust resigned or retired from their posts."

[7] Three other paragraphs were inserted which I have refused to permit to form the basis of an amendment because in my view they are wholly irrelevant to the issues of mitigation in this case.

The defendant's case

[8] Mr Simpson QC, who appeared on behalf of the defendant with Mr Spence, argued that the Burstein v Times Newspapers [2001] 1 WLR 579 (Burstein) entitled the defendant to adduce this evidence as "directly relevant background context" in mitigation of damages. Without it, he argued, the jury would consider the damages in an evidential vacuum if it reached that stage.

The plaintiff's case

[9] Mr Ringland QC, who appeared on behalf of the plaintiff with Mr Ferrity, submitted that the defendant had misconceived the purport of Burstein. It was his submission that a defendant may only seek to reduce damages by adducing evidence which is directly relevant to a claimant's conduct or reputation in the particular sector to which the defamatory material relates and that accordingly since these amendments did not relate directly to the plaintiff's conduct, they were inadmissible.

Conclusion

[10] I have come to the conclusion that I should permit the amendment to the defence at paragraph 18 between sub-paragraphs 18.1 and 18.8. I am of this view for the following reasons.

[11] Burstein introduced a new category of admissible evidence in mitigation of damages. In that case the defamatory allegation complained of was that the claimant had organised bands of hecklers to go about wrecking performances of modern atonal music. In mitigation of damages the defendant sought to introduce facts about the claimant which included the suggestion he had formed a group of campaigners against modernist atonal music which styled itself "The Hecklers", that they had issued a manifesto calling upon the public to join them in booing at the end of a performance of an opera of a modern composer and that the claimant and the Hecklers had greeted the end of the performance of that opera with boos and hisses.

[12] The Court of Appeal overturned the refusal of the first instance judge to permit the defendants to prove this material in mitigation. It held that for

the purposes of mitigating damages evidence of particular facts which were directly relevant to the contextual background in which a defamatory publication came to be made were not rendered inadmissible by any rule of common law even though they may include matters which were not causally connected with the publication of the libel or which concerned the claimant's general reputation, character or disposition or which consisted of facts that in other circumstances might have been ingredients of a defence of justification.

[13] At paragraph 18 May LJ said:-

> "… The result of the judge's ruling was that the jury were invited to assess the claimant's damages in something of a void. They had the text of the diary article which for their purposes contained a single sentence critical of the claimant. They knew that it was to be taken as defamatory of him and that there was no defence to the claim of damages. They knew who the claimant was in general terms. But they knew little or nothing of the context on which the defendants came to publish this defamatory statement. That seems to me to be quite artificial and unhelpful."

At paragraph 48 May LJ continued:-

> "They (the jury) have to assess damages taking account of the evidence they have heard of the context in which the publication came to be made. There is nothing conceptually difficult or confusing about that".

[14] The impact of Burstein was considered in Turner v News Group Newspapers Limited [2006] EWCA Civ 540(Turner). In this case the claimant complained of an article about couples who indulged in "swinging" defined as "hooked on sex with strangers". The article featured the claimant and one of his former wives whom it was alleged was pressured by the claimant to have sex with strangers at a Coventry club. The newspapers sought to rely on three categories of material in mitigation of damages under the Burstein rule including the involvement of the claimant and his former wife in fetish functions at a Coventry club, the claimant's encouragement of his former wife in her career as a model to pose for explicit photos and the fact that the claimant had "slagged off" his former wife in a newspaper feature.

[15] At paragraph 56 Keene LJ said:-

> "The Court of Appeal in Burstein was concerned to avoid jurors having to assess damages while wearing blinkers. If evidence is to qualify under the principles spelt out in Burstein, it has to be evidence *which is so clearly relevant to the subject matter of the libel or to the claimant's reputation or sensitivity in that part of his life (my emphasis)* that there would be a real risk of the jury assessing damages on a false basis if they were kept in ignorance of the facts to which the evidence relates."

[16] Whilst the Burstein case was set in the context of assertions about the plaintiff's character –and thus the judgments specifically refer to this aspect of the case --I do not believe that the Burstein principle is restricted to cases where the defendant seeks to reduce damages by adducing evidence which is directly relevant to a plaintiff's conduct or reputation. It has a wider remit than this. It cannot be right to confine the Burstein principle narrowly and to exclude other facts relevant to the contextual background in which the defamatory publication was made merely because they do not refer to the plaintiff's character. Gatley on Libel and Slander 11th Edition at paragraph 35.29 sets out seven categories of admissible evidence that can be given in mitigation of damages. The plaintiff's bad reputation and his own conduct are but two of the categories. The other five include:

- Factual elements to the contextual background on which the defamatory publication came to be made.
- Evidence properly before the court on some other issue.
- Facts which tend to disprove malice.
- Apology or other amends.
- Damages already recovered for same libel.

[17] It would be quite incongruous to permit facts relevant to the contextual background to be pleaded only on the question of the plaintiff's conduct or bad reputation and to disallow it in any of the other categories which might be relevant. Both principle and logic contest such a conclusion. Hence Keene LJ in Turner's case adverts both to evidence which is "so clearly relevant to the subject matter of the libel "and to evidence which is relevant to the claimant's reputation".

[18] In the instant case, the plaintiff has also sought aggravated damages. This in itself provides further reason why the defendant ought to be permitted to adduce evidence of any facts or circumstances which might serve to illustrate absence of malice which might otherwise aggravate the injury or that he derived his information from a reliable source etc. It seems to me that the matters relied on by the defendant at paragraph 18 are capable

of constituting a contextual background in which the publication, if it is found to be defamatory, came to be made. Without this information it is capable of being argued that the jury would be effectively blinkered or deprived of information that would help to set the contextual background against which they might have come to the conclusion that the defamatory publication was made and thus help to inform their decision on mitigation of conventional or aggravated damages.

[19] I therefore accede to the defendant's application to the degree I have already set out in paragraph 6 of this judgment.

[20] The costs of this matter will be left to the trial Judge to determine.