[2020] IEHC 363

THE HIGH COURT

Record No. 2015/1418 P

BETWEEN/

CHRIS GORDON

PLAINTIFF

- AND –

THE IRISH RACEHORSE TRAINERS ASSOCIATION

DEFENDANT

Judgment of Mr. Justice Bernard J. Barton delivered the 4th day of March 2020

1. This is the judgment of the Court on the Plaintiff's application for the following orders in a defamation suit:

   (i) a direction that the jury disregard all evidence given on behalf of the Defendant by the well-known racehorse trainer Ms. Liz Doyle; and

   (ii) an order striking out the plea of qualified privilege raised by way of defence to three of the seven publications the subject matter of the proceedings.

   Significant consequences for the parties will flow from the making of the orders sought, the most serious of which would deprive the Defendant of the defence of Qualified Privilege in respect of the first, second and fifth publications. Following from that eventuality the Plaintiff would be relieved of the necessity to establish malice, essentially turning the case into an assessment of damages in respect of the three publications *in quo*, there being no plea in the alternative. In this regard it should be noted that the Defendant

2. However, the gravamen of the Plaintiff's application is that the purpose of the evidence given to date by Ms Doyle on behalf of the Defendant is to establish the truth of the impugned statements, a course which in the circumstances the Plaintiff contends is wholly impermissible. The evidence is inadmissible and prejudicial to the point that the damage caused cannot be undone, the only practicable remedy for which is to grant reliefs sought. The reasons for the application and the ruling thereon by the Court must necessarily be viewed in context, accordingly, a brief synopsis of the factual background to the case follows.

Background

3. The Plaintiff is employed as the head of security for what was formerly known as the Irish Turf Club (the Turf Club). He took up this employment in 2010 following a distinguished career as a police officer with An Garda Síochána and retired from the force as a superintendent after 30 years' service. Prior tothe establishment of the Irish Horseracing Regulatory Board in 2018, the Turf Club, which originated in the 18th Century, was responsible for the overall governance of the horseracing industry in Ireland. Amongst the functions exercised in this role was responsibility for the implementation and enforcement of the rules of flat and steeplechase horseracing, the object of which being to ensure integrity in all aspects of the sport.

4. In 2012 there were several high-profile prosecutions arising from the importation and use of anabolic steroids in racing and show jumping bloodstock. One such prosecution involved a retired Department of Agriculture Veterinary Inspector, John Hughes. On 4 October, 2013 he pleaded guilty to possession of significant quantities of Nitrotane, a powerful anabolic steroid he had imported for sale and use in the equine industry. The Turf Club recognised that the use of anabolic steroids and other banned substances in racehorses carried very serious implications for the integrity of horse racing and constituted a significant risk to the industry in general, accordingly, it determined to take decisive action to ascertain the extent of the abuse and to stamp out the practice.

5. Following the successful outcome of the criminal proceedings against John Hughes, the Turf Club invited the Plaintiff, as head of security, to make several recommendations as to how best this objective might be achieved. One of the recommendations made in particular was considered to have industry-wide potential for tackling the problem. This involved Turf Club officials working in concert with officials from the Special Investigations Unit of the Department of Agriculture. The significance of the proposal from the perspective of the Turf Club lay in the statutory power enjoyed by the Department's inspectors to enter and search the premises of racehorse trainers for banned substances and to do so without notice.

6. While it was a condition of granting the annual training licence to racehorse trainers that certain types of yard inspections by Turf Club officials would be permitted, the officials enjoyed no power of entry *per se*, moreover, the scope of inspection was limited. Ms Doyle is and was a racehorse trainer, licenced by the Turf Club. She is also a member of the Irish Racehorse Trainers Association, which is incorporated as a company limited by guarantee and is the Defendant herein. The proceedings originate because of certain events which occurred surrounding and during a joint inspection of Ms Doyle's yard on the 26 March 2014.

7. Some two months previously, on the 22nd January 2014, a meeting took place between representatives of the Department of Agriculture and the Turf Club at which certain information and documentation were shared with the Turf Club representatives. The documentation included the book of evidence used in the successful prosecution of John Hughes. Of relevance to the issues in these proceedings and the evidence given in relation thereto by Ms. Doyle, the book of evidence contained bank statements and bank lodgement receipts for monies paid into a joint bank account held by himself and his wife.

8. According to the evidence given by and on behalf of the Plaintiff regarding the source of the lodgements, several of these were identified only by the initials written on the lodgement dockets of the individuals making the payments. One docket was for a total amount of €590 made up of two payments, one of €390 with the initials 'TD' and the other of €200 beside the initials 'LD' had been written. Mr Louis Reardon, a senior official of the Department of Agriculture produced a single copy of the book of evidence at the meeting, which he handed over to Mr. Denis Egan, Chief Executive Officer of the Turf Club.

9. In an effort to ascertain the names of the individuals who had made payments but were identified only by initials, Mr Egan gave evidence that when he came to the lodgement docket with the initials 'TD' and 'LD' he thought the latter possibly referred to Liz Doyle as she was the only licenced trainer he could think of at the time whose initials were 'LD' so he wrote her name on the docket followed by a question mark; an entry which events have proved was to have far-reaching consequences.

10. Following the meeting, it was agreed that joint inspections of trainer's yards would be initiated, involving inspectors from the Turf Club and the Special Investigations Unit of the Department of Agriculture. Copies of the book of evidence, which included the entry made by Mr Egan, were made available to the Plaintiff and his deputy, Mr Declan Buckley, as part of the identification process. In the context of the controversy which arose over the events which gave rise to these proceedings, the Plaintiff's evidence is that at the time of the joint inspection of her yard he was unaware Ms Doyle's name did not appear on the original lodgement docket but had been written in subsequently by Mr Egan on the copy of the book of evidence handed to him by Mr Reardon during the meeting with the officials from the Department of Agriculture officials.

11. Using the information which had been obtained during the meeting as well as from an anonymous source, a list of yards was compiled by the Turf Club which included the premises of Ms Doyle at Kitestown, Co Wexford; hers was amongst the first yards to be inspected on 26 March 2014, the date on which inspections commenced. The inspection team included the Plaintiff and his deputy, Mr. Buckley as well as a Turf Club Veterinary Surgeon and officials from the Special Investigations Unit of the Department of Agriculture which included among others, Mr. Louis Reardon.

12. The inspection party was met by Mrs. Avril Doyle, the mother of Ms Liz Doyle; she introduced her daughter to the inspectors. It is common case that the Doyles had no objection to the inspections and that these were completed without any untoward finding. However, there are conflicting accounts as to the circumstances in which an explanation for the inspections came to be given and as to the nature of the documentation produced in support thereof.

13. With regard to what transpired in the yard material to the present controversy, the evidence so far has been given by the Plaintiff, Mr. Buckley, Mr. Reardon and, on behalf of the Defendant, by Ms. Doyle. Depending on the outcome of the application, she is due to resume giving evidence in chief. While the Court has yet to hear the evidence of Mrs. Doyle her account of what transpired and what had been said (which she committed to writing shortly after the event) was put to the Plaintiff and the Plaintiff's witnesses on cross-examination. The explanation offered by the Plaintiff in evidence was that as far as he was concerned Ms Doyle's name had been found on a lodgement docket contained in the book of evidence used in the prosecution of John Hughes, an assertion in support of which he produced his copy of the book of evidence. Using the preceding page in the book he covered the initials T.D. and the amount of €390 leaving visible only the name 'Liz

Doyle? followed by the initials 'LD' € 200. This account of what documentation was shown in the yard is disputed by Ms Doyle and her mother.

14. It is clear from the written statements in relation to these events made subsequently by the Doyles as well as from Ms. Doyle's testimony to date, that as far as they are concerned, as has been suggested to the Plaintiff and his witnesses, what was shown was a single sheet of paper purporting to be a copy of the lodgement docket on which initials and a question mark beside the name Liz Doyle were absent, a contention flatly rejected by the Plaintiff. It is not in dispute, however, that Ms Doyle's name does not appear on the original lodgement docket contained in the book of evidence.

15. Within forty-eight hours of the inspection, p a copy of the original was obtained by the Doyles from Mr Pat Hughes, a friend of Ms Doyle for whom she had previously ridden out; he had obtained the copy from his brother, John Hughes. The copy furnished is similar in all respects to the copy which the Plaintiff claims he produced in the yard save that it did not include the entry 'Liz Doyle?.' Mr Egan has given evidence of a conversation he had on the 15th April 2014 with Mrs Doyle in the course of which he explained what had transpired and admitted to having written the entry 'Liz Doyle?' on the copy of the lodgement docket on the copy given to him, for several reasons, the Doyles were not convinced.

16. Shortly after the inspection and following a request to produce the document they were shown in the yard Mr. Buckley met Ms Doyle at a race meeting and showed her a copy of the lodgement docket contained in his copy of the book of evidence. Save in one material respect the docket was the same as that proved in evidence by the Plaintiff; the difference being that Mr. Buckley had placed a circle around the name 'Liz Doyle?' on his copy. As far as Ms. Doyle is concerned this document was quite different from the copy lodgement receipt she says she saw in the yard, a mock-up of which was subsequently fabricated from memory by the Doyles for explanatory purposes. It should be noted in the interest of completeness that the lodgement docket which they say was produced in the yard was sought on discovery but never materialised and was not discovered, a state of affairs consistent with the Plaintiff's contention that none such ever existed. Nevertheless, in her evidence Ms Doyle was adamant about the nature and content of the document she was shown.

The Impugned Statements

17. The impugned statements were published on various dates between the 12th June and 21st August, 2014. The first and second publications are directly concerned with the events surrounding and during the inspection of Ms. Doyle's yard on the 26th March. On the 12th June 2014 the late Mr. Frank Ward solicitor, acting on the instructions of the Defendant, wrote a letter of complaint to the senior steward of the Turf Club requesting an immediate investigation into the behaviour of the Plaintiff and other Turf Club personnel involved in carrying out the inspection. The full text of the letter is scheduled to the Statement of Claim and contains a statement which the Plaintiff claims is seriously defamatory of him as follows:

"We believe that the allegation of Ms. Doyle's name being found on a lodgement docket in connection with Mr. Hughes' bank account was untrue and uttered by Mr. Gordon in the hope of entrapping Ms. Doyle into admission of some wrongdoing which might jeopardise and destroy her professional reputation as a horse trainer. Ms. Doyle considers as indeed do our clients that this misconduct on the part of Mr. Gordon is entirely reprehensible and reflects very poorly on the integrity of the Turf Club."

Shortly before the publication of this statement, it is alleged that the Defendant published to its solicitor words carrying the same imputation.

18. The defence of qualified privilege is pleaded in respect of the these as well as the fifth, sixth and seventh publications, which are concerned with subsequent interconnected events. In the interest of completeness, I should mention the defences raised to the other impugned statements. Of these, the third was carried in the 9th August 2014 edition of "The Irish Field", the defence to which is that the article was not published by or with the authority of the Defendant and did not refer to the Plaintiff. The fourth statement, which is said to be a petition published by the Defendant to its members and/ or horse trainers in Ireland seeking the removal of the Plaintiff from his position as head of security at the Turf Club on the grounds of misconduct, is met with a full traverse.

Summary of the Plaintiff's Submissions

19. With regard to the application for a direction that the jury should disregard the evidence of Ms. Doyle, it is submitted by Mr. Hogan that her evidence in chief is wholly inadmissible on the grounds it was evidence of justification led to establish the truth of the document that had been shown to the Doyles in the yard. While the Doyles were undoubtedly entitled to give evidence of their belief in the truth of the impugned statement/statements at the time of publication they were confined to giving evidence which was directed towards their state of mind; evidence as to the truth of the statement *per se*, however, was impermissible in circumstances where there was no plea of truth.

20. It is contended that a careful perusal of Ms Doyle's evidence in chief will lead the Court to the inevitable conclusion that the nature and purpose of thereof amount to a justification of the statements *in quo* and is thus wholly inadmissible; with one exception no evidence was led as to the witness's state of mind. Indeed, the reply she gave to the one question which sought to elicit her belief as to the nature of the document produced in the yard was an emphatic assertion that it was entirely different from the document introduced in evidence by the Plaintiff, an assertion which it is contended goes to establishing, as a matter of fact, the truth of what was produced rather than to establishing her honest belief in what she had been shown.

21. Mr. Hogan advances the proposition that a rudimentary principle of defamation law is the presumption that a defamatory statement is untrue and thus calls in the first instance for a plea of justification/truth. Absent such a plea the starting point in the case is that the statements *in quo* are untrue or to put it another way, having chosen not to stand over them the Defendant concedes that the statements are false. The defence chosen to meet

the claim is a plea qualified privilege which, if established, will afford a full defence, unless defeated by proof of the malice pleaded and particularised in the statement of claim.

22. While evidence may be led as to the honesty of the witness's belief in the truth of the statements in quo and as to the grounds for such belief, Mr Hogan also advances the proposition that honest belief must be mistaken belief, or as he put it, the witness must have honestly but mistakenly believed in the truth of the statement at the time of publication, the presumption being in the absence of a plea of truth that the statement was false. Accordingly, the first consideration for any court in carrying out this exercise absent a plea of justification is to establish the parameters of the evidence which the witness is entitled to give in rebutting a plea of malice. In aid of this submission the attention of the Court was drawn to the 13th edition of Gatley on *Libel and Slander,* Chapter 33.28, and which merits repetition:

> *"Where privilege or honest comment is raised as a defence, it is common for the claimant to allege by way of reply that the defendant was actuated by express malice. In that situation the defendant will wish to give evidence to rebut the allegation of malice. The nature of that evidence will obviously depend on the way in which the claimant puts his case on malice, which must be fully pleaded in his reply. If it is alleged the defendant had no honest belief in the truth of the defamatory statement or published it recklessly without considering or caring whether it be true or not, the defendant would give evidence as to his belief in the truth of the statement and the grounds of his belief, notwithstanding that the effect of such evidence might be to prove the truth of the statement".*

23. Lest it should be understood in the present context from this statement of the law that evidence as to the truth of the impugned statement is admissible, the attention of the Court was also drawn to the qualification set out in footnote 104 to the paragraph which makes it clear that what is permissible is evidence as to the witness's state of mind rather than evidence as to the truth of the statement even though the effect of such evidence may prove the truth of the statement in the process; the note reads:

> *"This proposition from which there was little authority was approved by the Court of Appeal in Warren v. Random House (2008) EWCA Civ 834. However, as the court emphasised, what is admissible is evidence as to the state of mind, not as to the truth of the allegation.*

I understood this submission to mean that although the evidence tendered may have the *effect* of proving the truth of a statement is was nevertheless admissible provided it is directed towards and is concerned with the witness's state of mind.{*emphasis* added}.

24. Mr. Hogan argues that the wholly inadmissible evidence and the setting up by the witness of what he termed a contest of reputations between the Plaintiff and herself is highly prejudicial to the point where the damage to the Plaintiff's case cannot be undone. However, he makes it clear that the Plaintiff does not seek nor can he afford to have the trial aborted and the jury discharged. Instead, the direction sought and the striking out of

the plea would meet the justice of the case in circumstances which have arisen through no fault of the Plaintiff. In support of the direction as to the appropriate remedy, he cited *Bradley v Independent Star Newspapers* [2011] 3 I.R. 9.

25. Striking out the plea of qualified privilege followed from the direction because it is the foundation upon which the defence is constructed. From the opening address to the jury on behalf of the Defendant to the present point in the trial the evidence of the Doyles has been portrayed as being of fundamental importance to the defence of the action. Nor could the Defendant be heard to complain about the course of action urged on the Court, particularly when regard was had to the number of occasions during the trial where it was made clear by counsel that evidence as to truth was impermissible. Consequently, the Defendant had to accept the consequences which flowed from the evidence it had led.

Summary of the Defendant's Submissions

26. On behalf of the Defendant, Mr. McDowell rejected the submissions made on behalf of the Plaintiff, contending they were nothing short of preposterous. He also referred the Court to the same passage in Gatley cited by Mr. Hogan but drew the attention to the fact that the appeal in *Warren*, supra, was concerned with pleadings in the action and had nothing to do with the issues under consideration although the case was persuasive authority for the general proposition that the Defendant was entitled to lead evidence as to the witness's belief and the grounds therefor notwithstanding such might prove the truth of the statement. The cure for the complaint or any perceived mischief resulting from the evidence of the witness would be more than adequately and appropriately provided for by a direction reminding the jury they were not concerned with the truth of the relevant statements as a matter of fact and that insofar as the evidence went to proving or had the effect of proving the truth thereof such should be disregarded. As to this proposition, the attention of the Court was drawn to the statement of the law set out in the 12th edition of Gatley at para. 33.15, under the heading "Evidence admissible on other issues" which also merits repetition.

> *"Evidence which tends to prove some issue properly raised in the action is still admissible even though its effect may be to prove the truth of a libel to which no justification has been pleaded. For example, where there is a defence of privilege and the defendant wishes to refute an allegation of express malice, he may well want to establish that he honestly believed the statement to be true and to introduce evidence of the grounds of his belief. He will be permitted to do so, however, the jury would have to be directed that the evidence could not be treated as proving the truth of a defamatory allegation".*

27. Mr. McDowell reminded the Court that in his opening address this statement of the law is precisely what he told the jury and read extracts from the transcript to illustrate the point. The nature and effect of the defence of qualified privilege were made clear to the jury from the outset as was the obligation on the Defendant to establish the defence. In this regard, the jury had been given a brief outline of the evidence the Defendant intended lead, including the evidence of Ms. Doyle. The Court was also referred in the context of qualified privilege to the definitive restatement of the law by Lord Diplock in

Horrocks v. Lowe [1975] A.C. 135 summarised in the 12th ed. of Gatley at Chap. 17.3. In circumstances where there was an express allegation of malice, as there was in the statement of claim, the Defendant was entitled to adduce evidence in rebuttal even if it tends to prove the truth of the impugned statement.

28. As to the proposition advanced by Mr Hogan regarding the mistaken belief in the truth of a defamatory statement, the acceptance or acknowledgement that the belief was mistaken is not a requirement on the part of a defendant in seeking to rebut a plea of malice nor was it an ingredient in the defence of qualified privilege. The proposition was not supported by authority and none was cited. Qualified privilege is a stand-alone defence in respect of which the Defendant carries the burden of proof in the same way as the Plaintiff carries the burden of proving malice. In meeting that allegation a witness when giving evidence as to honest belief in the truth of a statement at the time of publication is not required to accept or acknowledge the belief was mistaken albeit such may occur in the course of the proceedings

29. The Defendant was entitled to adduce evidence of the witness's belief, the grounds therefor and that its officers accepted the truth of what they were told and upon which they acted accordingly. In the circumstances, the proposition that the jury should be directed to disregard the witness' evidence and that she should in effect be stood down was absurd and without any basis in law. From the outset not only had the Defendant stayed within the parameters of qualified privilege but it had been emphasised to the jury that the central issue in the case was whether the Doyles believed in the truth of the relevant statements and whether the officers of the Defendant believed that to be so when they were so informed and acted thereon.

30. With regard to the contest of reputations, Mr. McDowell very fairly accepted in that one respect that he did not seek to stand over the witness' evidence; the proposition was incorrect and inconsistent with the case he opened to the jury. However, he reminded the Court that this evidence was not elicited because of any question he had asked but rather had been given voluntarily by the witness without prompting.

31. Finally, the grotesque nature of the application was underlined by the consequence which would flow from an order striking out the plea of qualified privilege from the defence thereby depriving the Defendant of the one substantive defence it had raised thereby turning the case into an assessment of damages in respect of the relevant statements.

Decision

32. I have considered the submissions and the extracts from Gatley together with the authorities to which the Court has been referred. Suffice it to say that I accept and adopt the statements of law outlined therein. I should add the qualification that where a defendant chooses to meet a claim in defamation by pleading qualified privilege and actual malice is relied upon to defeat the defence, honest belief in the truth of a defamatory statement at the time of publication cannot be founded on proving the truth of the impugned facts.

33. I agree with the contention of counsel for the Plaintiff that in the absence of a plea of justification/truth the defence of qualified privilege proceeds on the premise that the Defendant accepts the impugned statement or statements in respect of which it is raised bears a defamatory meaning. It may well be trite but there is no purpose or advantage to be gained in having an honest belief in a statement which is true; it is a *sine qua non* of a cause of action in defamation that the impugned statement is defamatory, however, if proven to be true the law affords an absolute and complete defence to the claim.

34. Such considerations do not arise here, rather the claim in respect of the first, second, fifth, sixth and seventh publications has been met with a plea of qualified privilege, as to which the onus of proof is carried by the Defendant. However, if and when the burden is discharged the legal presumption that the publication of a defamatory statement was malicious is rebutted and a full defence afforded unless defeated by proof of actual malice on the part of the Defendant or those for whom the Defendant is vicariously liable, the burden of which is carried by the Plaintiff. Ordinarily, the issue is raised by way of reply to a plea of qualified privilege in the defence but in this case, somewhat unusually, malice has been expressly pleaded and particularised in the Statement of Claim, a plea which has been met with a full traverse in the Defence and issue joined thereon by the Reply.

35. There have been several amendments to the pleadings but in my view, nothing of any import turns on these for present purposes. The statements of the law set out in the extracts from Gatley adopted by the Court must be read having due regard to the way and sequence in which the issues have been raised on the pleadings. The first and second publications, set out at Paragraphs 4 and 5 of the Statement of Claim, have been referred to earlier and will not be repeated here. Suffice it to say I am satisfied that it has been made crystal clear to the jury the Defendant does not seek to justify any of the impugned statements.

36. Nor is it contended that any of the statements are incapable of bearing a defamatory meaning, which is consistent with the absence of an application to have the Court rule thereon pursuant to s. 14 of the Defamation Act, 2009 (the 2009 Act). This is hardly surprising given the content; it would be almost perverse to conclude that the statements *in quo* are incapable of bearing the imputations pleaded by the Plaintiff, though that will be a question which the jury will have to consider in due course.

37. The common law defence of qualified privilege, which survives the 2009 Act, finds statutory expression in s. 18. Subsection 2 provides that:

> *"subject to section 19, it shall 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."

For the purposes of the section "duty" means a legal, moral or social duty and "interest" means a legal, moral or social interest (see subs. 7).

38. The defence of qualified privilege, whether at common law or under statute, is conditional on compliance with certain well-established requirements. Section 19 is declaratory of the common law in this regard and provides that the defence shall fail if, in relation to the publication of the statement in respect of which the action is brought, the Plaintiff proves that the Defendant acted with malice. It follows that whether reliance is placed on the common law or statutory defence of qualified privilege, a publication proved to have been motivated by malice is not protected, the corollary to which is that protection is afforded where the occasion is used in accordance with the purpose for which it arose; the use of the occasion for its proper purpose must be the dominant motive. It follows that use of the occasion for an indirect motive is improper and will result in the loss of the protection.

39. Accordingly, evidence as to honest belief goes to establishing protection afforded by qualified privilege unless the underlying motivation of the publisher amounts to an abuse of the occasion. Absence of honest belief in the truth of a defamatory statement at the time of publication is generally conclusive evidence of express malice. Consequently, the motive underlying the publication of an impugned statement on an occasion of qualified privilege is generally crucial to the success or failure of the plea were met by an allegation of malice.

40. As mentioned previously, the particulars of malice pertinent to the first and second publications have been pleaded in the Statement of Claim. The particulars recite the circumstances of the inspection summarised earlier herein and explain how the entry "Liz Doyle?" came to be written by Mr Egan on the lodgement docket in the book of evidence given to him at the meeting with officials from the Department of Agriculture and how on the 15th April, 2014 he offered an explanation in that regard to Mrs. Doyle. Consequently, from that time, or shortly thereafter, the case made is that the Defendant knew that the Plaintiff was wholly unaware when carrying out the inspection that the witness's name on his copy of the lodgement docket did not appear on the original but had been written in subsequently by Mr. Egan. The particulars continue as follows:

> *"In light of the aforesaid, at the time the letter from the defendant's solicitor was published on the 12th June, 2014 the defendant was well aware that the plaintiff had not intimated the inspection in the hope of entrapping Ms. Doyle into an admission of some wrongdoing which might jeopardise or destroy her professional reputation as a horse trainer', as was asserted in that publication".*

41. I have read the transcript of the evidence in chief given to date by Ms. Doyle. Her evidence in relation to the documentation produced in the yard at the time of the

inspection commences at p. 99. Save for rulings by the Court on a number of objections and ruling the right to recall witnesses in order to afford an opportunity to address aspects of Ms Doyle's evidence which counsel for the Plaintiff contended had never been put to the Plaintiff or the witnesses called on his behalf, her evidence on this subject continued throughout the afternoon sitting until ending with a response to a question put by the Court at the close of the hearing for the day at P 131 at which juncture Mr. Harty intimated an intention to make the application herein and invited the Court to sit early the following morning for that purpose. I acceded to the request.

42. With regard to the evidence of Ms. Doyle I think it should be said in fairness to her that it will have been obvious to everybody in court that she is a horse trainer not a lawyer and cannot be expected to understand the many intricacies of defamation law. Indeed, I venture to say she is not on her own as there are many lawyers who do not understand these intricacies either, a not unusual circumstance given what is involved. I should add that the Court regularly benefits from the assistance of counsel in this regard when called upon to address these the course of a trial.

43. Turning to the one aspect of Ms. Doyle's evidence over which Mr. McDowell very fairly says he does not stand over as running counter to the case he opened to the jury, namely the setting up of a contest of reputations between the Plaintiff and the witness, I am satisfied from a perusal of the transcript that the evidence in question was volunteered spontaneously and had not been led. Nevertheless, Mr. Hogan understandably laid considerable emphasis on this evidence in support of the application which, as he correctly submitted, could only be considered as going to justification.

44. I have already adverted to the fact that during her evidence in chief there were a number of contested objections in respect of which the Court was required to make rulings. In my judgment, what is particularly significant given the grounds advanced in support of the application is that not only was there no objection to the evidence which the witness volunteered but there were no objections to the evidence led which the Plaintiff now contends was wholly inadmissible because it was given for the purpose of establishing the truth of what the witness says transpired during the inspection rather than to what was relevant, namely evidence as to her state of mind.

45. Moreover, it is argued the evidence adduced is so prejudicial to the Plaintiff's case the resulting damage can only be remedied by a direction that the jury disregard the evidence and by striking out the defence of qualified privilege, a necessary consequential order given the reliance which the Defendant places on the evidence of the witness and her mother. The consequences cannot be overstated, the Defendant would be deprived of the defence of qualified privilege raised in relation to the relevant statements thereby relieving the Plaintiff of the burden of proving malice thus rendering the Defendant liable in damages.

46. The Court has made it clear in the course of these proceedings, as indeed it has in the course of many other such actions, that it is not the role of the trial judge to fulfil the function which is the preserve of counsel, though on occasion it may be necessary in the

interests of maintaining an even balance for the trial judge to intervene in the questioning of witnesses with questions of his or her own, the purpose being, as succinctly stated by McCarthy J. in *Donnelly v. Timber Factors Ltd* [1991] 1 I.R. 556 at p. 566 " *…to clarify the unclear, to complete the incomplete, to elaborate the inadequate and then truncate the longwinded. It is not to embellish, to emphasise or save rarely to criticise. That is the function of counsel."* It follows that if objection was to be taken to evidence which was wholly inadmissible and prejudicial as now contended, that was a matter for counsel, which begs the question why the absence of objection?

47. The application must be viewed in the context in which the plea has been raised and the explanation offered therefor to the jury when the defence case was being opened to them. At the beginning, middle and end of the address they told in no uncertain terms that they were not concerned with establishing as a matter of truth the nature form or content of the document which was produced in the yard at the time of the inspection; simply put it was not an issue they would be invited to try. What was relevant, however, was whether the Doyles honestly believed in the truth of the relevant statements and whether the Defendant's officers believed in the truth of what they were told by them and acted accordingly.

48. I must say that from that point in the trial I had understood the case to be travelling along that particular track, indeed, I interrupted Mr. Hogan's submissions to make precisely that observation. In the circumstances, I have little doubt that the evidence led from the witness was intended to be directed to what she believed she had been shown in the yard. Furthermore, in answer to the question it seems reasonable to infer from the absence of objection to the evidence, impugned for the purposes of the application as going solely to justification, that counsel for the Plaintiff also viewed it in the same way as the Court until the end of the afternoon's proceedings when the application was intimated.

49. Given the multiplicity and rapidity of the objections raised in the course of the trial so far, about which I hasten to add I make absolutely no complaint given the role and duty of counsel to raise objections where called for in the interests of ensuring a fair trial, I would have expected objection to have been made at the very first sign evidence as to justification was being led if so perceived at the time. There could have been little or no doubt about the nature of the evidence whether given in answer to a question or volunteered by the point in the witness's evidence recorded at p. 101 of the transcript. As it is, however, and although interrupted by other objections, the witness continued to give evidence thereafter without objection that the evidence went to justification rather than to her belief in the truth of the impugned statements at the time of publication.

50. In the interest of completeness, I should add that I cannot accept the submission that in giving evidence as to honest belief in the truth of an impugned statement for the purpose of rebutting a plea of malice that the Defendant or the Defendant's witnesses must accept or acknowledge that the belief was mistaken and that the jury must be so satisfied. This is not to say that a mistake cannot be acknowledged, on the contrary, there have been a

number of cases over which I have presided, in which some of the counsel engaged in this case were also involved, where there was such an acknowledgement, however, I agree with counsel for the Defendant that an acknowledgement or acceptance that the belief was mistaken is not *sine qua non* where the defence of qualified privilege is met with a plea of malice.

51. Indeed, to digress for a moment, one of the developments brought about by the 2009 Act is the provision for making an offer of amends (see ss. 22 and 23) which involves acknowledgement by a defendant in circumstances where it is decided not to contest the claim, whether or not defences, including qualified privilege, are available. It would be very strange, in my judgment, if having established an entitlement to rely on the defence of a qualified privilege a defendant in seeking to rebut an allegation of malice by giving evidence as to honest belief in the truth of defamatory statement at the time of publication had to satisfy a jury it was now accepted the belief was mistaken.

Conclusion

52. If such were a requirement one would have expected statements of law to that effect to have appeared in case law and authoritative texts on defamation law such as Gatley and Cox and McCullough. Nonesuch have been opened to the Court, moreover, no such requirement features in the 2009 Act about defeating the statutory defence of qualified privilege. The conclusion of the Court is that acknowledgement by or on behalf of the defendant that the honest belief in the truth of the defamatory statement at the time of publication is not a requirement to be satisfied to defeat an allegation of malice, albeit that there are cases where such occurs.

53. It should be remembered that the Doyles are not servants or agents of the Defendant; they are not parties to these proceedings. What is material to the defence of qualified privilege in this case, if the right to rely upon the plea is established, is the state of the Defendant's mind, which given the Defendant is incorporated, is in effect the mind of the officers who were involved and took the actions as they did, including instructing to the late Mr. Ward to write the letter containing the impugned statement constituting the first and second publications.

54. The Court acknowledges and is conscious of a previous ruling in relation to the connectivity between the evidence of the Doyles with the Defendant on which its officers acted and in respect of which it is said evidence will be led as to their belief in the truth of the information they received. To this extent the Doyles, though not parties to the proceedings, are intimately connected with the defence of the claim, particularly with regard to the state of mind of the Defendant's officers.

55. To accede to the application in the circumstance outlined herein would in my judgment amount to choosing what might be described as a nuclear option to deal with the issue which has arisen which would mean depriving the Defendant of a defence provided by law raised in relation to three of the impugned publications thereby turning the claim into an assessment and rendering the Defendant liable in damages. I am satisfied a more

measured response to the situation which has arisen that will meet the justice of the case is required, accordingly, for all these reasons the Court will refuse the application.

56. Accordingly, and lest there should be any confusion in the minds of the jury, I consider the justice of the case is best served by a direction to the jury, before Ms. Doyle returns to the witness box, to the effect that insofar as any evidence they have heard from the witness to date or may hear from her or other witnesses conveys an impression that they will be concerned with determining the true nature of the document shown to the Doyles in the yard by Mr. Gordon they should be disabused of that and instructed such is not an issue they will be given to try and further that any evidence which proves or which tends to prove the truth of the impugned statements in quo should be disregarded by them.

57. In essence what the Court intends is to remind the jury that the issues with which they are concerned are those which arise on the pleadings and that therefore it is not part of the Defendant's case nor will they be concerned to be satisfied as to whether or not, as a matter of fact, the impugned statements *in quo* were true and that insofar as any of the evidence heard to date or to be heard goes to the establishing the truth thereof, rather than to the witnesses' state of mind as to honest belief in the truth of the relevant statements at the time of publication with which they are concerned, is to be disregarded by them. The jury will also be directed to disregard the witness's evidence which set up a contest between reputations, the only relevant reputation being that of the Plaintiff.