

THE HIGH COURT

[2023] IEHC 699

[Record No. 2019 5651 P]

BETWEEN

JOHN MATTHEW BERRY

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

FIRST NAMED DEFENDANT

AND

NOEL SHANNON

SECOND NAMED DEFENDANT

JUDGMENT of Ms Justice Marguerite Bolger delivered on the 8th day of December 2023

1. This is the first named defendant's application to remit the proceedings to the Circuit Court pursuant to O. 49, r. 7 of the Rules of the Superior Courts. For the reasons set out below, I am refusing this application.

Background

2. The plaintiff's claim arises from a photograph of him that was placed on a bulletin board in a Garda station entitled "*Active Criminals*" which identified him by his name and address. The second named defendant was a tradesperson working unsupervised in that office, who took photographs of the bulletin board and circulated them on social media and WhatsApp. The plaintiff is not and never was involved in crime. He claims that anyone looking at the photographs circulated on social media would conclude that he was.

3. The plaintiff issued a plenary summons on 16 July 2019 and filed a statement of claim on 6 January 2020, in which he claims damages under a number of headings, including defamation, breach of his constitutional and Convention rights, breach of the Data Protection Acts and negligence. He does not claim damages for personal injuries, although he does

refer in his statement of claim to having suffered personal injuries by virtue of the exacerbation of his mental health condition. In replies to particulars of 17 November 2020, he expanded on his loss and damages in explaining that his confidence, health, everyday life and recreational activities had been affected. He also set out particulars of the mental health problems he suffered as had been requested by the first named defendant in their notice for particulars.

4. The first named defendant's defence of 18 January 2020 denies any wrongdoing, denies that the plaintiff is not a criminal and claims that the publication was true or substantially true that they are entitled to a defence of honest opinion. The first named defendant later filed two amended defences, to which the plaintiff consented, in which they removed the reference to the plaintiff having received the benefit of the Youth Diversion Programme but continued to deny that the plaintiff was not involved in crime, although the first named defendant has admitted that the plaintiff has no previous convictions. The amended defence took issue with the plaintiff's failure to secure a PIAB Authorisation. The first named defendant says the plaintiff has claimed damages for personal injuries and therefore cannot proceed before a jury.

5. The first named defendant asserts in this application that the plaintiff's claim taken at its height would only attract compensation within the jurisdiction of the Circuit Court. The plaintiff disagrees, relying on the decision of the Supreme Court in *Higgins v. Irish Aviation Authority* [2022] 2 ILRM 61 where a publication by email viewed by a limited audience was found to fit within a third band of serious defamatory material with a value ranging from €125,000 to €199,000. The plaintiff argues this is comparable to the defamation he has alleged. The plaintiff criticises the first named defendant for not offering amends and for claiming justification on the basis of truth and honest opinion and claims that the manner in which the first named defendant is defending the proceedings may give rise to an increase in damages as an aggravation of what the plaintiff claims was defamatory of him. The plaintiff says he is not seeking and has not sought damages for personal injuries but that the publication impacted on his well-being and had consequences for his work and personal life, which he says are relevant factors in asserting the gravity of the wrongs he alleges.

Discussion

6. Order 49, rule 7 states:

"(1) Where any action or proceeding is pending in the High Court which might have commenced in the Circuit Court or the District Court, any party to such action or proceeding may apply to the High Court that the action be remitted or transferred to the Circuit Court or District Court (as the case may be), and if the High Court should not consider the action or proceeding fit to be prosecuted in the High Court it may remit or transfer such action or proceeding to the Circuit Court or the District Court (as the case may be) to be prosecuted before the Judge to such Circuit or (as the case may require) the justice assigned to such District as may appear to the Court suitable and convenient, upon such terms and subject to such conditions as to costs or otherwise as may appear just."

7. The test which must be considered by the court is as set out by Fitzgibbon J. in *Connor v. O'Brien* [1925] 2 I.R. 24 where he stated at p. 31:

"... if the amount of damages recoverable is the only question involved in the decision, the Court must consider whether the plaintiff could reasonably contemplate the recovery of a sum for damages beyond the jurisdiction of the Circuit Court."

This test was subsequently approved by the Supreme Court (Ó Dálaigh C.J.) in *Ronayne v. Ronayne* [1970] I.R. 15.

8. The first named defendant accepts the plaintiff's claim must be taken at its height for this application and that the court must proceed on the basis that the plaintiff can succeed in establishing his claims. The court was referred to the decision of *Cooper-Flynn v. RTE* [2004] 2 IR 72 which confirms that evidence of a plaintiff's misconduct can be relevant to determination of damages for defamation. However, it is unclear what misconduct the first named defendant alleges against the plaintiff, particularly given the first named defendant's decision to remove the reference to the plaintiff's apparent involvement in the Youth Diversion Programme from its second amended defence.

9. I do not accept the first named defendant's assertion that the plaintiff has claimed for damages for personal injuries and is, therefore, precluded from availing of a trial by jury. The plaintiff has not made any such claim, albeit he has clearly set out in his proceedings the impact he says these publications had on his health and well-being. The High Court cannot aggregate a plaintiff's right to trial by jury in a defamation case where other causes of action for which a jury trial is not available, have been included; *Lennon v. HSE* [2015] 1

IR 92. How those various causes of actions are to be managed, alongside the claim against the second named defendant arising from his publication of the photograph on social media for which he has been convicted of a criminal offence, may have to be resolved before this matter proceeds to trial, but for the moment it is clear that whatever other causes of action the plaintiff has in addition to his claim for defamation, should not be remitted to the Circuit Court for a trial by judge alone. The first named defendant's pleas do not justify such a remittal.

10. I have considered the decision of the Supreme Court in *Higgins* and where the plaintiff's claim, at its height, might potentially rest. I am satisfied that the plaintiff's decision to issue proceedings in the High Court against the first and second named defendants was reasonable and proper. This application, therefore, falls outside of the provisions of O. 49, r. 7(1) and the entire case should remain in the High Court for the plaintiff to pursue and the defendants to defend as they see fit.

Indicative view on costs

11. My indicative view on costs is, in accordance with s. 169 of the Legal Services Regulatory Act 2015, that the plaintiff is entitled to their costs. I will put the matter in for mention before me on 18th December 2023 at 10:30am for the purpose of hearing such further submissions which the parties may wish to make in relation to costs and any other orders to be made. Any written submissions should be filed with the court at least 48 hours before the matter is back to me.

Counsel for the plaintiff: Paul O'Higgins SC, Mark Lynam SC

Counsel for the first named defendant: Conor Power SC, Mark D. Finan BL