Neutral Citation Number: [2008] EWHC 2481 (QB)

Case No: HQ07X02208

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20th October 2008

Before :

RICHARD PARKES QC
Sitting as a Deputy Judge of the Queen's Bench Division

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Between :

SHAUN BRADY — **Claimant**

- and -

KEITH NORMAN — **Defendant**

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- -

Adrian Davies (instructed by **Messrs Stevens**) for the Claimant
Jonathan Crystal (instructed by **Thompsons**) for the Defendant

Hearing dates: 6th-7th October 2008

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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RICHARD PARKES QC

Richard Parkes QC :

1. On Monday 6th and Tuesday 7th October 2008 I ruled on three matters of law before the start of the trial of this libel action, and I now give my reasons for those rulings. The three matters were whether the publication complained of was protected by qualified privilege; whether the words complained of were capable of bearing a defamatory meaning; and whether there was any evidence to leave to the jury from which they could properly have drawn an inference of internet publication in circumstances in which publication was not protected by qualified privilege. A letter to the court dated 1st October 2008 from Mr Jonathan Crystal, for the Defendant, foreshadowed the first of those issues. Mr Crystal's letter also warned that there were issues of admissibility of evidence contained in witness statements served on behalf of the Claimant. In the event, it appeared that similar issues arose about the evidence of his own lay client, Mr Norman, and about the legitimacy of the Defendant's *Burstein* particulars. As matters turned out, after a brief discussion of the live issues and the scope of admissible evidence, the witness statements were amended by counsel; nor was it necessary to rule on the legitimacy of the *Burstein* particulars, in the light of assurances from Mr Crystal as to the use which he intended to make of them. It was unfortunate that these issues had to be dealt with on the first day of the trial, because - despite Mr Crystal's letter to the court, which was intended to avoid the need for the jury to be kept waiting - the jury had to be sent away for a day before the case could be opened to them.

2. This action arises out of an article published in the July 2006 edition of the Loco Journal, the monthly magazine of the trade union ASLEF. The Claimant, Mr Shaun Brady, is the former General Secretary of ASLEF and the Defendant, Mr Keith Norman, is its current General Secretary.

3. There is an unfortunate history to the action, which I shall state briefly. On 20th May 2004, a barbecue for members of ASLEF staff was held in the back garden of the union's headquarters at 7 Arkwright Road, Hampstead. Late in the evening, there was an altercation between the Claimant and ASLEF's then President, a Mr Martin Samways. A report into the events of that evening was produced by Professor Aileen McColgan. The report concluded (inter alia) that Mr Samways had been loud and aggressive, that he had struck and been verbally abusive to a female member of staff, that the Claimant had intervened, and that a fight ensued between the two men. The report was critical of the Claimant's conduct. He and Mr Samways were suspended from the union in May 2004, and in August he was dismissed from his position as General Secretary. He brought a claim against ASLEF for unfair dismissal, and obtained judgment in his favour, with an order for substantial compensation. ASLEF's appeal was dismissed by the Employment Appeal Tribunal. In December 2005, the Claimant made three complaints to the Certification Officer (who has statutory functions under trade union legislation) about the procedures employed by ASLEF in the disciplinary process. On 2nd June 2006 the Certification Officer found that one of the three complaints was out of time, whereupon the Claimant withdrew the others. There was no determination by the Certification Officer on the merits.

4. At the ASLEF conference (known as the Annual Assembly of Delegates, or AAD) in June 2006, Agenda Item 42 was debated and rejected by a majority of delegates. It read as follows:

> "Agenda Item 42 – Bournemouth – That this branch Bournemouth in the light of the Employment Tribunal ruling in favour of Shaun Brady requests that this AAD 2006 fully debates the finding of the Employment Tribunal with a view to the reinstatement of Mr Shaun Brady. Further this branch Bournemouth requests this 2006 AAD allows Shaun Brady to address this AAD as a democratic trade union if at this stage the Executive Committee has failed to recognise the decision of the Employment Tribunal."

5. In July 2006, the Loco Journal contained a number of reports on the June ASLEF conference. Among the reports was this article on page 7:

> "THE BRADY ERA IS OVER
>
> ASLEF conference delegates declined to debate a proposition calling for former General Secretary Mr Brady to address conference, coupled to efforts to consider his reinstatement. They felt it was pointless to discuss a "passed era" (sic).
>
> One compelling reason was that the Certification Officer had ruled the previous week that Mr Brady had legitimately been excluded from ASLEF membership for bringing the union into disrepute. Therefore as he is not an ASLEF member he is not eligible within the union's rules to be General Secretary.
>
> It was also pointed out that Mr Brady could not be reinstated because the Union already has a properly elected general secretary – who would presumably have to be dismissed to bring Mr Brady back."

6. The whole issue of Loco Journal was put up on the ASLEF website, in accordance with what I understand is the union's normal practice.

7. Mr Brady complained of the first paragraph and the first sentence of the second paragraph of the article, and pleaded that the meaning of the words was that the Certification Officer had ruled that he had legitimately been excluded from membership of ASLEF for bringing the union into disrepute. There was also an identical legal innuendo meaning, which seemed to add little and which Mr Davies decided against opening to the jury.

8. The Defendant denied that the words bore that meaning or any defamatory meaning, but admitted that they referred to the Claimant. There was no plea of justification, whether in the narrow meaning complained of by the Claimant or in a wider meaning (the Defendant not, of course, being constrained in a plea of justification by the meaning put on the words by the Claimant).

Qualified privilege

9. The only substantive defence was qualified privilege. That was pleaded by Mr Crystal in the following terms:

i) The words were self-evidently a report of what had taken place at the ASLEF conference.

ii) As General Secretary of ASLEF, the Defendant was under a duty and/or it was his proper and legitimate interest to communicate to those to whom the words were published a report of what had taken place at the ASLEF conference, and all those who read the words had a common and corresponding interest in receiving such communication.

iii) It is further averred that the communication by the Defendant in the Loco Journal and on the ASLEF website was reasonable in all the circumstances and as wide as was necessary to inform those interested.

10. Mr Adrian Davies, for the Claimant, conceded in his Reply that members of ASLEF (and only members) had a legitimate interest in receiving information about what took place at the union conference. In argument, he confirmed his acceptance that qualified privilege protected publication to members of the union, and he extended that concession to ex-members and officers and ex-officers of the union and their widows, and to the union's professional advisers. There was therefore no dispute that publication to the vast bulk of the 18,000-odd circulation of Loco News was protected. The dispute centred on a list of 202 further publishees. There was no plea of malice.

11. Mr Crystal's skeleton argument put his case on privilege very shortly indeed. Beyond the overwhelming number of individuals who were either members or retired members or (as it emerged) their widows, or officers or retired officers of the union, he maintained that the 202 further recipients each also had an interest in the published information. Mr Davies' concessions extended to cover some of those on the list, for the list included a number of ex-members, ex-officers and widows, and ASLEF's counsel and solicitors. The issue was whether those on the list to whom Mr Davies' concessions did not extend, or some, and if so how many, had an interest in the report such that publication to them was privileged.

12. In oral submissions, Mr Crystal contended that the defence of qualified privilege must succeed. He first appeared to rely on a pleading point, namely that the Claimant's own case depended on the proposition that publication was exclusively to people interested in the railway industry. He submitted that all the 202 publishees had an interest in what took place at the annual ASLEF conference, and that in the light of the Claimant's own case, and the fact that the Claimant did not allege publication to anyone who did not have an interest in the railway industry, there was nothing left of the Claimant's case. It is true that the Claimant pleaded that the ASLEF website would have been read by non-members of ASLEF with an interest in the railway industry, and that the words complained of would have been understood in the meaning pleaded partly by reason of the history of the circumstances of the Claimant's election and dismissal as general secretary, information which would have been known to many interested in the railway industry, but there was no doubt (especially having regard to the terms of the Reply) what the Claimant's case was. There is a great difference between the kind of interest in the railway industry which leads people to read a railway industry magazine, and the kind of interest which the law regards as giving rise to a defence of qualified privilege. Mr Crystal's second submission was that publication of the Loco Journal was reasonable in the

circumstances and as wide as necessary to inform those interested. As I understood this point, he was submitting that this was an instance where the general secretary had to communicate with all members of the union, but could not do so without at the same time communicating incidentally with non-members (or at least those not covered by Mr Davies' concession). That was a submission which could not be made good in the absence of evidence or agreement. Thirdly, he submitted that it was for the Claimant to lead evidence that there were publishees who did not have an interest (in the sense giving rise to qualified privilege) in the railway industry. That was an unjustifiable inversion of the well established rule that it is for the Defendant who relies on the defence of privilege to prove the facts and circumstances necessary to create the privilege, unless they are not in dispute or have already emerged in evidence: see for instance *Gatley* 10th ed para 33.23. In short, Mr Crystal's submission that the defence of qualified privilege must succeed was premature, and in order to resolve the issue and to make good use of the time available before the jury was due to return, it was agreed that I should hear the evidence of the Defendant, Mr Norman, limited to the facts relevant to the defence of privilege.

13. Mr Norman's evidence was, in short, that the annual conference of the union was very important, because it was an expression of the wishes of the membership and dictated policy for the year. Loco Journal had been published since 1888, and was well respected in the trade union movement. He did not himself compile the list of the 202 publishees who (beyond the categories accepted to be protected by privilege) received the journal. He said that he thought that the approximate number left after taking out anyone to do with ASLEF and overseas recipients was about 145. He was taken through the list, which consisted of 5 pages numbered in the bundle pp416-420. On page 416, there were only 5 recipients who did not fall into the categories covered by Mr Davies' concession. They were a cartoonist who allowed his collection of cartoons to be exhibited in ASLEF's offices, in return for a monthly copy of Loco Journal; Mr Brian Clarke, of the Conference Centre for Trade Union Education, about whom Mr Norman knew nothing; Mr Tony Benn, the former MP, whom Mr Norman described as a 'friend of the railways'; the Health & Safety Advisory Council, which had an interest in railway safety; and Lord Clarke of Hampstead, who supported the carriage of freight by rail and was interested in the Loco Journal. On page 417, there were 27 non-overseas publishees: there were affiliated bodies of ASLEF, Labour Party officials, the chairmen of two local transport authorities, a number of MPs, some of whom were said to be members of the House of Commons Transport Select Committee and honorary members of ASLEF, a spokesman for the Green Party, with which ASLEF wished (being a 'broad church') to exchange information, several journalists, most of whom were said to be transport correspondents, but others of whom, according to the list, specialised in industrial matters or politics, and the printer of Loco Journal. On page 418, the 50 publishees not based in Eire or Northern Ireland included railway charities (as Mr Norman explained, ASLEF supports them and sends them a copy of Loco Journal) UK railway companies (which had an interest in railways and recognised ASLEF as a professional trade union), the Rail Passengers' Council (a consumer group whom Mr Norman wished to keep informed), specialist libraries (which Mr Norman said enabled students to use Loco Journal for reference), specialist press (Railway Gazette, with an obvious interest in transport), nine named subscribers with no stated affiliation, and the general secretary of the National Association of Probation Officers. Of the 9 unaffiliated subscribers, Mr Norman said that some were 'local managers' (I took him to mean managers of

railway companies), and some (he did not say how many) were members who bought additional copies. On pages 419-420, of the 58 non-overseas publishees, 14 were general secretaries of other trade unions (some of whom, Mr Norman said, had an interest in railways, but all exchanged their magazines with ASLEF by way of an exchange of information), 3 were involved in trade union education (they were sent the magazine because they asked for it), 1 was from Labour Party National Trade Union Liaison (Mr Norman thought this a historical arrangement to exchange publications), 5 were trade union libraries (where students used the magazine for trade union research), 1 was the General Federation of Trade Unions (again, according to Mr Norman, a historical arrangement which provided for magazine exchange), 8 were transport organisations (with which, as Mr Norman candidly explained, magazines are exchanged and displayed on racks in their offices), and 26 were listed as 'individuals with interest in trade unions'. Of these, Mr Norman said, at least one was a former ASLEF member, one was a manager of a freight company, and one was a former member of ASLEF's head office staff. There was no suggestion in his evidence that any of them - except in so far as the list itself made clear - received their copies outside England and Wales. In cross-examination, Mr Norman confirmed that he had an up to date list of members, and that if he wanted to send a circular to members alone, he could do so.

14. On the basis of Mr Norman's evidence, Mr Crystal stressed the importance of the conference as a shop window for the union. He accepted that different publishees appeared to have different interests, but in broad terms he submitted that all of them (the cartoonist, he conceded, might be 'on the edge') had a substantial and legitimate interest in what went on inside ASLEF, particularly at the annual conference. That particularly applied to those in the transport industry, the relevant politicians and journalists. He sought to distinguish the case of *Trumm v Norman* [2008] EWHC 116 (QB), in many ways a similar libel action, also brought against the same defendant in respect of publication in Loco Journal, where the same list of 202 publishees was considered by Tugendhat J. In that case, Mr Crystal submitted to Tugendhat J that Mr Norman had a duty or interest to communicate to ASLEF members, and to the other 202 individuals (who were accepted not to be ASLEF members), certain facts about the circumstances in which Mr Trumm was expelled from ASLEF. It was common ground in that case, as in this, that qualified privilege applied to communications to the membership. The judge concluded that qualified privilege could not be relied on as a defence to journalists and other subscribers to Loco Journal who could not be shown to have any interest in the affairs of ASLEF over and above that of any ordinary member of the public. He did not need to consider the position of each of the 202 publishees separately, because it was plain to him that there was publication of about 100 copies to persons who had no material interest in the affairs of the union over and above that of ordinary members of the public, and that there was no defence of qualified privilege for publication to such persons. As I say, Mr Crystal sought to distinguish that decision on the footing that one of the passages complained of by Mr Trumm related to personal matters, and plainly was not privileged. I do not regard that as a ground for distinction, because the passage in question had earlier been ruled not privileged by Eady J, and Tugendhat J was only considering privilege in respect of information which did not fall into that category.

15. No doubt in the light of Mr Norman's acceptance that he could, if he wished, communicate with ASLEF members alone, Mr Crystal did not repeat his earlier

submission that the extent of publication was reasonable in the circumstances and no wider than necessary to inform those interested.

16. Mr Davies contended that Mr Crystal was in effect arguing for a variant of *Reynolds* privilege (as first explained in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127), without the requirement for responsible journalism, because his submission entailed a broader privilege than traditional common law qualified privilege would permit. He referred to paragraph 14.13 of *Gatley* for the proposition that the requisite interest must be not as a matter of gossip or curiosity but as a matter of substance apart from its mere quality as news. Mr Crystal, replying, made use of the same passage in support of his argument.

17. My conclusion, having heard Mr Norman's evidence, was that he failed to show that he had any duty to publish the article complained of to the majority of those on the list of 202 publishees. Nor, in my judgment, did he show any interest in publishing the material to those publishees, nor that the publishees had any material common or reciprocal interest in the report. He made no suggestion, for instance, of the kind that he did in *Trumm v Norman*, namely that he wanted the article complained of in that case to reach beyond the ASLEF membership in order to inform everyone who might have heard rumours about the terms of settlement with Mr Trumm to know the true position as he saw it. As Mr Crystal accepted, the interests of the publishees on the list varied. Indeed, some of those on the list were not shown to have any interest at all in trade union or transport affairs. Some, of course, had specialist transport expertise (for example, the MPs on the Transport Select Committee, or railway operating companies), but it did not seem to me that their mere possession of that expertise meant that Mr Norman had any legitimate interest in informing them of the Certification Officer's ruling about the case of Mr Brady, or of the circumstances of his expulsion, any more than he had an interest in telling members of other trade unions, or journalists, or Labour Party officials. Moreover, their interest in learning of the details of Mr Brady's expulsion was not shown to be greater to any substantial degree than that of any member of the public possessing an interest in transport or trade union affairs. I concluded that privilege did not protect publication to some 131 of the individuals and organisations on the list. They were the 5 listed on page 416, to whom I have already referred, the 26 listed on page 417 (omitting only the printer of Loco Journal), 47 on page 418 (omitting 3 of the subscribers to allow for Mr Norman's evidence that 'some' were members buying an extra copy), and 53 on pages 419-420, making perhaps excessive allowance for Mr Norman's evidence that on these pages at least one recipient was an ex-member and another an ex-officer. I therefore ruled on Monday that publication to those 131 recipients was not protected by qualified privilege.

Meaning

18. Mr Crystal submitted that the words complained of were not capable of a defamatory meaning. This was not pleaded in the Defence, and it was unclear to me why the application was not made at a very much earlier stage of the proceedings, given that (if successful) it would have brought the action to an end.

19. Mr Crystal's submission was that the defamatory allegation had to engage the Claimant, whereas a meaning that the Certification Officer had ruled that the Claimant had been legitimately excluded from the union for bringing it into disrepute

did not do so, because that meaning was not discreditable of the Claimant. The effect of the words was simply that the Certification Officer had ruled one way rather than another. That being so, he argued, the words were not capable of a meaning defamatory of the Claimant, so there was nothing to go to the jury.

20. Mr Crystal did not refer to authority, but I remind myself of the formulation of the principles set out by Eady J in *Gillick v Brook Advisory Centres* (as approved by the Court of Appeal: [2001] EWCA Civ 1263 at [7]), and in particular that my function is to decide whether the words are capable of bearing a defamatory meaning, and that in doing so I should reject a meaning which can only emerge as the result of a strained or forced or utterly unreasonable interpretation. Much of what Eady J said in *Gillick* is primarily concerned with the evaluation and delimiting of the range of meanings of which the words are capable, which is not the task which I have to perform, for the meaning is not challenged as such: what is challenged is whether the words are capable of bearing a defamatory meaning. Nonetheless, I bear in mind the need to give the article the meaning which it would have conveyed to the ordinary reasonable reader reading the article once. Hypothetical readers should not be treated as being either naive or unduly suspicious; they should be treated as being capable of reading between the lines and engaging in some loose thinking, but not as being avid for scandal; and I should avoid over-elaborate analysis, because an ordinary reader would not analyse the article as a lawyer would analyse a document. The words complained of should be read in context.

21. Ultimately, and bearing all those matters in mind, it seemed to me that the words complained of were plainly capable of being defamatory of the Claimant, and should be left for the jury to consider. No reasonable reader would regard the Certification Officer's ruling as morally neutral: its effect was to confirm that the Claimant had been legitimately expelled from the union for a serious offence. On Mr Crystal's argument, to say of someone that a court had ruled that he had been properly been found guilty of (for instance) multiple murder did not 'engage' that person, merely reported the ruling, and was not capable of reflecting adversely on him. That (likely defences apart) would plainly be wrong. It seems likely that Mr Crystal's submission was prompted by the perhaps somewhat narrow and literal meaning pleaded by Mr Davies. The effect of the repetition rule, had Mr Crystal set out to justify, would have been that the words complained of would have had to be justified "by reference to the underlying allegations of fact and not merely by reliance upon some second-hand report or assertion of them" (*Shah v Standard Chartered Bank* [1999] QB 241 at 263). In other words, it would not have been enough to justify the mere fact of the Certification Officer's ruling: it would have been necessary to justify the underlying allegation that the Claimant had been excluded from membership of ASLEF for bringing the union into disrepute. However, the fact that the Claimant chose to plead the meaning of the words by reference to the ruling and all that it embraced rather than by reference to the underlying allegation of fact does not mean that the meaning was not capable of being a defamatory one.

Inference of website publication

22. It was common ground that the Loco Journal was published on the ASLEF website as well as in hard copy, where it would have been open for anyone to read. On the Claimant's case, the article would have been read on the ASLEF website by an unknown number of readers. The Claimant adduced no evidence of website

publication, but the Defendant disclosed statistics which showed that the number of visits to the ASLEF website during July 2006 varied between 649 and 2,179, the lowest figures generally being at weekends.

23. Mr Crystal submitted that there was no proper basis on which an inference could be drawn that a substantial number of people without a legitimate interest in the matter would have read the words complained of on the website. He pointed out that there is no rebuttable presumption of law of publication on the internet to a substantial but unquantifiable number of people within the jurisdiction: see *Al Amoudi v. Brisard* [2007] 1 WLR 113, which shows that the claimant has the burden of proving that the material in question had been accessed and downloaded. There must be a substratum of fact from which an inference of publication could be drawn, and the fact that a small number of people have visited the site was not, he argued, a sufficient substratum. In his submission, to allow the jury to infer publication to non-privileged publishees in England and Wales would be no more than an exercise in guesswork, and would be wholly speculative. Mr Davies, by contrast, contended that the number of hits on the ASLEF website was common ground, and provided a sufficient basis to invite the jury to draw an inference of publication of the article.

24. In *Trumm v Norman* [2008] EWHC 116 (QB) Tugendhat J (who had tried that action without a jury) considered whether it was right to draw precisely the inference which Mr Davies wished in the present case to leave to the jury, and while he was prepared to infer without hesitation that members of the union would have accessed the website (which had no significance, since it was common ground in that action, as in this, that such publication would be privileged), he was unable to infer that there was any website publication to non-members of ASLEF. However, in *Trumm* the judge was not considering a submission that the inference should not be left to the tribunal of fact.

25. Where it is suggested that a question of fact should be taken away from the jury, it is necessary to apply a test closely analogous to that used in criminal trials on submissions of no case. In *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 at [37], May LJ stated that issues which properly depend on an evaluation of evidence, so as to determine material questions of disputed fact, are matters for the jury. “But ... it is open to the judge in a libel case to come to the conclusion that the evidence, taken at its highest, is such that a jury properly directed could not properly reach a necessary factual conclusion. In those circumstances, it is the judge's duty, upon a submission being made to him, to withdraw that issue from the jury. This is the test applied in criminal jury trials: see *R v Galbraith* [1981] 1 WLR 1039, 1042c”.

26. What would Mr Davies have been asking the jury to do in the present case, if the matter had been left to them? He would have been inviting them to infer that among the not very substantial numbers of people who have accessed the ASLEF website, and not merely accessed the website as a whole but also proceeded to read the online version of the Loco Journal, there would have been a number who had no legitimate interest in the words complained of. I quite accept that the membership and staff, and ex-members and ex-members of staff, and others with a profound interest in the union’s affairs (such as ASLEF’s professional advisers) are likely to access the website fairly regularly and to read the online version of Loco Journal, but there seems to me no basis on which it could safely be inferred that anyone would have done so who lacked a proper interest in reading the article about Mr Brady. Such

people might have done so, and they might not. Without some evidence to justify the inference (for instance, evidence that the ASLEF site and the information contained in it provide an attractive resource for transport enthusiasts generally, rather than simply for members and staff) it seems to me to be no more than pure speculation to infer that an 'outsider' would have read the words complained of. An inference is a conclusion reached on the basis of evidence and reasoning: it is not a matter of guesswork. It would not have been right to ask the jury to take a guess. I therefore held that there was no sufficient evidence of website publication to individuals in non-privileged circumstances to leave to the jury.