Neutral Citation Number: [2005] EWHC 21 (QB)

Case No: HQ02X02953

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2005

Before :

THE HON. MR JUSTICE EADY

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Between :

Christopher Miller	**Claimant**
- and -	
Associated Newspapers Ltd	**Defendant**

- -
- -

Stephen Suttle QC (instructed by **WHCG**) for the Claimant
Mark Warby QC and Adam Speker (instructed by **Reynolds Porter Chamberlain**) for the Defendant

Hearing date: 14th December 2004

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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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THE HON. MR JUSTICE EADY

Mr Justice Eady :

1. In this libel action the Claimant, Detective Chief Inspector Christopher Miller, sues Associated Newspapers Ltd in respect of articles published in the issues of *The Daily Mail* and *The Evening Standard* for 11th September 2001. The story in *The Daily Mail* was headed "Hamilton sex case shambles cost public £1M". The Claimant contends that in their natural and ordinary meaning the words conveyed imputations:

   i) that the Claimant conducted a grossly incompetent inquiry into allegations of sexual assault made against Neil and Christine Hamilton by Nadine Milroy-Sloan, which has wasted up to £1m of public money;

   ii) that three years earlier the Claimant had conducted another grossly incompetent investigation into the alleged abduction and rape of a 17-year old girl which had wasted £400,000 of public money.

   There is also a complaint of largely similar words published on the same day, and continuously thereafter, on the Defendants' dialog Newsroom website, to which the same meanings are attributed.

2. In *The Evening Standard* on the same day an article was published under the heading "Yard admits it should not have arrested the Hamiltons". There is also complaint of continuous website publications on and after 11th September 2001. The natural and ordinary meanings attributed to this article are broadly similar to those in the case of *The Daily Mail*, although no figure is attributed to the cost of the allegedly incompetent investigation into the case of the 17-year-old girl.

3. The particulars of claim were served as long ago as 23rd September 2002. A defence was served on 24th December of that year and, with my permission, an amended defence was served on 15th December 2003. As matters stood, therefore, up to the time of the present application, there were challenges to the meanings as well as pleas of justification directed towards both investigations. Paragraph 9 of the amended defence set out *Lucas-Box* meanings common to *The Daily Mail* and *The Evening Standard* articles, as follows:

   i) that the Claimant, who had a leading role in the inquiry into the allegations of sexual assault made against Neil and Christine Hamilton by Milroy-Sloan, was amongst those responsible for important failures by detectives, which included delays, management failures and poor decision-making;

   ii) at the time of publication there were reasonable grounds to suspect the Claimant of neglect of duty in connection with the investigation of the alleged abduction and rape of a 17-year old girl three years earlier (the Miss B investigation).

   There then follow sixteen paragraphs of particulars of justification (some of which are sub-divided).

4. The principal application before me is for permission to re-amend to add to the pleas of justification. There are proposed changes to the *Lucas-Box* meanings as well as to the particulars.

5. As to the Milroy-Sloan investigation the proposed *Lucas-Box* meaning would read as follows:

> "The Claimant, who had a leading role in and responsibility for the inquiry into allegations of sexual assault made against Neil and Christine Hamilton by Milroy-Sloan, was amongst those responsible for important failures by detectives, which included delays, management failures and poor decision-making, and led to the Hamiltons being arrested when this should never have happened".

The meaning with regard to the Miss B investigation would now read as follows:

> "At the date of publication the Claimant was suspected of, and there were reasonable grounds to suspect the Claimant of neglect of duty in connection with the investigation of the alleged abduction and rape of a 17-year old girl three years earlier (the Miss B investigation). Further, the Claimant was in fact guilty of such neglect".

6. The primary objection taken on behalf of the Claimant is that it is impermissible, in relation to the Miss B investigation, to insert the words "was suspected of" because actual suspicion is irrelevant to the objective test which is to be applied to a defence of "reasonable grounds to suspect": see e.g. *Shah v Standard Chartered Bank* [1999] QB 241, 266, 269-270 and *Chase v News Group Newspapers Ltd* [2003] EMLR 218.

7. Mr Mark Warby QC, appearing for the Defendants, does not challenge that the objective test is appropriate for a defamatory meaning pitched at level 2 (i.e. reasonable grounds to suspect), but he submits in the light of the Court of Appeal decision in *Musa King v Telegraph Group Ltd* [2004] EMLR 429 at [29]-[33] that the fact of suspicion is admissible for the purpose of justifying a meaning at level 3. The distinction between the various "levels" is perhaps conveniently illustrated in the judgment of Brooke LJ in *Chase* at [45]:

> "The sting of a libel may be capable of meaning that a claimant has in fact committed some serious act such as murder. Alternatively it may be suggested that the words mean that there are reasonable grounds to suspect that he/she has committed such an act. A third possibility is that they may mean that there are grounds for investigating whether he/she has been responsible for such an act".

In the light of that now well recognised tripartite classification, Mr Warby suggests that the words complained of are at least capable of bearing the third, and least serious, of those meanings. In that context, he submits that he should be allowed to plead and prove the fact of suspicion.

8. It is clear from the passages to which I have referred in *Musa King* that Mr Warby is entitled to rely upon the allegation of suspicion, provided he is right in submitting that the words here are capable of conveying no more than the third tier level of gravity. On Mr Warby's case, in relation to the Miss B investigation, all three levels of gravity

should be in play. He now wishes to amend to allege also that the words meant that the Claimant was guilty of neglecting his duties and to plead justification in relation to that (i.e. level 1). It has always been his case that he should be able to set out reasonable grounds to suspect (level 2). The allegation of actual suspicion now comes in purely against the possibility that the jury might find the words to bear only the least serious of the three possible levels of seriousness.

9. It would be necessary to give the jury a clear direction that, so far as level 2 is concerned, actual suspicion would be irrelevant. Subject to that important caveat, however, I see no reason why he should not be allowed to plead the point. I am very doubtful myself whether the true meaning of the articles is to convey a defamatory meaning of Mr Miller no higher than that of grounds to investigate. At trial the decision will be for a jury, and my only role at this stage is to pre-empt perversity; that is to say, I can only exclude a meaning if I come to the conclusion that a jury would be perverse to uphold it. I do not believe I can say that in relation to any of the proposed *Lucas-Box* meanings. I am reminded that the exercise should be one of generosity and not parsimony: *per* Sedley LJ in *Berezovsky v Forbes* [2001] EMLR 1030.

10. There is a subsidiary objection to the *Lucas-Box* meaning with regard to the Milroy-Sloan investigation, in that there is said to be an inconsistency with paragraph 10.20.6 which refers to the Claimant having a "large share of the responsibility" for the Hamiltons' arrest. What (if any) degree of responsibility he had will be for the trial. But I do not find any inconsistency that would justify shutting out the proposed meaning.

11. There is next an objection to a new paragraph 10.6.1:

> "The Claimant's admissions when interviewed by Supt. Hinksman on 2nd June 2000, that the whole case had gone hopelessly wrong, and that he should have usurped DI Woodward and taken a more interventionist role in the investigation".

Objection is taken to this form of pleading upon the basis that what the Claimant said to Supt. Hinksman has been "flagrantly misrepresented". That particular officer was investigating at the time what had gone wrong in the course of the Miss B investigation. It concerned a young woman who had complained of rape. It led to proceedings in the Crown Court which were dismissed by the judge on the grounds of abuse of process. What the Claimant actually said to Mr Hinksman in the course of his investigation is not materially disputed. The question is whether or not the way the matter is summarised in paragraph 10.6.1 is a correct interpretation or summary of it; or rather (since this is a pleading point) whether the proposed formulation is so manifestly untenable that no fair-minded jury could think it a reasonable interpretation of what took place.

12. The point which is taken by Mr Suttle QC on the Claimant's behalf is that he made it clear to Mr Hinksman that he was (as would, in one sense, be obvious) speaking at the time with the benefit of hindsight. Mr Warby submits, on the other hand, that if he was prepared to go as far as he did, it may be that upon further questioning at trial Mr Miller would be persuaded to accept that clear vision, or closer supervision at the

material time of DI Woodward for whom he was responsible, would have made him realise earlier that it had gone wrong (or was likely to go wrong). What is more, even if the Claimant is not prepared to admit as much, the jury might nevertheless be persuaded to take that view. I do not believe that it would be right for me to refuse permission for this paragraph, and thus to deny Mr Warby the opportunity of making his submissions to the jury along those lines. In any event, he is prepared to reformulate the plea to reflect exactly what Mr Miller told Mr Hinksman (including the reference to hindsight).

13. In the proposed paragraph 10.6.2 the Defendants wish to rely upon repeated misrepresentations by the Claimant as to the outcome of disciplinary proceedings, which are mentioned in the words complained of, arising out of the Miss B investigation.

14. It is necessary to understand the background. There was a disciplinary board which expressed conclusions on 19th October 2001. Two charges were dismissed and two were found to be "not proven … beyond all reasonable doubt". The board apparently, according to the transcript, felt obliged to take that approach in view of the specific wording of the charges before them. The board nevertheless made some observations to the Claimant in his presence:

> "Mr Miller, the board is firmly of the view that in looking at the rape investigation as a whole, as a crime manager your role extended from the time the allegation by [Miss B] was made through to the case disposal at court.
>
> The public and the Metropolitan Police have a right to expect the crime manager to exercise much closer supervision in a complex and sensitive case of this nature. In our view you failed to exercise that supervision".

15. What the Defendants wish to plead is that Mr Miller made a positive case that he had been acquitted by the board – without disclosing the existence of those adverse comments on his behaviour, or indeed the existence of the transcript, until 17th September 2004. It is suggested that the Claimant, in letters before action dated 6th September 2002, in his reply of 30th January 2004, his witness statement of 15th July 2004 and in lists and draft lists of documents served prior to 17th September 2004 had made dishonest misrepresentations in an attempt to suppress the board's true conclusions and to deceive the Defendants. It is said that he lied and that those lies will be relied upon as amounting to admissions by conduct.

16. Various points are taken against this form of pleading. For one thing, it is said that events occurring after publication cannot be relied upon as providing "reasonable grounds to suspect" (an issue that has to be judged as at the time of publication). To this, Mr Warby responds that he relies upon the conduct to prove, not reasonable grounds to suspect, but actual neglect of duty (i.e. level 1).

17. Mr Warby submits that subsequent conduct which is capable of indicating a guilty state of mind may be relied upon to establish guilt: *Moriarty v L C and D Railway* (1870) LR 5 QB 314. He relied upon the reasoning of Cockburn CJ at p.319:

> "The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is the plaintiff, or the ground of defence, if he is defendant, is honest and just; just as it is evidence against a prisoner that he had said one thing at one time and another at another, as shewing that the recourse to falsehood leads fairly to an inference of guilt. Anything from which such an inference can be drawn is cogent and important evidence with a view to the issue. So, if you can show that a plaintiff had been suborning false testimony and has endeavoured to have recourse to perjury, it is strong evidence that he knew perfectly well his cause was an unrighteous one. I do not say that is conclusive; I fully agree that it should be put to the jury, with the intimation that it does not always follow, because a man, not sure he shall be able to succeed by righteous means has recourse to means of a different character, that that which he desires, namely, the gaining of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it. It does not necessarily follow that he has not a good cause of action, any more than a prisoner's making a false statement to increase his appearance of innocence is necessarily a proof of his guilt; but it is always evidence that ought to be submitted to the consideration of the tribunal which has to judge of the facts; and therefore I think that the evidence was admissible, in as much as it went to shew that the plaintiff thought he had a bad case".

There is no suggestion here that the Claimant had been suborning witnesses, as was alleged in *Moriarty*, but the principle is not confined to those facts. It does seem curious that the Claimant, having made the positive case that he had actually been acquitted by the disciplinary board, then failed to disclose the existence of the judgment or the transcript. The Defendants wish to assert that this provides evidence that the Claimant knew that he had been criticised in his supervisory role, and indeed that he had fallen short of the standards to be expected of him.

18. My attention was drawn in this context to two passages in Phipson on Evidence (13th edn.) which suggest that conduct, and in particular lies, can be treated as tantamount to an implied admission of guilt. As is clear from the standard *Lucas* direction given in criminal cases, a lie can sometimes be treated as evidence against the accused person (although, of course, it can never suffice by itself), provided the lie is deliberate, that it relates to a material issue, and that the motive is truly the realisation of guilt: see paragraphs 28-16 and 31-35. Those are matters for further investigation in due course.

19. I have no wish to trespass on the trial judge's ruling as to the admissibility of this material, in the light of the circumstances prevailing when he is called upon to rule, but at this stage it would be quite wrong for me to shut out this part of the pleading as unsustainable.

20. A different strand of objection is based upon the so-called repetition rule. It is said that the Defendants may not rely upon the board's conclusions in order to support a

plea of justification. That principle, however, does not really arise in the present context. Not only would the alleged suppression of the transcript be admissible in accordance with the principles I have already discussed, but the Defendants wish to respond to the Claimant's reliance upon the findings of the board as primary facts for his own purposes (both in the reply and the letter before action). It thus follows that the Defendants are entitled to point to the findings as a whole, for the purpose of demonstrating that the board's findings could not be characterised as an acquittal, in any ordinary sense of the term, and that its findings were by no means all one way. As Mr Warby submits, for the Claimant to be able to assert that he was acquitted by the board but then prevent the Defendants from pointing to the transcript would be unfair to the Defendants as well as misleading to the jury.

21. There was some argument as to whether or not in police disciplinary hearings the terms "not proven" and "not guilty" are or should be used interchangeably. Since this concerns the exercise of statutory powers, it would appear ultimately to be a question of law. That would be a sterile debate, however, since there is no basis for excluding the pleaded case Mr Warby intends to advance for the purposes already rehearsed.

22. So much for the board's conclusions of the 19th October 2001. The Defendants also wish to rely upon the Claimant's conduct in maintaining a positive case that he acted reasonably in delegating responsibility for the Miss B investigation to Detective Inspector Woodward – but without fully disclosing the conclusions reached by a second board on 15th November 2001. In this instance, the findings relied upon are as follows:

> "DI Woodward's behaviour over a long period of time was inexcusable, bullying, inappropriate and falling far short of that one would expect of an officer of such experience …
>
> It is beyond our comprehension that such behaviour by an officer was an issue of which the senior management team, including DCI Miller, were unaware of (*sic*).
>
> We are not impressed by DCI Miller's view that the initial matter he was dealing with was 'just two grown men having an argument in the canteen' bearing in mind the rank difference.
>
> … DCI Miller …failed to deal with a matter of a racist comment made by DI Woodward in the hearing of Sergeant Jessop … the fact that in this case it was made by his immediate subordinate should have increased his concern …"

The arguments about conduct tantamount to an admission are also relevant here and need not be repeated.

23. It is argued, additionally, on the Claimant's behalf that Mr Woodward's racist remark is outside the scope of the litigation because the words complained of are not capable of meaning that he had failed to deal appropriately with that aspect of his misconduct. The Claimant heard nothing of this until May 1999 (some three months after the Miss B investigation had to all intents and purposes come to a conclusion). Accordingly, it

is said, it cannot have had any bearing on Mr Woodward's suitability to take responsibility for the Miss B enquiries.

24. There are two points which arise. First, the Defendants wish to rely on the Claimant's "suppression" of the board's lack of comprehension for reasons already explained: see again the remarks of Cockburn C.J. cited above. Secondly, if the Defendants are correct in their assertions about Mr Woodward's behaviour (e.g. in simulating acts of buggery upon a junior officer and making anti-semitic remarks), they will no doubt wish to argue before the jury that someone capable of such coarse and ill-judged conduct is unlikely to have impressed the Claimant, over the considerable period of time he knew him prior to that, as having the right qualities for conducting a sensitive rape enquiry. Those unacceptable traits of character are likely to have become apparent from a much earlier point. That is relevant not least because the Claimant has made a positive case that he had "no reason to doubt the competence" of Mr Woodward before May 1999. Equally, of course, I understand that the Claimant's case may well be that Mr Woodward had some kind of emotional or mental breakdown which led to his behaving out of character by May 1999. These are matters for trial. I cannot possibly rule them out at this stage.

25. That, I believe, concludes consideration of the objections to the proposed amendments with regard to the Miss B investigation.

26. I have already referred to the amendment of the *Lucas-Box* meanings and the introduction in paragraph 9.1 of the phrase "and responsibility for" in the context of the Hamiltons' arrest. It is the Defendants' case, as I understand it, that the Hamiltons' arrest was a fiasco which should never have been allowed to happen. Since the Claimant had a role in the investigation of Milroy-Sloan's false allegations, they wish to argue that he cannot avoid his share of responsibility by shifting blame to officers above and below him and thus occupying himself, as it were, a moral blind-spot. That is for the jury to decide. It may be that they will conclude that, in the circumstances prevailing, the arrest was in accordance with appropriate police standards or, alternatively, that the Claimant argued against the arrest as effectively as he could but was overruled. But that is an exercise which requires the evidence to be analysed and carefully probed at trial. These are matters which could only be shut out by a judge on a preliminary basis if it were demonstrable, on paper, that the Claimant could not be held to bear *any* moral responsibility for the highly public arrest of two people against whom there was no evidence (as was admitted on 28th August 2001) and that it would be perverse to hold otherwise. I should be exceeding my function to shut out those matters from the jury's consideration.

27. In these circumstances I do not believe it would be right to make it a condition of permitting the relevant amendment that the Defendants should specify the exact proportion of responsibility the Claimant is supposed to bear in comparison with other officers. The Defendants' case does not depend on any such mathematical calculation. They merely attribute *some* degree of responsibility. The Claimant's advisers therefore have sufficient information to know the case they have to meet.

28. There is also objection to the proposed paragraph 10.22. There, reference is made to the need for the Claimant to have identified the Milroy-Sloan allegations as "a critical incident", in Metropolitan Police terms, and for him to have assumed certain roles in consequence. The objection relates to a plea that the Claimant should have been

particularly conscious of this following the humiliating collapse of the Miss B case, and in the shadow of judicial criticism from His Honour Judge Pearson who, in August 1999, had held that the proceedings should be dismissed for abuse of process. The charge is thus that the Claimant failed to learn lessons or, at least, that he should have been even more aware (than any other officer of comparable rank) of the nature of the Milroy-Sloan investigation by reason of what had happened two years earlier.

29. The objections revisit familiar territory. The inclusion of "judicial criticism" is said to offend the repetition rule and to introduce impermissible third party opinion (i.e. that of the Judge) on a primary factual assertion relied on for justification. Also, the point is taken that what the Claimant said to Supt. Hinksman has again been misrepresented.

30. The relevant plea is directed towards justifying a particular *Lucas-Box* meaning. As always, it is critical to identify the purpose for which the allegations are being made. It is not to prove the truth of what the Judge said in August 1999. It is being alleged that the Claimant in 2001 was responsible for failures which led to the Hamiltons' arrest. It is part of that case to identify his role and responsibilities in the Milroy-Sloan investigation and whether he fell short of the standards required of an officer in that role and exercising those responsibilities. Relevant to that, of course, would be his state of knowledge and his experience of comparable cases.

31. The relevance of what the Claimant said to Supt. Hinksman is simply that, by the time of the Milroy-Sloan investigation, the Claimant had already admitted (obviously with hindsight) that he should have played more of an interventionist role in the Miss B enquiry. By 2001 he had the benefit of that hindsight and the Defendants seek to pray that in aid as a factor which should have led to greater control over the 2001 rape enquiry. The same goes for the pending disciplinary charges. Of course, if there is a jury, the trial judge will need to give them clear guidance on the precise relevance of these matters, but judges are well used to negotiating these hurdles.

32. In the result, therefore, I find myself again unable to refuse the Defendants the opportunity to plead the points.

33. Objection is raised next to certain passages in paragraph 10.42. These relate to a different officer, Det. Insp. Summers, who the Defendants wish to allege misinterpreted his instructions in effecting the arrest of the Hamiltons. The Defendants' case is that Commander Croll had (on 29 June 2001) only authorised an approach to them for a voluntary interview. Arrest was only a fall-back position. Their case (right or wrong) is that Mr Summers simply offered their solicitor the choice of arrest by appointment or arrest without notice, and that the Claimant must take responsibility for allowing him to depart from the instructions. Again the merits of these arguments need to be addressed at trial in the light of the evidence.

34. The objection to this form of pleading is on the basis of a recently disclosed document purporting to be a manuscript note made by a different Mr Summers (a solicitor) in July 2001. It is supposed to show that the Hamiltons were given an opportunity to provide an alibi without being arrested. There may, for all I know, be something in the argument, but it is hardly a strike-out point. I have to assume for present purposes that the Defendants will be able to prove at trial that no opportunity was afforded for voluntary interview. Indeed, there is evidence from a Mr Coleman of the Hamiltons'

solicitors dated 21st August 2001 which would appear to support the Defendants' case. I cannot prejudge any of these issues.

35. There were other detailed arguments on the form of the defence and of the adequacy of further information given. There is no doubt that some of the Defendants' allegations are somewhat lacking in substance (e.g. in relation to the Miss B investigation that the Claimant had "allowed a shortage of staff and resources" on the day that the suspects had been bailed to come back), but that is not to say that a pleading should be disallowed. It may come to nothing at trial, but the Claimant is not left in difficulty as to how to deal with the points raised.

36. Finally, I should say that on a number of occasions I was invited to disallow certain matters by way of case management. But this case concerns a subject of some public importance; that is to say, the way in which sensitive allegations of rape were dealt with by the Metropolitan Police. The court will not be too interventionist in coming between a jury and the parties in such cases. What matters is that the jury has the full context against which to make its judgments and that the parties can deal with the allegations made against them. The issues should not be fined down to such an extent that they become academic and divorced from the inevitable complexity of the overall canvas. I do not feel able now to impose any further restrictions upon the way the Defendants conduct their case, although the trial judge may wish to impose greater disciplines by way of limiting the scope of the evidence required for resolving the issues.