



Neutral Citation Number: [2020] EWHC 2359 (QB)

Case No: QB-2020-000201

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Date: 2 September 2020

Before :

THE HONOURABLE MR JUSTICE NICKLIN

Between :

Nina Burleigh

Claimant

- and -

Telegraph Media Group Limited

Defendant

Ian Helme (instructed by **McAllister Olivarius**) for the **Claimant**
Adrienne Page QC and Jonathan Scherbel-Ball (instructed by **Ince Gordon Dadds LLP**)
for the **Defendant**

Written submissions: 28 July 2020

**Covid-19 Protocol: This judgment was handed down by the judge remotely
by circulation to the parties' representatives by email and release to Bailii.
The date of hand-down is deemed to be as shown above.**

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.

.....
THE HONOURABLE MR JUSTICE NICKLIN

The Honourable Mr Justice Nicklin :

1. In this libel action, the Claimant contends that she has been defamed in an apology, published by the Defendant on 26 January 2019 in the online and print editions of *The Daily Telegraph* (“the Apology”). The Apology appeared in the following terms (with numbers added in square brackets):

“Melania Trump – An Apology

Following last Saturday’s (Jan 19) Telegraph magazine cover story ‘The mystery of Melania’, we have been asked to make clear that the article contained a number of false statements which we accept should not have been published. [1] Mrs Trump’s father was not a fearsome presence and did not control the family. [2] Mrs Trump did not leave her Design and Architecture course at University relating to the completion of an exam, as alleged in the article, but rather because she wanted to pursue a successful career as a professional model. [3] Mrs Trump was not struggling in her modelling career before she met Mr Trump, and [4] she did not advance in her career due to the assistance of Mr Trump.

[5] We accept that Mrs Trump was a successful professional model in her own right before she met her husband and obtained her own modelling work without his assistance. [6] Mrs Trump met Mr Trump in 1998, not in 1996 as stated in the article. [7] The article also wrongly claimed that Mrs Trump’s mother, father and sister relocated to New York in 2005 to live in buildings owned by Mr Trump. They did not. [8] The claim that Mrs Trump cried on election night is also false.

We apologise unreservedly to The First Lady and her family for any embarrassment caused by our publication of these allegations. As a mark of our regret we have agreed to pay Mrs Trump substantial damages as well as her legal costs.”

2. The Claimant is described in the Particulars of Claim as an “award-winning author and journalist”. She was the author of the article “*The mystery of Melania*” that had been published by the Defendant and in respect of which the Apology was subsequently published (“the Original Article”).
3. The Claim Form was issued on 20 January 2020. In the attached Particulars of Claim, the Claimant contended that the natural and ordinary meaning of the Apology was:

“... the Claimant negligently or maliciously wrote a piece so littered with serious and defamatory falsehoods about Mrs Trump that it should not have been published and justified the payment of substantial damages to her, as well as a full and prompt retraction and apology.”
4. The Apology did not identify the Claimant as having been the author of the Original Article. Nevertheless, the Claimant contends that the Apology would have been understood by a large number of readers of the Apology to refer to her. Particulars of reference are set out in the Particulars of Claim. No innuendo is pleaded.
5. In correspondence, the Defendant denied that the Apology was defamatory of the Claimant. It accepted that there would be readers of the Apology who would have understood the words to refer to the Claimant as the author of the Original Article.

The Defendant contended that the hypothetical ordinary reasonable reader (who understood the words to refer to the Claimant), would understand the natural and ordinary meaning of the Article to be:

“... the *Daily Telegraph* had published an article containing statements about Mrs Trump which it accepts were false, which it should not have published, and for which it is appropriate that it publishes a correction and apology to her and pay her damages.”

6. By Order dated 29 April 2020, Master Davison directed trial of the following preliminary issues:
 - i) on the assumption that there were readers of the [Apology] who upon reading the [Apology] knew or recalled the identity of the Claimant as the author of the [Original Article], what natural and ordinary meaning... the [Apology] bears in respect of the Claimant; and
 - ii) whether that meaning is defamatory of the Claimant at common law.

The Master further directed that these preliminary issues would be determined by a Judge without a hearing on the basis of written submissions, following the practice established in *Hewson -v- Times Newspapers Limited* [2019] EWHC 650 (QB) [16]-[27]. The parties' written submissions were filed on 28 July 2020. Copies of these submissions will be available when this judgment is handed down.

7. The Original Article has been included in the bundle for the trial of the preliminary issues. I have deliberately not read it as, on the pleaded issues, it is not admissible in relation to the preliminary issues I have to determine. The hypothetical ordinary reasonable reader would not have read the Original Article and neither party relies upon it. The natural and ordinary meaning of the Apology falls to be determined on the basis that the reader would have read the Apology alone.

Determination of Meaning: Legal Principles

8. There is no dispute as to the approach the Court must adopt when determining the natural and ordinary meaning of a publication. It is set out in *Koutsogiannis -v- Random House Group Limited* [2020] 4 WLR [11]-[12]. The Supreme Court emphasised the importance of context and the Court not adopting an over analytical approach in *Stocker -v- Stocker* [2020] AC 593 [38]-[40]. The Court must be astute to differentiate between implications conveyed by the publication and inferences drawn by individual readers: *Allen -v- Times Newspapers Ltd* [2019] EWHC 1235 (QB) [28].
9. As to whether the meaning found by the Court is defamatory at common law, the principles are set out in *Allen* [19]. A statement is defamatory of a claimant if, but only if, (a) it imputes conduct which would tend to lower the claimant in the estimation of right-thinking people generally; and (b) the imputation crosses the common law threshold of seriousness, which is that it substantially affects in an adverse manner the attitude of other people towards him/her or has a tendency to do so.
10. Mr Helme has referred to a well-established line of authority that an allegation that someone has demonstrated a lack of care or skill in performance of their profession or calling has been held to be defamatory: e.g. *Drummond-Jackson -v- British Medical*

Association [1970] 1 WLR 688; *Skuse -v- Granada Television Ltd* [1996] EMLR 278, 288; *Dee -v- Telegraph Media Group Ltd* [2010] EMLR 20 [48]; *Thornton -v- Telegraph Media Group Ltd* [2010] EWHC 1414 (QB) and *Morgan -v- Times Newspapers Ltd* [2019] EWHC 1525 (QB).

11. Ms Page QC has cited *Oversea-Chinese Banking Corp Ltd -v- Wright Norman & Others* [1994] 3 SLR 760 as a case which she submits is directly analogous. A newspaper published an apology which accepted that an earlier published letter contained statements that were “*wholly unfounded*” and that the newspaper knew of “*no basis or foundation whatsoever for the statements*”. The plaintiff complained that the apology bore a meaning that he had acted “*recklessly, irresponsibly and mischievously*” by publishing the letter. In the High Court in Singapore, Chao Hick Tin J held that the apology was not defamatory (at pp.780-781):

“What is the correct meaning to be placed on the word ‘unfounded’?... The word ‘unfounded’ could mean ‘not true’, ‘groundless’, ‘without foundation’, ‘baseless’. It is certainly not defamatory to say that a person got his facts wrong or that what he said was not true or unfounded.

Mr Milmo accepted that ordinarily there is nothing defamatory to say that a person has made an unfounded statement. He argued that it depends on the context, how it was made and the surrounding circumstances...

Mr Milmo relied upon the case *Tracy -v- Kemsley Newspaper The Times*, April 9, 1954, where the plaintiff, a journalist, succeeded in obtaining damages in respect of an apology published by the defendant arising out of an article written by the plaintiff and published in the *Sunday Times* allegedly defamatory of Canon Maurice O’Connell... The apology admitted that the article of the plaintiff constituted an ‘unjustifiable attack on the character and position of the Canon’. It went on to say ‘the defendants are completely satisfied that any imputation against (the Canon) are (sic) wholly unfounded and are unreservedly withdrawn’. The judge directed the jury that those words were capable of bearing a meaning defamatory of the plaintiff for they said that ‘as a journalist she had done bad work’. There was evidence that she was not able to obtain any offers of employment since the publication of the apology. The jury returned a verdict for the plaintiff.

In our present case, there is nothing in the apology which accused Mr Wright of having ‘recklessly, irresponsibly and mischievously’ written the letter...

I do not think that *Tracy* is authority for any general proposition that readers cannot reply to an article by a journalist to say that what the journalist wrote is quite wrong without thereby defaming the journalist, namely that he was slipshod in his work as a journalist. The report on the case was simply too brief. But I cannot see any justification why a reader may not say that what a journalist wrote is wrong or not correct without at the same time being construed as having attacked his integrity or competence... How could it be defamatory to merely say that a person erred or made a mistake?

In any event, Mr Wright is not a journalist. The present apology must be read in its true context. It meant that Wright drew the wrong inference or reached the wrong conclusion. Nothing therein sought to attack him in relation to his business

or profession... In my view, it would be straining language to suggest that implicit in the words is the allegation that Wright wrote the three paragraphs recklessly and mischievously. To the ordinary fair-minded reader, not avid for scandal, the apology meant that [the newspaper] admitted that the allegations made by Wright against [the bank] were not correct and that [the newspaper] had published something that was wrong and which it should not have published; it therefore apologised to [the bank] for that.”

12. Mr Helme has not made any submissions as to the authority of *Tracy -v- Kemsley Newspapers Ltd* (referred to in *Oversea-Chinese Banking Corp Ltd*), but I have obtained a copy of the report and considered it. As Chao Hick Tin J noted, the report is short, and it does not set out the full text of the apology that was sued upon.

Submissions

13. Mr Helme submits that the Apology is very damning of the Claimant’s work. It states that the Original Article contained, at least, eight false statements that “*should not have been published*”. The Apology does not state that the Original Article may have conveyed these false statements inadvertently. The errors were so serious that they justified an unreserved apology not just to Mrs Trump but to her family as well; they also justified the payment of substantial damages and Mrs Trump’s costs. Mr Helme argues that the Apology is a “*brusque denigration of the Claimant’s writing*”. Mr Helme accepts that the hypothetical reader would not have knowledge of the intricacies of the law of defamation, but he submits that “*the inference that the article constituted an unlawful defamation is overwhelming*”. He argues that the reader would know that payment of damages and costs would only occur where the newspaper was “*‘over a barrel’ and had no defence*”. In summary, Mr Helme submits that the Claimant’s pleaded meaning contains all the elements conveyed by the Apology.
14. Ms Page QC makes a preliminary point that the words “*negligently or maliciously*” in the Claimant’s meaning are a breach of the single meaning rule; the two states of mind are wholly different, and indeed inconsistent. She argues, however, that this demonstrates the fundamental problem with the Claimant’s meaning; it is only with the application of some adverb connoting culpability that the meaning assumes any defamatory flavour. The Apology, she submits, does not attribute blame to the Claimant. The meaning advanced by the Claimant can only be arrived at if readers engage in conjecture. That led Ms Page QC to the submission:

“This is why, from the outset of her complaint, [the Claimant] has had to cast about (inconsistently) amongst some, but far from all, of the possible explanations for a publication by [the Defendant] which [the Defendant] later admitted contained a number of false statements. On her case, the possible explanations range from [the Claimant] being supposedly ‘*incompetent and unprofessional*’ [from the letter before action] to [the Claimant] having supposedly acted ‘*negligently and maliciously*’”.

15. Ms Page QC has advanced a further argument. She contends that her submissions are “*reinforced by a fundamental point of public policy*”, namely that the courts should be slow to construe the publication of an unexceptional and orthodox apology by a publisher as conveying a meaning which, at common law, is defamatory of the author of the original article. She argues that it should not be necessary for a publisher who

has published an apology to be faced with the burden of advancing a substantive defence: e.g. qualified privilege at common law or defences under s.2 or s.4 Defamation Act 2013.

16. Mr Helme, in answer to Ms Page's attack on the words "*negligently or maliciously*" in the Claimant's meaning, accepts that "*in some ways this is an unnecessary gloss*". But he suggests that these words are meant to convey the serious implications of the Apology for the Claimant. He contends that malice is presumed in respect of publication of defamatory statements, but he accepts that it "*may be a step too far*" to suggest that the Apology imputes express malice on the part of the Claimant.

Decision

17. Approaching this case, I read the Apology first and noted my initial impression of meaning. I then read the parties' submissions and reflected upon the points that they had made. In this case, my initial view as to meaning did not substantially change.
18. In my judgment, Ms Page QC's submissions are largely to be preferred. Fundamentally, to extract any defamatory meaning, the hypothetical ordinary reader would have first to reach a conclusion as to *how* the identified false statements had come to be included in the Original Article. Ms Page is right that there is a spectrum of explanations ranging from innocent mistake (for which the Claimant was not necessarily responsible) to deliberate fabrication. As the reader is given no steer on this in the Apology, s/he would be speculating as to how this had happened. A reader who seized upon an explanation that attributed culpability to the Claimant would be unreasonable and 'avid for scandal': *Koutsogiannis* [12(i) and (iii)]. This is not a case where there is an implication – or a 'nudge and a wink' – to prompt the reader to draw a conclusion that the Claimant was culpable for the publication of the identified "*false statements*".
19. In this respect, it seems to me that the reader would also attach importance to the apparent seriousness of the factual errors that the Apology was correcting. If the factual error(s) went to the very heart of the Original Article, then the hypothetical reader might justifiably conclude that there had been a serious failure on the part of the author or journalist. That might supply the defamatory element of want of skill or care. Here, I consider that almost all the corrections would strike the hypothetical reader as either being trivial factual corrections, or arguably opinions upon which different people might disagree. Corrections [2], [6], [7] and [8] seem to me to fall into the former category. None of the matters that were corrected would strike an ordinary reader as being of any real significance. The Apology would not have appeared to the reader to have been withdrawing, and apologising for, a serious defamatory attack on Mrs Trump or the central thrust of the Original Article. I reject Mr Helme's submission that the reasonable reader would conclude that the false statements were of such a seriousness that the newspaper had been compelled to pay Mrs Trump substantial damages.
20. At its highest, I accept that a reader might have paused to wonder why the *Daily Telegraph* was paying "*substantial damages*" to Mrs Trump if this was all that fell to be corrected in the Original Article, but in my judgment that would not affect the reader's overall assessment of the meaning of the Apology. Publishers of newspapers settle threatened claims for a variety of reasons.

21. Although they are interesting, I do not derive much assistance from the authorities of *Oversea-Chinese Banking Corp* or *Tracy*. Previous decisions relating to meaning are so fact specific that they rarely provide anything beyond the most general of guidance. *Oversea-Chinese Banking Corp* has similarities to this case, but respectfully, there are dangers in laying down broad propositions, such as, “*it is not defamatory to say that a person got his facts wrong, or what he said was not true or unfounded*”. Whether any particular apology conveys a defamatory imputation depends upon the precise words used, their context and their overall effect. That task is to be performed by applying the established principles that guide the assessment of meaning rather than casting around for analogous cases.
22. By the same token, I reject Ms Page QC’s submission that the Court should be influenced in its assessment of meaning, as a matter of policy, by a desire to maintain the effectiveness of published apologies in the settlement of defamation claims. The meaning of a published apology, like any other publication, is ascertained by application of the established principles. As Sedley LJ observed in *Berezovsky -v- Forbes* [2001] EMLR 45 [14], “*there is no defensible way in which the courts can adjust the meaning of meaning so as to include things which no sensible reading of the words could embrace*”. It is perfectly possible for published apologies to defame third parties. Apologies do not fall into a separate category to which a regime more benevolent to the publisher is applied.
23. In my judgment, the Apology neither alleges nor implies any culpable failure on the part of the Claimant; it does not suggest that there was a want of skill or care on her part. The corrections of the “*false statements*” are not of a gravity that suggests a fundamental failure on the part of the Claimant, as author of the Original Article. On the contrary, they would strike the hypothetical reader as being trivial or insubstantial. Most importantly, the Apology contains no attribution of fault or blame for the errors. I accept Ms Page QC’s submission that it is revealing that the Claimant’s meaning contains two contradictory adverbs: “*negligently*” and “*maliciously*”. The reality is that the reader is told nothing in the Apology of how the “*false statements*” came to be included in the Original Article; whether oversight, carelessness or malice. A reader making a selection from those options would be speculating, not detecting an implication from the terms of the Apology.
24. I return therefore to the determination of the preliminary issues. In this case, the questions are more appropriately answered in reverse order. Was the Apology defamatory of the Claimant at common law? For the reasons I have given, and applying the test in *Allen* ([9] above), the answer is no. In light of that conclusion, it is not strictly necessary to consider the question of what meaning the Apology bears, but in my judgment, to a reader who was aware that the Claimant had written the Original Article, the natural and ordinary meaning is:

“... the Claimant had published an article containing several statements about Mrs Trump which were incorrect. The *Daily Telegraph* accepted that these false statements should not have been published and had agreed to publish a correction and apology and to pay substantial damages to Mrs Trump.”
25. I will give the parties an opportunity to address the consequence of this ruling, but my provisional view is that the Defendant is entitled to judgment on the Claimant’s claim.