

THE HIGH COURT

[2018 No. 274 CA]

BETWEEN

LEON DIOP

PLAINTIFF

AND

TRANSDEV DUBLIN LIGHT RAIL & STT RISK MANAGEMENT LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Barr delivered on the 12th day of December, 2019

Introduction

1. The plaintiff was born in Dublin on 5th August, 1994. He grew up in Tallaght and after finishing school he obtained a degree in psychology from Maynooth University. He is currently employed in an educational establishment. The plaintiff is a coloured gentleman. This is relevant to the issues which fall to be determined in this case.
2. On 8th June, 2016, at approximately 19:48 hours the plaintiff boarded a Luas tram at Middle Abbey Street, going in the direction of Tallaght. The plaintiff's left arm was in a sling, as he had suffered a recent injury to his shoulder. The plaintiff was in the company of his brother, who was then a student in Dublin City University.
3. On the occasion in the question, the plaintiff had a valid ticket to make the journey on the Luas. His brother had a Leap Card, which he had tagged-on in the usual way at the stop at Middle Abbey Street. The plaintiff and his brother were sitting side by side on seats that were between the doors on the tram and as such they were facing in towards the body of the carriage.
4. It is common case that two security guards, Mr. Burke and Mr. Fay, who were employed by the second defendant to provide security services on the Luas on behalf of the first defendant, boarded the tram at the Blackhorse stop. It is the plaintiff's case that upon entering the carriage, the two security guards came straight over to the plaintiff and his brother and demanded production of their tickets. The plaintiff states that as they were producing the tickets the plaintiff made the comment "*this is slightly racially profiling*". After some very short conversation, one of the security guards, Mr. Burke, instructed the plaintiff and his brother to leave the tram. He said that a number of times. The instruction was accompanied by a hand gesture waving them towards the door. However, the other security guard, Mr. Fay, countermanded that instruction and permitted the plaintiff and his brother to remain on the train. The two security guards alighted from the train at the next stop and the plaintiff and his brother continued to the Red Cow stop, where the plaintiff attempted to lodge a complaint about the incident, but the office was closed.
5. It is the plaintiff's case that as a result of the immediate approach of the security guards to him and his brother, their demand that they produce tickets, followed by the order to leave the train, accompanied by hand gestures, he was treated in a most unfair manner and was defamed by that series of events, because other people in the carriage, who either overheard the exchange, or saw the gestures that accompanied the direction to

leave the carriage, would have come to the conclusion that either the plaintiff and his brother did not have valid tickets permitting them to be on the tram, or had otherwise acted in such a way as to justify their removal. In these circumstances, the plaintiff seeks damages for defamation against the defendants.

6. In their defence, the defendants have denied that they had engaged in any racial profiling as alleged by the plaintiff, but state that they had merely made a request for production of their tickets, as they were entitled to do and that there then ensued a conversation between the security guards and the plaintiff, wherein they denied that they had engaged in any racial profiling. It was denied that the plaintiff and his brother had been specifically targeted by the security guards on entering the carriage. In particular, they alleged that it was only because the plaintiff had made the statement "*that is slightly racially profiling*" in relation to a coloured youth who had left the tram at the same time as Mr. Burke had entered it, that he, Mr. Burke, had gone over to ask the plaintiff and his brother for production of their tickets.
7. It was denied that the exchange which had taken place bore the alleged or any defamatory meanings. Without prejudice to that defence, it was further pleaded that the occasion was one which attracted the defence of qualified privilege.

The Exchanges Between the Plaintiff and His Brother and the Security Guards

8. The Court has been greatly assisted in the resolution of this case by having had the opportunity to view CCTV footage from a number of cameras within the carriage. The Court has also had the benefit of both seeing and hearing footage taken by the body camera worn by Mr. Burke, which was activated during a large portion of his exchange with the plaintiff and his brother.
9. It was accepted by all parties that the footage on the bodycam did not cover the initial portion of the exchange between the plaintiff and Mr. Burke. There is an important conflict between them in relation to what happened and what was said prior to the bodycam being switched on.
10. The evidence of the plaintiff, which was supported by that of his brother, was to the effect that the two security guards had entered by separate doors facing the plaintiff and his brother and on either side of them. Mr. Burke entered from the door to the plaintiff's left. When the door opened, a young coloured male, who was completely unknown to the plaintiff and his brother, left the tram by the same door through which Mr. Burke entered. The plaintiff stated that Mr. Burke came straight over to him and his brother and asked "*do you have tickets?*", to which the plaintiff and his brother replied "*yes*". The security guard then repeated the word "*tickets*" and gestured with his hand that they be produced. The plaintiff states that it was at that point that he said "*this is slightly racially profiling*". At the same time his brother produced his Leap Card and asked whether the security guard was going to check his card, as the security guard did not appear to have the necessary machine to check a Leap Card. It was at that point that the bodycam was turned on. The plaintiff agrees that the transcript of the bodycam footage which was

produced in Court, was an accurate representation of the conversation that then ensued between the plaintiff and the security guards.

11. Mr. Burke's evidence, which was supported by the evidence of his colleague, Mr. Fay, was to the effect that they had had trouble throughout the day with three coloured male youths, who were hopping on and off the tram without having valid tickets and were generally misbehaving while on the tram. Mr. Burke stated that as he entered the tram at the Blackhorse station, one of the youths stepped off when he said "get off" to him. Mr. Burke stated that it was in response to that command, that the plaintiff had made the statement about racial profiling. Mr. Burke stated that upon hearing that comment being made, he then went over to the plaintiff and his brother to ask for production of their tickets. He denied that the comment about racial profiling had been made by the plaintiff after he had first requested production of the tickets. He stated that he switched on his bodycam when the plaintiff's brother asked whether he was being checked.
12. There is clearly a dispute between the parties as to when the comment in relation to racial profiling was first made by the plaintiff. A finding in relation to this conflict will be made later in the judgment. The remainder of the exchange between the parties was captured on the bodycam and was produced to the Court. Both sides accepted that it was an accurate representation of the verbal exchange between the parties. The transcript was in the following terms:

"Plaintiff's brother: Are you checking me?"

Mr. Burke: Yeah

Mr. Fay: I'll tell you why we've checked you because the other three gentlemen we put off at three different stops

Plaintiff: Yeah just because we're black lads doesn't mean we're with them

Mr. Fay: This is nothing to do with racial profiling

Plaintiff: No, I'm pretty sure it is

Mr. Fay: Is it? You're on camera mate you're being recorded, it's nothing to do with racial profiling, it's a random spot check.

Mr. Burke: Do you know what you're saying to people now

Plaintiff: Ok, yeah, yeah

Mr. Burke: Here buddy now listen I don't like your attitude just step off there please

Plaintiff: Are you fucking joking me

Mr. Burke: Yeah now honestly now step off, please step off

Plaintiff: You see two black lads sitting down ... (Mr. Burke speaks over him)

Mr. Burke: That's got nothing to do with it, just step off now your attitude is appalling [sic]

Mr. Fay: Well just leave it and you can stay but don't say we're racially profiling cus [sic] every single other one the staff ...

Plaintiff: Okay

Mr. Fay: Yeah go ahead driver it's sorted

Mr. Fay: The other lads been put off the trams three times, that's the only reason you were asked, cus [sic] you were in the same area. There were twelve other blokes we're after putting off five different trams all just around here

Plaintiff: Okay

Mr. Fay: Turn the camera off"

Conclusions

13. The first issue for determination is the exact sequence in which the plaintiff came to make the remark, "*This is slightly racially profiling*". Having listened carefully to the evidence of the witnesses and having viewed both the CCTV footage and the bodycam footage a number of times, the Court does not accept the evidence given by Mr. Burke and Mr. Fay, that Mr. Burke only asked for the tickets in response to the comment being made by the plaintiff that Mr. Burke's conduct towards the other coloured youth had been "*slightly racially profiling*". The Court prefers the evidence of the plaintiff, which is supported by the evidence of his brother, Mr. Adam Diop, that that comment was made after Mr. Burke had asked them if they had tickets and had gestured that they should produce them. The Court reached this conclusion for the following reasons:

- (a) It is clear from the CCTV that the coloured youth in the blue parka jacket, who exited the tram from the same doors that Mr. Burke entered, did not say anything to Mr. Burke, nor did Mr. Burke say anything to him.
- (b) It is clear from the CCTV footage that the youth exiting the carriage and Mr. Burke did not even look at each other. They merely passed by each other as one exited and the other entered.
- (c) It is clear from the CCTV that the first time that Mr. Burke speaks on entering the carriage is when he approaches the plaintiff and his brother to ask if they had tickets. I regard the evidence given by Mr. Burke that he said "*get off*", or words to that effect to the youth as he exited the carriage and that it was that comment which prompted the plaintiff's remark about racial profiling, as a lie told by Mr. Burke to justify his approach to the plaintiff and his brother seeking production of their tickets.

- (d) I regard the evidence given by Mr. Fay to the effect that on entering a tram he would always say "off" to youths leaving the tram, as being an untruth told in an effort to bolster the evidence given by Mr. Burke. That evidence is simply not credible.
- (e) I am satisfied that there was no reason why the plaintiff would have had any reason for accusing Mr. Burke of engaging in racial profiling in connection with his dealings with the coloured youth in the blue parka jacket, who left the tram as he entered it, because there was no interaction between them at that time.
- (f) I find the evidence given by Mr. Fay that he heard the comment about racial profiling as he entered the carriage, as being explicable due to the fact that he entered the carriage some seconds after Mr. Burke, as he had been conversing with the driver via walkie talkie prior to, or as he entered, the carriage.
14. Accordingly, the Court prefers the evidence of the plaintiff and his brother, to the effect that Mr. Burke entered the carriage and came straight over to them and asked "*Do you have tickets?*", to which they replied "*Yes*" and he then repeated the word "*tickets*" and gestured with his hand for them to be produced, to which the plaintiff said "*This is slightly racially profiling*". At the same time, the plaintiff's brother was handing over his Leap Card and was asking "*Are you checking me?*", at which time Mr. Burke's bodycam was switched on. The Court is satisfied that the remainder of the exchange between the plaintiff and the security guards is as set out in the transcript.
15. It should be noted that the repeated requests made by Mr. Burke of the plaintiff to step off the tram, which appear towards the end of the transcript, were accompanied by hand gestures indicating that the plaintiff and his brother should move towards the doors.
16. In her cross-examination of the plaintiff and his brother, Ms. Morgan S.C. on behalf of the defendants, put forward the proposition that on the day in question the two security guards had encountered three coloured male youths playing a game of "cat and mouse" with the security guards, by jumping on and off the tram and engaging in various forms of antisocial behaviour while on the tram. It was put to the witnesses that the security guards knew that there were three male youths involved. One of the male youths got off at the Blackhorse stop. Counsel stated that, it was a well-known ploy for troublemakers to attempt to "hide in plain sight" by sitting quietly on a seat pretending to be ordinary fare paying passengers. In these circumstances, it was put to the witnesses that it was reasonable for Mr. Burke to approach the plaintiff and his brother and seek production of their tickets. Counsel stated that it was standard operating procedure for security guards to demand production of tickets from people who they thought may have been engaged in antisocial behaviour, because such people rarely had valid tickets and could be lawfully put off the tram.
17. Counsel put it to the plaintiff and his brother that the security guards had gone over to them seeking production of their tickets because they knew that there were two coloured male youths left on the tram. It was not a case of general racial profiling, it was just

unfortunate that the miscreants on this occasion happened to be of the same colour, age and sex as the plaintiff and his brother. The plaintiff did not accept that proposition. He stated that he felt that he and his brother had been targeted because they were coloured. He pointed out that there was another young coloured man sitting nearby, who had not been asked for production of his ticket. The plaintiff stated that he believed that it was an example of racial profiling of him and his brother.

18. The proposition put forward by senior counsel for the defendants in cross-examination was unfortunately not backed up by the evidence given by Mr. Burke. Initially, he stated that he had only approached the plaintiff and his brother seeking production of their tickets when he had heard the comment about racial profiling being made by the plaintiff. However, in cross-examination he tweaked this somewhat, by stating that he had approached the plaintiff because he was in the same area as the other youths, who had been causing trouble and because of his comment about racial profiling.
19. The evidence of Mr. Burke was somewhat undermined by the evidence given by Mr. Fay, who stated that they had had trouble with three coloured male youths on the Luas that particular day. However, he denied that it was the activities of those youths that had been behind the approach made to the plaintiff and his brother by Mr. Burke, due to the fact that they had put these youths off the train a number of times earlier in the day and therefore they knew what they looked like. Accordingly, it does not appear plausible that Mr. Burke could have had any suspicion as indicated by him, or as had been postulated by senior counsel, that the plaintiff and his brother might have been the remaining two of the three troublesome youths. Mr. Fay's evidence in this regard is confirmed by his statement on the early part of the transcript that they had put the three youths off trams at three different stops earlier in the day.
20. The Court is of the view that Mr. Burke and Mr. Fay have deliberately put the making of the racial profiling comment by the plaintiff earlier in time, as a justification for their approach to the plaintiff and his brother on that occasion, so as to avoid an accusation that they had in fact engaged in racial profiling.
21. However, this is not a case about racial profiling. It is an action claiming damages for defamation. In looking at the question whether a particular episode was defamatory of a plaintiff, I am satisfied that the Court must look at the entirety of the transaction or encounter between the parties. It is well established that where a plaintiff claims to have been defamed by words written in an article, the plaintiff cannot cherry pick parts of the article which suit his case, but must present the entirety of the article to the jury. In *Griffin v. Sunday Newspapers* [2011] IEHC 331, Kearns P. stated as follows at paragraph 21:

"Thus it follows that a plaintiff cannot select an isolated passage or sentence in an article and complain of that alone if other parts of the article throw a different light on that passage. The real test is whether the result of the whole is calculated to injure the plaintiff's character."

22. I am satisfied that that approach must be adopted in relation to this incident. The Court must look at the entirety of the exchange between the plaintiff and his brother and the security guards. It should be noted that section 2 of the Defamation Act, 2009 provides that a "*statement*" shall include gestures and any other method of signifying meaning.
23. Leaving aside whatever the true motivation may have been for requesting the plaintiff and his brother to produce their tickets, I am satisfied that a request by a security guard for production of tickets by a passenger, is not defamatory per se. Accordingly, I find that it was not defamatory of Mr. Burke to request the plaintiff and his brother to produce their tickets.
24. The fact that there then ensued a disagreement between the parties as to whether the security guards had engaged in racial profiling, thereby necessitating the security guards continuing to speak to the plaintiff and his brother after they had returned their tickets to them, was not defamatory of the plaintiff. The security guards were entitled to refute the accusation that had been made against them. Accordingly, I find that it was not defamatory of the plaintiff for Mr. Burke and Mr. Fay to speak to him after they had returned their tickets to them.
25. When one looks at the behaviour of the plaintiff in context, and in particular with the benefit of the CCTV footage and the bodycam footage, it is clear that the plaintiff was not speaking in a loud voice, he was at all times calm, he was seated at all times and was not aggressive. He was politely expressing an opinion which he held. In these circumstances, the Court is satisfied that the plaintiff had not acted in any way in contravention of the Light Railway (Regulation of Travel and Use) Bye-Laws 2015 and in particular he had not acted in breach of Regulation 5 thereof. The Court is satisfied that in expressing his opinion in the manner that he did, the plaintiff was not acting in a manner that was abusive, threatening or offensive to any person, as prohibited under the regulations. In these circumstances, the Court finds that Mr. Burke had no right to direct the plaintiff and his brother to leave the tram.
26. Having purchased a valid ticket, the plaintiff had a contractual right to stay on the tram until he reached his destination, as long as he did not misbehave in such manner as to justify his removal. In expressing an opinion as he did, the plaintiff was not acting in an offensive manner, even though Mr. Burke and Mr. Fay may have been offended by his opinion. For Mr. Burke to tell the plaintiff "*Here buddy now listen I don't like your attitude just step off there please*", was a breach of contract on the part of the defendants, its servants or agents. It was also defamatory of the plaintiff, because other passengers, who may have overheard the remark, or who may have seen the accompanying hand gestures made by Mr. Burke, which made it clear that the plaintiff was being told to leave the tram, would have reached the understandable conclusion that the plaintiff was being put off the tram, either because he did not have a valid ticket, or because he had otherwise misbehaved himself in such a way as to justify his removal. The Court is satisfied that Mr. Burke in telling the plaintiff to step off the tram on four occasions and by giving the hand gestures that he did, defamed the plaintiff.

27. In their defence the defendants have relied on the defence of qualified privilege. This defence is provided for under section 18 of the Defamation Act 2009. It preserves the defence which had been recognised under common law prior to the enactment of the Act and made certain provisions in relation to persons making complaints to third parties concerning the conduct of another person.
28. Broadly speaking the defence of qualified privilege most commonly arises in two types of cases. Firstly, where a person makes an accusation regarding the plaintiff which turns out to be wrong, which accusation is published to third parties in the vicinity. Cases under this heading would include accusations of shoplifting, fare evasion and fraud. The second general category includes cases where a person makes a complaint to a third party concerning the conduct of a person, thinking that that person is the appropriate person to whom such complaints should be addressed. This would include complaints made to the Gardaí, Tusla and various professional bodies, concerning the conduct of the person in a professional or other capacity. These are not the only categories in which qualified privilege can arise, but they are the most common ones.
29. The position at common law was expressly retained by section 18(1) of the Defamation Act 2009. The defence at common law provided that as long as the person making the false accusation had a duty or interest in so doing and the person to whom it was made had a duty or interest in receiving the complaint or accusation, the maker of the statement would be protected as long as they acted without malice. The law in relation to qualified privilege in Irish Law was examined in *McCormack v. Olsthoorn* [2004] IEHC 431 and more recently in *RP & JP v. BK* [2018] IEHC 139 and *Nolan v. Laurence Lounge* [2018] IEHC 352.
30. It is not necessary to go into this aspect of the defence in any further detail because the Court is satisfied that in this case, while the initial interaction of the security guards with the plaintiff was an occasion covered by qualified privilege, that ceased to be the case once it had been established that the plaintiff was in possession of a valid ticket. Thereafter, the interaction between Mr. Burke and the plaintiff ceased to be covered by qualified privilege because it had been established that the plaintiff had a contractual right to be travelling on the tram and he was not otherwise misbehaving, or engaging in antisocial or offensive behaviour. Accordingly, the issue of qualified privilege does arise in respect of the subsequent statements and communications made by Mr. Burke concerning the plaintiff during the latter part of the conversation. Thus, his defamatory statement and gestures when indicating to the plaintiff that he should leave the tram, was not covered by qualified privilege.
31. In his evidence, Mr. Fay stated that he had only permitted the plaintiff and his brother to remain on the tram, because the plaintiff had agreed not to repeat his allegation that the security guards had engaged in racial profiling. That evidence is not supported by the transcript. It is clear therefrom that when Mr. Burke made his fourth direction to the plaintiff to step off the tram, Mr. Fay stepped in at that point and stated that the plaintiff

could stay on the tram, but he was not to repeat the accusation of racial profiling. It was only at that point that the plaintiff indicated his agreement by saying "okay".

32. Contrary to what was asserted in evidence by Mr. Fay, the Court is satisfied that the plaintiff was not permitted to remain on the tram because he had given any previous indication that he would desist from his accusation of racial profiling. It is clear that any such agreement, or assent on the part of the plaintiff only came after Mr. Fay had issued his countermanding order, permitting the plaintiff to remain on the tram. The court is satisfied that Mr. Fay issued his countermanding order, permitting the plaintiff and his brother to remain on the tram, because he could clearly see that Mr. Burke had overstepped the mark completely.
33. As noted earlier, in looking at the overall effect of the encounter, the Court cannot lose sight of the fact that the instruction to leave the tram was almost immediately countermanded by Mr. Fay. This happened so quickly that the plaintiff and his brother had not even stood up from their seats, when they were told that they could remain on the tram. Thus, any person either within earshot, or who saw the hand gestures, would have been almost immediately aware that the plaintiff and his brother were not in fact going to be put off the tram. That was confirmed by the fact that they stayed seated in their seats, while the security guards moved away and stood some feet away. The security guards alighted at the next stop and the plaintiff and his brother continued to the Red Cow stop. Thus, any passenger in the carriage could not have been under any misapprehension that the plaintiff and his brother had been misbehaving, or had done something to warrant their being put off the tram.
34. In these circumstances, the court finds that while there was a momentary breach of contract and defamation of the plaintiff, when instructed a number of times by Mr. Burke to leave the tram, which was accompanied by gestures, both were almost simultaneously expunged by the countermanding instruction issued by Mr. Fay. Having regard to the matters that must be considered as set out in section 31 of the Defamation Act, 2009, the Court is satisfied that it would be both unwarranted and unjust to make a substantial award of damages for defamation in this case. Here there was but a momentary defamation of the plaintiff, which was almost immediately corrected, such that third parties to whom it was published, could not reasonably have formed any lasting adverse opinion of the plaintiff. The court is satisfied that it has jurisdiction to award nominal damages in this case. In "*Defamation Law and Practice*", 1st edition, by Cox and McCullough it is provided as follows at paragraph 11-07:

"Nominal damages are awarded where a plaintiff has been defamed by a publication and where it is appropriate for him or her to take legal action in order to vindicate his or her reputation, but where there has been no actual damage suffered and therefore no point would be served by making an award of damages. In this type of situation, the successful plaintiff is awarded a nominal sum but will also be awarded his or her costs."

35. In the course of argument, it was submitted by Ms. Morgan S.C. that if the court were to find that any defamatory statement had been made by the defendants, their servants or agents, in assessing damages the Court should take account of the fact that subsequent to the incident, the plaintiff posted a detailed account on his Facebook page of the interaction which he had had with the security guards on the tram. Counsel pointed out that at the present time it appeared that the plaintiff had over 3000 followers on Facebook. In evidence, the plaintiff stated that while that was correct as of the date of the hearing, he thought that at the time of the incident he had somewhere in the region of 1000 followers.
36. In these circumstances, it was submitted by counsel that the award of damages, if any, should be reduced to zero due to the fact that, whereas the initial publication had been to an extremely limited number of people, who were present in the carriage at the time and who did not know the plaintiff, by virtue of the plaintiff's actions on his Facebook page, he had republished the incident in great detail to a far wider audience. It was also relevant to note that that posting had remained on his Facebook page up until the hearing of the action.
37. The Court is not persuaded by the argument made by counsel on behalf of the defendants. There is a world of a difference between actions and words which carry a meaning that is defamatory of a person and a subsequent statement made by that person, whether on the Internet or otherwise, to the effect that they were defamed by a person who made a particular false allegation against them. It is entirely reasonable that a person might say "*Mr. A made a false allegation against me when he said such and such*". By making such a statement, the person against whom the allegation was initially made, is not merely repeating the allegation, but is emphasising their denial of it.
38. Furthermore, in this case the primary thrust of the posting made by the plaintiff after the incident, was to the effect that he felt that he had been the subject of racial discrimination in the form of racial profiling carried out by the security guards on the tram. These were views which he strongly held. The Court is of the opinion that in expressing these views, the plaintiff was not republishing the original allegation in such a way as to warrant a diminution in any award of damages to which he may be entitled.
39. Accordingly, while the Court has found that there was a fleeting defamation of the plaintiff, having regard to the fact that it was almost immediately expunged, the Court cannot find that there was any lasting damage to the plaintiff's good name or reputation; in such circumstances I award the plaintiff nominal damages of €500.00.
40. In relation to the allegation that Mr. Burke called the plaintiff a "*cunt*" as he was leaving the carriage, I am not satisfied that any such remark was made by Mr. Burke. The CCTV footage is far from conclusive on this point. Even if such a comment was made, it is well settled that mere insulting language or abuse is not defamatory per se.
41. Finally, it is not for this Court to say whether the actions of Mr. Burke in selecting the plaintiff and his brother for ticket inspection, when no other passengers in the carriage,

either white or coloured, were so asked, amounted to racial profiling or discriminatory conduct of the type prohibited by the Equal Status Acts, 2000 – 2015. All the Court can say is that the plaintiff and his brother were most impressive witnesses. They were treated badly by a servant or agent of the defendants during this incident. However, this Court cannot award compensation for the fact that people may have been treated badly or unfairly; this was purely a case about defamation.