

# The Irish Times Law Report

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## Court rejects plaintiff's submission that the word 'mother' comes within the definition of 'calling'

Colette Caffrey (plaintiff) v Jerry's Supermarket Limited (defendant).

*Defamation - Slander - Whether actionable per se - Whether the word "mother" comes within the definition of "calling" as provided for in the Act - Whether words spoken capable of bearing a defamatory meaning - The Defamation Act 1961, (No. 40) sections 16 & 19*

The Circuit Court (before the President, Mr Justice Smyth); judgment delivered November 1st, 2004.

The general rule is that slander is only actionable on proof of special damage, real or actual damage such as the material loss of the hospitality of friends, loss of consortium or loss of some pecuniary advantage or profit. In the absence of special damage the plaintiff must, in order to succeed, bring her case within one or more of the recognised exceptions contained in s19 of the Defamation Act, 1961, as a slander that falls within any of those four categories is actionable per se.

The word "mother" does not come within the definition of "calling" as provided for in section 19 of the Defamation Act 1961.

The Circuit Court so held in

dismissing the plaintiff's claim.

Damien Keaney, BL, for the plaintiff; Adrienne Fields, BL, for the defendant.

Mr Justice Smyth commenced his judgment by setting out the factual background to the case. On January 16th, 2003, the plaintiff was present as a customer on the defendant's premises in Skerries with her son who was in a buggy and her daughter who was between two and a half and three years old. The plaintiff purchased credit for her mobile phone at the top of the shop and then went to leave. At this stage she noticed her daughter had a magazine or comic with her, which she had probably taken from the rack positioned within easy reach of children and in or about same time she also noticed a lady had followed her daughter out of the shop, and according to the plaintiff said in a loud voice "your child is shoplifting". The plaintiff said the words were spoken in an angry tone with about half a dozen people within earshot and people looked and stared in her direction. The plaintiff returned the comic to the lady and apologised. The lady responded by saying "you should look after your kids better". The plaintiff said this was also uttered in an angry tone and as people were going into and walking past the shop. The plaintiff stated that she

felt ashamed as some people were staring at her. The plaintiff said her child became distressed and cried when the comic was taken from her and that there may have been some shouting. The plaintiff felt that the words meant or were intended to mean that she was an unfit mother, or not a good mother, and that she was sending her child into the shop to take magazines. The plaintiff thought the other lady was accusing her of being a thief. When the lady was given the comic she put it under her arm and went back into the shop with it.

Mr Justice Smyth said it was obvious that the plaintiff had assumed the lady was a staff member. The plaintiff's description of the lady was vague and differed from that given in particulars but it was never suggested by the defendants that the lady was a passer-by or a shopper. The defendants had no recollection of the incident and therefore could not dispute the plaintiff's account. The defendants called evidence to the effect that during the relevant period, lunchtime of January 16th, 2003, the employees rostered for work in that area of the shop were not aware or made aware of such an incident. The plaintiff did not bring it to their attention and indeed her evidence was that she went home and did not return to the shop again.

Mr Justice Smyth said the possi-



Mr Justice Smyth

bility could not be excluded that another member of staff from another part of the shop might have been involved but was satisfied on the evidence that it probably did occur and that the other lady involved was probably a member of the defendant's staff.

Mr Justice Smyth then analysed the law. He stated that the general rule is that slander is only actionable on proof of special damage, real or actual damage such as the material loss of the hospitality of friends, loss of consortium or loss of some pecuniary advantage or profit, and that there was no evidence to suggest that the plaintiff had suffered

any special damage as same is understood by law. Mr Justice Smyth said that in the absence of special damage the plaintiff must, in order to succeed, bring her case within one or more of the recognised exceptions contained in section 19 of the Defamation Act, 1961, as a slander that falls within any of those four categories is actionable per se, i.e. without need to prove special damage.

The plaintiff submitted that the word "mother" came within the definition of "calling" as provided for in section 19 of the Defamation Act 1961.

Mr Justice Smyth then analysed the offending phrases. As regards the phrase "your child is shoplifting" Mr Justice Smyth was of the view that while those words were capable of bearing a defamatory meaning they were defamatory of the child and not the mother. If they were the only words used during the course of the incident, then because they referred to the actions of the child and not to the plaintiff, they were not referable to the plaintiff and on their own could not form the basis of an action.

Mr Justice Smyth then referred to section 19 of the Defamation Act 1961 which provides that in an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling trade or business.

Mr Justice Smyth stated that the plaintiff contended that to be a mother is a calling within the meaning of the section, and if that is the case, then to use words which are capable of meaning that someone is an unfit mother is slanderous per se.

In support of that contention counsel for the plaintiff referred to Article 42.2.1 of the Constitution recognising the special position of the mother in the home

and the Oxford Dictionary definition of the word "calling" as a profession or occupation, a vocation. Mr Justice Smyth said there was little doubt that being a parent was in a general sense a calling but that it did not necessarily follow that it was a calling within the meaning of section 19 of the Defamation Act. Mr Justice Smyth referred to section 2 of the 1952 English Defamation Act, which he stated is broadly similar to section 19. Mr Justice Smyth then referred to the *Gayley* (10th Ed.) wherein the author submitted that there must be something in the nature of paid work or employment or commercial endeavour to satisfy the test of the statute. Mr Justice Smyth then looked at the historical distinction between and office for profit and an office of honour - slander of the former was actionable per se whereas slander of the latter was not.

Mr Justice Smyth said that another approach was to see whether one could apply the *eiusdem generis* rule to the provision. Mr Justice Smyth stated that the rule is merely a presumption. However, if it were applied to the instant case the word "calling" would have to take its meaning from the words preceding it and its meaning would be presumed to be restricted to the same genus as those words. He said that given the authority that there had to be something in the nature of paid work it was difficult to locate a meaning for "calling" which would encompass the role of a mother.

Mr Justice Smyth then referred to the wider principle by which meaning is attributable to a word by reference to the context in which it appears. He cited *Cross on Statutory Interpretation* (3rd Ed. 1995) and *Inspector of Taxes v Kiernan* [1981] IR 117. Mr Justice Smyth was of the view that applying that test "calling" would be looked at in the context of its associated words i.e. office, profession, trade or business and would bear the restricted meaning of an activity which car-

ries with it a salary or wages or some other emolument, the loss of which would probably entail some pecuniary damage.

Finally Mr Justice Smyth referred to section 16 of the Defamation Act 1961 which made separate provision for slanders that impute unchastity or adultery to any woman or girl and stated that given the recognition of the role of mother in the Constitution it was reasonable to suppose that if the legislature had intended calling to have the particular meaning it would have provided for it in the Act.

Mr Justice Smyth stated that in all the circumstances and having considered all the arguments he was unable to hold with the plaintiff's submission that the word "mother" comes within the definition of "calling" as provided for in section 19 of the Defamation Act, 1961 and given the absence of special damage that the plaintiff's action could not be maintained.

Mr Justice Smyth went on to say that even if his interpretation of section 19 was misconceived there were other difficulties in the plaintiff's case. Mr Justice Smyth was not satisfied on the facts that the words "you should look after your kids better" even taken in conjunction with the words "your child is shoplifting" were capable of bearing the defamatory meaning the plaintiff attributed to them. Counsel for the defendants stressed the supposition that the words "you

should after your kids better" have a perfectly innocent meaning i.e. "if you had kept an eye on your child she would not have taken the comic in the first place". Mr Justice Smyth stated the standard of opinion in these cases has regard to the opinions of reasonable or right thinking people, as they constitute a standard of opinion recognised by law. Looking at those words in their ordinary sense and in their particular context, Mr Justice Smyth was unable to see how the sense of the community reflected in the impressions of reasonable people would impute to the said words that the plaintiff was unfit to be a mother.

Mr Justice Smyth concluded by saying that since the plaintiff could not rely on the words in the first phrase as they were not addressed to her and the words in the second phrase were not, in his opinion, capable of bearing the defamatory meaning attributed to them or, at the very least, could bear an innocent meaning, then even if the words were taken together as referring to the plaintiff they cannot be relied upon and for those reasons Mr Justice Smyth stated the plaintiff's claim must fail.

Solicitors: Lawlor O'Reilly & Company for the plaintiff; Corrigan & Corrigan for the defendant.

Joan Kelly, barrister

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## Keyhouse

### A COMPANY PROFILE

# Legal technology – invest wisely or not at all

Poor information technology investments by legal practices can be worse than no investment at all, writes Barry McCall

The benefits of information technology to the profitability of legal practices are well established. Firms who make use of the technology correctly are more productive and more profitable. Those that don't, lag behind. Indeed, those that invest unwisely can actually find the technology more of a hindrance than a help to effective practice management.

"A poorly thought out investment in information technology can do more harm than good," says Justin Phelan, managing director of Keyhouse, one of Ireland's largest developers and suppliers of legal service software. "Technology is not an end in itself. Simply buying a software package and investing in hardware will not deliver results. The technology solution has to be designed and tailored to meet the specific needs and business objectives of the individual practice, if it is to deliver real results."

"Unfortunately we see all too many cases where significant investments running six figures and more have failed to deliver."

Phelan sees two main reasons for law practices finding themselves in this situation - the

choice of vendor and the absence of a thought out technology strategy. "Legal firms, like any professional practice, have their own very specific needs," he says.

"Information technology solutions that may well be very appropriate to firms in other sectors will not necessarily work for a legal firm. It is not a case that the supplier will knowingly provide the wrong solution, it is simply that they do not understand the needs of the client."

The lack of a technology strategy has much to do with the very nature of many legal practices. "Legal firms, like many other businesses, tend to be very focused on their own core business - servicing clients," adds Phelan.

"Most will not have a dedicated IT department or team, and technology is not viewed as something which is central to the business. This means that it is often purchased on a piecemeal basis with no broad overview of how it should support the overall business."

Keyhouse has found that many law firms tend to focus on narrow technology issues, rather

than how that technology might help their firm achieve its broader business objectives. A recent IT advisory paper from the British Law Society has described this as a "semi-detached IT strategy", where technology enthusiasts in isolation from, or involving very little consultation with, their colleagues within the firm have drawn up the strategy.

"If technology is to work it must be seen as a key part of the firm's overall business development plan," states Phelan. "This means that the firm must decide what its overall business objectives are - what areas of practice it is going to concentrate on, what types of client it wants to service and so on. Once that has been decided, the firm should turn its attention to how technology can help it reach those objectives."

"This is what the UK Law Society has termed the 'joined up practice', and that's a very good phrase for it. It's where all aspects of the practice, from the front office, through the partners

and legal professionals, to the back office support, are linked by technology."

But developing such a strategy is by no means simple, particularly where the practice has no dedicated IT department. And this is where firms such as Keyhouse come into the equation. Keyhouse is a market leading IT supplier of software, infrastructure, training and project management in Ireland. Keyhouse has been servicing lawyers for over 20 years and has developed a successful reputation based on results.

Having installed its first legal accounts and support systems as far back as 1983, Keyhouse has a real hands-on understanding of what a legal practice needs and how important successful implementation is to maximising performance for the benefit of both the practice and its clients.

"Our software and systems are crucial to the effective administration of many large and small law offices and departments throughout the country. Most importantly, we have leveraged our experience of working with legal firms to ensure that all of our products are designed around their needs," continues Phelan.

"All of our software products are developed and supported by us in Ireland," says Keyhouse sales and marketing director Brian Sweeney. "We are the largest supplier to the legal profession in this country with in excess of 200 firms and public



Key personnel: Mr Brian Sweeney, sales and marketing director, with Ms Martina Winters, sales executive at the Keyhouse office in Bray, Co Wicklow. Photograph: Cyril Byrne

sector legal departments using our products." Keyhouse offers a one-stop-shop solution to its clients.

"We develop the software and provide the hardware," says Sweeney. "We offer a service right the way up from a single PC to full network installation and management. Information technology can be difficult to get right. It is a complex specialised area. Using our considerable experience our clients can keep disruption to a minimum, while

maximising the benefits. Most of all, we work in partnership with our clients and take a common sense approach - we don't give our clients anything they don't want or need." Sweeney points out that Keyhouse clients can be divided into two broad groupings - those that have come looking for a solution, and those that have come with problems due to a failed solution. "Our sole focus is on the legal sector," says Sweeney.

"And we design and develop

our own software to meet the needs of that sector. We don't import British solutions and try to make them fit. When a client comes to us looking for a solution, we are able to work with them and design it around their needs and business objectives. However, very often we are called in to try to rescue a situation where a technology investment has failed.

"Indeed, during a period of particularly strong growth for Keyhouse in the late 1990s when we

grew from eight clients to 80, many of these new clients came to us seeking to convert from previous systems which weren't working for them. These firms end up paying twice for solutions - this should never be the case."

"We pride ourselves on getting it right first time for our clients," he continues. "Our solutions deliver real productivity and profitability gains. But inappropriate solutions deliver the opposite, they add to overall costs and create problems for the business. We have more than once been asked to retrieve a situation where a firm invested in one particular package which simply didn't work."

"When considering an investment in information technology a legal practice has to be absolutely sure of the track record of both the supplier and the solution being offered - this is the only way to avoid costly mistakes."

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"RESULTS BUILD REPUTATIONS"

\*Source: Keyhouse Customer Survey 2004