

Noah v Shuba and Another

In the High Court of Justice—Chancery Division

16 February 1990

[1991] F.S.R. 14

Before: Mr. Justice Mummery

Judgment delivered 16 February 1990

The plaintiff was a consultant epidemiologist at the Communicable Disease Surveillance Centre of the Public Health Laboratory Service ("PHLS"). The first defendant was the managing director of the second defendant, a company which sold products for use by beauty therapists.

The plaintiff was the author of *A Guide to Hygienic Skin Piercing*, which was written by him at home in the evenings and weekends, and first published by PHLS in 1982. It had long been the practice of PHLS for employees to retain the copyright in works written by them and the Guide showed the plaintiff to be both the author and proprietor of the copyright in it.

[...]

In June 1986, the first defendant delivered a lecture to an audience of about 25 at a conference, an almost verbatim typed report of which was derived from the memorandum. Several weeks later, the typed report was given by the defendant to an editor of the magazine *Health & Beauty Salon* for publication, and was subsequently published in the October issue of that magazine. The *15 article contained references to sporicidin and included two substantial extracts from the plaintiff's Guide and a further short passage therein was attributed to the plaintiff. The short passage which was not in fact written by the plaintiff read as follows:

"Follow clinic procedure for aftercare. If proper procedures are followed, no risk of viral infections can occur."

The effect of the extracts and the short passage was to give the impression that the plaintiff endorsed the views of the first defendant.

The plaintiff commenced proceedings against the defendants and *inter alia* claimed damages for copyright infringement, additional damages under section 17(3) of the Copyright Act 1956 and damages under section 43 of the 1956 Act for false attribution of authorship. The plaintiff further claimed that the words attributed to him were defamatory on the basis that it appeared that advice given by him was vague, grossly incompetent and dangerous.

[...]

With respect to the false attribution of the short passage to the plaintiff, the defendants argued that the words complained of did not constitute a "work" within the meaning of

section 43 of the 1956 Act. The defendants also argued that the words complained of were not defamatory of the plaintiff and did not cause injury to his reputation or feelings.

[...]

Held:

[...]

(5) The whole of the quoted passage, being the extract from the Guide and the two sentences not written by the plaintiff, had been falsely attributed to the plaintiff. Damages of £250 would be awarded to the plaintiff under this head.

Moore v. News of the World Ltd. [1972] 1 Q.B. 441, followed.

(6) The false attribution to the plaintiff of recommendations and expressions of opinion as to aftercare procedure and risk of viral infections were defamatory of the plaintiff. Damages of £7,500 would be awarded to the plaintiff under this head.

Obiter:

The two sentences by themselves did not constitute a "work" within the meaning of section 43.

Exxon Corporation v. Exxon Insurance Consultants International Ltd. [1982] Ch. 119, referred to.

[...]

Mummery J.:

This is an action for infringement of copyright, false attribution of authorship and libel.

The plaintiff, Dr. Norman David Noah, MB, MRCP, MFCM, is the Professor of Public Health and Epidemiology at King's College School of Medicine and Dentistry. He took up that appointment in October 1989. Prior to that he had at all relevant times been a consultant epidemiologist at the Communicable Disease Surveillance Centre of the Public Health Laboratory Service ("the PHLS"). Dr. Noah is the author of a publication entitled A Guide to Hygienic Skin Piercing (Guide) which was first published by the PHLS in 1982.

This action arises out of the publication of an article in the October 1986 issue of the monthly magazine Health & Beauty Salon which circulates among health and beauty therapists and others in related trades. The article was entitled "Sterilisation for Salon Safety." Though represented to be a feature written for readers of the magazine, the article was, in fact, an almost verbatim report of a lecture which had been delivered by the first defendant, Mr. Julian Shuba, on the subject of sterilisation, hygiene and salon safety in the context of the risks of contracting and transmitting infectious diseases, such as viral hepatitis, Aids and herpes.

[...]

The lecture which was reported in the article had been delivered by Mr. Shuba in June 1986 from typed notes to an audience of about 25 people at a beauty and health exhibition held

in Manchester. The exhibition had been organised by the proprietors of Health & Beauty Salon and one of those who attended the lecture was the editor of the magazine, Marion Mathews.

The publication of the article provoked these proceedings in which Dr. Noah asserts and Mr. Shuba admits that two passages in the article reproduce substantial extracts from Dr. Noah's Guide and that a further short passage in the article, which is printed within quotation marks and attributed to Dr. Noah, was not in fact written by him. The words in the "misquotation" follow a passage on "proper clinical procedures" and read as follows:

"Follow clinic procedure for aftercare. If proper procedures are followed, no risk of viral infections can occur."

In these circumstances Dr. Noah claims that:

[...]

(3) There has been attributed to him the authorship of the passage which was not, in fact, written by him, constituting an offence contrary to section 43 of the Copyright Act 1956 and entitling him to further damages.

(4) The words attributed to him, when read in context, were defamatory of him as they meant that he had, in the way of his profession, given medical advice to the beauty trade which was in part uselessly vague and in part grossly incompetent and dangerous.

In response to these claims Dr. Shuba asserts that:

[...]

(3) Section 43 of the Copyright Act 1956 does not apply since Dr. Noah has not been falsely attributed with the authorship of "a work" within the meaning of that section.

(4) The words complained of were not defamatory of Dr. Noah and did not cause any injury to his reputation or feelings.

[...]

Factual background

[...]

In June 1986 Mr. Shuba attended the conference arranged at the Piccadilly Hotel in Manchester by the proprietors of Health & Beauty Salon. He took with him a folder of material and detailed lecture notes which were based on the internal memorandum he had prepared for distribution within the Tao Clinics. The typed notes reproduced two substantial extracts from Dr. Noah's Guide and contained references to sporicidin. The lecture was attended by about 25 people, including Marion Mathews who has been the editor of the magazine for ten years. The magazine's advertising department had arranged for Mr. Shuba to give the lecture. Miss Mathews did not attend the whole of the lecture. *22 She was there at the beginning and at the end and took no notes. Her original intention had been to report simply the fact that the lecture had taken place, and not to report the contents of the lecture in detail. Her evidence, which I accept, was that at the end of the lecture someone coming out had told her what an interesting lecture it was, saying that she would like to read it in the magazine. As Miss Mathews thought it might be of interest and importance to readers of the magazine to read what Mr. Shuba had to say, she asked him

whether he had any notes. He informed her that he was very happy for the magazine to publish an article. He did not let her have the notes then. They were received by her some weeks later through the public relations press officer. She then arranged for the publication of the article in the October issue. She made only minor editorial corrections to the lecture notes. She wrote the headline and a short introduction to the article. The article reproduced two substantial extracts from Dr. Noah's Guide. It was illustrated by a photograph of one of Mr. Shuba's company's employees, Judith Kimber, standing with a range of sterilisation methods or products provided by the House of Famuir. Sporidicin is prominently displayed in the photograph. On another page of the article there was a reproduction of the sporidicin logo or display card referring to its cost and to its dilution qualities. On the final page of the article there was an advertisement for Sporidicin sterilisation and the House of Famuir catalogue and price list. The article itself also referred, in close proximity to the verbatim account of Dr. Noah's guidelines, to the fact that the use of "Sporidicin solution for disinfecting and destroying Aids, hepatitis etc. viruses and all bacteria in a 10 minute soak, should form the modern standard of procedure."

The article came to Dr. Noah's attention when he received a letter on 18 November 1986 from E. A. Ellison & Co. Ltd., suppliers and consultants to the hairdressing and beauty professions, enclosing a copy of the article. The writer of the letter stated:

"I feel that you have been included in the article in a way in which you seem to endorse a lot of the writer's own views, and this has been borne out by comments made by several of the hairdressers who have read the article and visited our depots since."

Dr. Noah was also telephoned by other people who had read the article.

When he first read the article Dr. Noah did not realise that the quotation marks, which enclosed the extracts from the Guide on proper clinical procedures, also included the last seventeen words which he had not written and which form the basis of his present claims for false attribution of authorship and for defamation. The complaint which he made to the editor of Health & Beauty Salon by letter dated 6 January 1987 was for infringement of copyright in respect of the extracts which had been reproduced without his permission and also that the article implied that the use of sporidicin had been recommended by him. The prompt response of the editor of Health & Beauty Salon was a reply on 12 January 1987 apologising for the breach of copyright and offering Dr. *23 Noah a space in the magazine to object to the implication that he had recommended the use of sporidicin. The complaint against Health & Beauty Salon was finally settled by the publication in the September 1987 issue of the magazine of a full apology for unauthorised use of his copyright material and for false attribution of authorship to him of the part of the extract on clinical procedures which he had not written. An apology was also published for any incorrect impression that had been given that he recommended the use of Sporidicin as a disinfectant.

[...]

[N]o further progress was made in securing a settlement of Dr. Noah's claims against Mr. Shuba.

I now turn to consider the legal position.

It was assumed by both counsel that their submissions on the copyright questions and on false attribution of authorship that the relevant provisions of the Copyright Act 1956

continue to apply to the issues in these proceedings arising from acts done while that Act was still in force, even though the Copyright Designs and Patents Act 1988, which repeals virtually all the 1956 Act, commenced on 1 August 1989. In my view, it was right to make that assumption: see Schedule 1 to the 1988 Act, paragraph 11(1) (first ownership of copyright), paragraph 14 (acts infringing copyright), paragraph 22(2) (false attribution of authorship) and paragraph 31(1) (damages for infringement committed before commencement of the 1988 Act).

[...]

Further, Dr. Noah's claims for damage to his reputation and injury to his feelings caused by the publication are, in my judgment, more closely allied to the "misquotation" attributing the last seventeen words of the second extract to him than to the verbatim reproduction of the earlier extracts.

It is the "misquotation" of the last seventeen words that has given rise to the further claims for false attribution of authorship and defamation. The claims arise from the misplaced position of the quotation marks following the second extract from Dr. Noah's Guide. Instead of being placed, as they should have been, at the end of the verbatim extract from the Guide, the quotation marks are so placed as to include the further seventeen words which relate to "aftercare". It has been admitted by Mr. Shuba that those words were not written by Dr. Noah.

The offence of false attribution of authorship in section 43 of the Copyright Act 1956 is in terms which impose a restriction in relation to, *inter alia*, literary works. References in the section to a work "shall be construed in reference to such a work." It is provided in subsection (2) that:

"A person (in this subsection referred to as "the offender") contravenes those restrictions as respects another person if, without the licence of that other person, he does any of the following acts in the United Kingdom, that is to say, he—

(a) inserts or affixes that other person's name in or on a work of which that person is not the author or in or on a reproduction of such a work, in such a way as to imply that the other person is the author of the work."

The offence is actionable as a breach of statutory duty: section 43(8). As regards remedies it is provided in subsection (10) that

"nothing in this section shall derogate from any right of action or other remedy (whether civil or criminal) in proceedings instituted otherwise than by virtue of this section;

Provided that this subsection shall not be construed as requiring any damages recovered by virtue of this section to be disregarded in assessing damages in any proceedings instituted otherwise than by virtue of this section and arising out of the same transaction." *32

Thus, for example, in *Moore v. News of the World Limited* [1972] 1 Q.B. 441, the claim for the statutory offence under section 43 was linked to a claim for libel. A separate award of damages could be given for the statutory offence if the other cause of action did not cover the injury caused by the false attribution of authorship. In that case the Court of Appeal

upheld the jury's award to the plaintiff of £4,300 for libel and £100 for false attribution of authorship. Lord Denning M.R. observed at page 450 C that in most cases of false attribution of authorship there will also be a cause of action for libel or passing off and the damages for those causes of action would cover false attribution as well, so that there would be little extra awarded for false attribution.

There were certain points of agreement between the parties in relation to the section 43 claim:

- (1) The effect of the misplaced quotation marks was to imply that Dr. Noah was the author of the last seventeen words.
- (2) No licence or consent had been granted by Dr. Noah consenting to the attribution of those words to him.
- (3) If an offence had been committed, that did not derogate in any way from Dr. Noah's claim for defamation arising out of the same transaction.
- (4) As regards any damages to be awarded it was, however, appropriate to take into account in assessing the damages for false attribution of authorship any amount that might be awarded to Dr. Noah for defamation as a result of people wrongly thinking that he had written the words in question.

The point of dispute between the parties is whether Dr. Noah's name was inserted or affixed on something that can properly be described as a "work" or a reproduction of a "work" within the meaning of section 43(2)(a). The question is, therefore, what is to be identified as the relevant "work"? It was contended on behalf of Dr. Noah that the relevant work is the whole of the passage in quotation marks which was attributed to him, including both the words of which he was the author *and* the words of which he was not the author, that it was implied that he was the author of the whole of that passage and that was a false implication since he was not the author of the last seventeen words. Alternatively, it was submitted that, if only the last seventeen words are relevant to identification of the work, then they on their own constituted a work of which Dr. Noah was not the author and the use of his name and the position of the quotation marks in relation to it implied falsely that he was the author.

On the other hand, it was submitted on behalf of Mr. Shuba that for the purposes of section 43 the relevant "work" would consist only of those words which the person complaining had not written. The bulk of the passage within quotation marks was in fact written by Dr. Noah so that he could not complain about that. His only complaint could be about the last two sentences consisting of seventeen words and they *33 were too short and insubstantial a matter to constitute a literary "work" within the meaning of section 43.

In my judgment, the main submission made on behalf of Dr. Noah is the correct one. Dr. Noah's name was inserted on or affixed to the whole of the quoted passage so as to imply that he was the author of the whole of that passage. He was not the author of the whole of that passage. That passage has been falsely attributed to him. If Mr. Shuba's argument were right, no offence would be committed under section 43 if a passage was quoted verbatim from an author's work with several key statements of the passage altered to the contrary sense simply by the insertion of the word "not". The result would be that the passage reproduced was still substantially what the author had written, but would convey to the reader the opposite meaning to what the author had written. The effect would be a violation of the author's interests protected by section 43. They are not only economic

interests but also an author's interests in his reputation and in the integrity of his work.

It is not necessary for me to decide the alternative argument. I have, however, heard argument from both sides and I can say that I would have rejected Dr. Noah's submission that the last two sentences on their own constituted a "work" within the meaning of section 43. Those two sentences on their own do not afford sufficient information, instruction or literary enjoyment to qualify as a work: see *Exxon Corporation v. Exxon Insurance Consultants International Limited*[1982] Ch. 119.

The third cause of action relied on by Dr. Noah is libel. That cause of action is also based on the last two sentences within the quotation marks of the second extract reproduced from Dr. Noah's Guide.

Dr. Noah claims that the words are defamatory of him, both in their ordinary and natural meaning or by way of innuendo, meaning that he had, in the way of his profession, given medical advice to the beauty trade which was in part uselessly vague and in part grossly incompetent and dangerous.

[...]

The defamatory statements have undoubtedly injured the feelings of Dr. Noah. He is a person of high reputation and standing in his profession. He enjoys a reputation for sound and impartial advice. He takes pride in his careful pioneering work in the field of hygiene and skin piercing practices. There have been wrongly imputed to him advice and recommendations which he reasonably considers are in vague and ill-advised terms. On the other hand, the extent of the publication has been limited. The libel has not been published to the whole world or even to the medical profession at large. Health & Beauty Salon has a relatively small circulation (4,500 copies) to a limited market, mainly among those in the beauty treatment field. Some of the readers will, *35 however, have received medical or hygiene training and know of facts which would lead them to doubt the soundness of the advice contained in those two sentences and to question the competence of Dr. Noah.

As to mitigating factors, I take account that there has been a full apology to Dr. Noah by the proprietors of Health & Beauty Salon in a lengthy statement published in the September 1987 issue of the magazine. I do not, however, regard the apology offered by Mr. Shuba in his letter of 2 July 1987 as mitigating the injury to Dr. Noah's feelings. In fact, if anything, the letter aggravates the libel on Dr. Noah by proceeding without justification to attack his integrity and motives and the propriety of his behaviour as a public official in making a claim for substantial damages for infringement of copyright, false attribution and defamation.

[...]