UNAPPROVED

THE COURT OF APPEAL

Donnelly J. **Neutral Citation Number [2023] IECA 1**

Haughton J.

Allen J.

Record No: 2022 54

BETWEEN/

KEVIN TRACEY

APPELLANT

-and-

THE IRISH TIMES LIMITED and GERALDINE KENNEDY

and EOIN MCVEY

RESPONDENTS

Record No: 2022 55

AND BETWEEN/

KEVIN TRACEY

APPELLANT

-and-

INDEPENDENT STAR LIMITED and GERARD COLLERAN

RESPONDENTS

Record No: 2022 56

AND BETWEEN/

KEVIN TRACEY

APPELLANT

-and-

INDEPENDENT NEWSPAPERS (IRELAND) LTD. and GERRY O'REGAN

and STEPHEN RAE and TIM HEALY

RESPONDENTS

Record No: 2022 57

AND BETWEEN/

KEVIN TRACEY

APPELLANT

-and-

INDEPENDENT NEWSPAPERS (IRELAND) LTD. and PHILIP MOLLOY and PAUL DUNNE and GERRY O'REGAN and MICHAEL DENIEFFE

RESPONDENTS

JUDGMENT of Ms. Justice Donnelly delivered on the 12th day of January 2023

Introduction

1. On the 17th September 2004, each of four newspapers (The Irish Times, Irish Independent, Evening Herald and Irish Daily Star, hereinafter *"the newspapers"*) published an article about a prosecution for assault taken against the plaintiff (hereinafter *"the appellant"*) in the District Court the previous day. The articles, while similar, are not identical and each has a different headline. All of the articles say, albeit in somewhat different terms, that the appellant was convicted of assault and that he was given the Probation Act because the assault was a minor one. The appellant issued proceedings against each of the newspapers individually on 23 December 2008 (together referred to as *"the proceedings"*), claiming that he had been defamed. His claim is that he was not convicted because the assault proceedings were dismissed against him. He claims the articles (and the photograph of him in one publication) were published maliciously.

2. In the High Court, Meenan J., pursuant to motions brought by each of the newspapers, directed a trial in each action of a preliminary issue *"namely as to whether the publication upon which the Plaintiff sues is protected by privilege"*. It is against those orders that the appellant appeals.

3. The procedural history of the proceedings is relevant to the arguments raised in the present appeals. The newspapers had previously brought motions in the High Court, dated 30 June 2010, invoking the inherent jurisdiction or alternatively Order 19 rule 28 of the Rules of the Superior Courts to strike out/dismiss/stay the proceedings on grounds that they were unsustainable, bound to fail, or frivolous and/or vexatious. The newspapers were successful in the High Court where the appellant did not appear but relied upon two medical reports to explain his absence. On appeal by the appellant against each of the High Court orders, the Supreme Court, in a series of judgments delivered by MacMenamin J. ([2019] IESC 62, [2019] IESC 67, [2019] IESC 68, & [2019] IESC 69), allowed the appeals and ordered that the matters be remitted to the High Court for a rehearing in accordance with law.

The Fresh Motions

4. On return to the High Court, the newspapers issued new motions *("the fresh motions")*. These identical fresh motions sought the following relief:

a) An order re-entering the motion of 30 June 2010 arising from the Supreme Court judgment.

b) Further or alternatively, an order pursuant to Order 25 rule 1 and/or pursuant to Order 34 rule 2 and/or pursuant to Court's case management or inherent jurisdiction *"fixing for trial the determination of a preliminary issue, namely as to whether the publication upon which the Plaintiff sues is protected by privilege, arising from section 18 of the Defamation Act 1961 and/or at common law"*.

c) An order for directions as the Court sees fit arising out of the Supreme Court judgment and order.

5. In the High Court, the appellant, who appears personally, objected to the re-entered motion primarily on the basis of his contention that the only matter ordered by the Supreme Court to be reheard was the original motion. Meenan J. held that the second relief claimed fell within the terms of the Order of the Supreme Court. He also stated that if there was any doubt, the judgment of the Supreme Court was clear that these were legal issues which the Supreme Court identified. In particular, he relied upon the *dicta* of MacMenamin J. at para 43 of the judgment and also the *dictum* at para 44 that *"[t]he balance of justice requires that this important issue should be remitted to the High Court for determination in accordance with law."* Meenan J. was satisfied to make the order sought on each motion.

The Issues on Appeal

6. In his notice of appeal, his written submissions, his subsequent affidavit and his oral submissions, the appellant's primary focus was on what he contended was the procedural impropriety of these fresh motions being permitted to be heard. He claimed this was contrary to the judgment and order of Supreme Court which, he argued, only permitted the original motion to be heard. He made various claims of lack of fair procedures that the High Court judge had heard the motion to re-enter when, he contended, the motion was only listed for mention, a claim of bias against the High Court judge in allowing the newspapers to expand the strike out motion, and apparently, a rather ill-defined allegation that seems to amount to one of an unsuccessful conspiracy between members of the Bar to prevent him from accessing the correct court for the hearing before Meenan J.

7. The claim of bias seems wholly based upon the fact that the High Court judge did not agree with the appellant's understanding of the effect of the Supreme Court Order, and the fact that the judge went on to order costs against him. Making a claim of bias is entirely unwarranted in those circumstances; a judge may be right or wrong in a decision but the fact of being wrong does not in itself demonstrate bias. If an appellant wishes to say that the judge made the incorrect decision then the notice of appeal should make that assertion, accompanied by the reason why it is claimed the decision was made in error. That finds its usual expression in the phrase *"the trial judge erred in law in finding that…"* or *"the trial judge erred in fact in finding that…"*. In relation to the allegation of some type of conspiracy, I am satisfied that even if one accepts what the appellant says about the conversation he had with an unidentified barrister who enquired as to why he was in court, nothing in what is said in his affidavits come close to any proof of conspiracy.

8. On the substantive issue of whether this was an appropriate order to make, the appellant's principal submission was that the *"defamatory article(s)"* were clearly not protected by s. 18 of the 1961 Act as that only applied to a fair and accurate reportage of the District Court and that these were not fair or accurate reports.

9. Counsel for the newspapers submitted that the import of the Supreme Court judgment was clear. It had identified issues of a legal nature that had to be decided in the case. It was submitted that the remittal to the High Court by the Supreme Court was explicitly based upon matters proceeding *"in accordance with law"* and that the fresh motions were properly before the High Court. The issue of whether there ought to be a preliminary hearing on the legal issues was, it was said, encapsulated in the judgment and order of the Supreme Court. Counsel confirmed to this Court that the relief sought in the original motion to dismiss was not being pursued in the motions of November

2020; the relief claimed, in each case, was an order for the trial of a preliminary issue of law.

10. Counsel submitted that it was appropriate to have this matter heard before a judge as a preliminary matter as it was an issue of law only. He submitted that there was no contradiction in the evidence before the Court on the issue of whether the reports were fair and accurate. Mr. Healy, the court reporter on whose report the articles were all based, swore affidavits in the earlier motions in which he exhibits his notes from the District Court hearing. He avers, for example, in the proceedings against the Independent Star Limited, that the article *"is a contemporaneous, fair and accurate report of proceedings publicly determined by a court in this jurisdiction."* Counsel submits that there is no real dispute as to the facts contained in the report but that the appellant's claim in defamation is that the articles say that he was convicted when he was, in fact, acquitted.

The District Court Order and the Probation of Offenders Act

11. The District Court Order, apparently drawn up on 22 April 2008, records that *"it was ordered as follows: without proceeding to a conviction the Court found the facts proved and did dismiss the charge pursuant to Section 1(1)(i) the Probation of Offenders Act 1907".*

12. Section 1(1) of the Probation of Offenders Act provides as follows:

> *"(1) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of the opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or*

that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either

(i) Dismissing the information or charge; or

(ii) Discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

The Supreme Court Judgment(s)

13. MacMenamin J., with whom the other members of the Supreme Court agreed, delivered individual judgments in each of the proceedings. The decision in the Irish Times proceedings ([2019] IESC 62) was the leading judgment and contained the reasoning of the decision to allow the several appeals. The other judgments referred to and applied to those cases the reasoning set out in the Irish Times proceedings. Each of the judgments set out in full the contents the individual newspaper article concerned. It is unnecessary to repeat the contents here. The Irish Times judgment is the judgment referred to in the remainder of this judgment.

14. The judgment, having set out the claims, noted that one plea was relevant to the appeal; that the District Court prosecution had actually been dismissed under the Probation of Offenders Act, 1907, and thus the appellant had not been *"convicted"* of the assault.

15. The judgment referred to the plea by the Irish Times in their defence, relying on s. 18 of the 1961 Act, that the article was a fair and accurate report of proceedings publicly heard in a court established by law and exercising judicial authority within the State. The Irish Times had pleaded that the article which it had published was absolutely privileged or, alternatively, was protected by qualified privilege. The Supreme Court

noted that the nature of the privilege attaching to court reports was *"obviously a legal issue of some significance"*.

16. The judgment covered in detail the circumstances in which the previous decision of the High Court had been made in the absence of the appellant. MacMenamin J. also considered the relevant authority on the procedural aspects of a motion to strike out or dismiss proceedings as bound to fail. Of particular relevance is the *dictum* at para 28 that:

> *"The jurisprudence, therefore, establishes a spectrum of instances where, when appropriate, or on appeal, a court may simply remit a case to the High Court for consideration, or, alternatively, having considered the issue raised in the pleadings (O.19 r.28), or by the case more generally, (inherent jurisdiction), make whatever order is appropriate". (emphasis in original)*

17. MacMenamin J. considered that, in adjudicating on the motion, the court had to carry out an assessment of two main points. The first was the prior conduct of the litigant and the explanation for non-attendance. The second consideration, and the decision on which is relevant to the present appeal, is that the court may also consider the case with a view to determining whether or not the case can succeed. If the case has some chance of success, even if there is inadequately explained or unexplained absence of a party, the court may be justified in making whatever order is just, subject to the principle of proportionality, i.e. a more limited order could be made.

18. MacMenamin J. stated at paras 39, 40 and 41:

> *"39. Counsel points out that the President did not 'strike out' the proceedings because of the appellant's absence, but rather because he was satisfied that the proceedings were bound to fail, having regard to the 'obvious' applicability of the then s.18 of the 1961 Act. He emphasises that, even now, the appellant has*

not ever sworn a replying affidavit, or engaged substantively with the matter of the application that these proceedings were bound to fail. Counsel submits that the only evidence before the court is that the report in the newspaper was fair and accurate. This is true, insofar as it goes. But these issues are not questions of evidence, but rather matters of law. There are a number of questions. These include:

(i) what is the extent of the protection afforded by s.18, or the common law; and more specifically:

(ii) Is the privilege absolute or qualified?

(iii) Is all the article covered by privilege?"

40. While the Court has been referred to legal authorities, such as the High Court decision on the issue of privilege, Philpott v. Irish Examiner [2016] IEHC 62, Barrett J., I am not persuaded that the legal precedents entirely assist the case which counsel must make. The article in question said that the appellant had been 'convicted of assaulting' a neighbour. At another point, it is said the judge granted leave to appeal, saying that, even though there was no penalty, 'the Probation Act was still a criminal conviction.' But it is, at least, arguable s.1(1)(i) of the Probation of Offenders Act, 1907 provides that a District Court may, in certain circumstances, hold that it is 'inexpedient' to proceed to a conviction, and may make orders without proceeding to conviction. Whether the report is, therefore, 'fair or accurate' is, therefore, a point where, at least, an argument can be made. It cannot be sufficiently emphasised that this judgment does not purport to determine the law on the issue; there are many counter arguments, perhaps very strong ones.

41. It is sufficient to say that I think, on this occasion, the President erred when he decided simply to dismiss the case as having no chance of success. It is arguable that it has some chance of success, though I go no further. In the circumstances, the President should have given consideration to an order with lesser effect." (emphasis in original)

19. At para 44, MacMenamin J. stated:

"The balance of justice requires that this important issue should be remitted to the High Court for determination in accordance with law. This judgment and the order proposed does not, in any sense, predetermine an outcome. The respondents remain entitled to remake their case on this notice of motion in the High Court. The appellant, in turn, is now well on notice of the case which the respondents wish to advance. <u>The High Court may be asked to make orders and determinations not arising from the notice of motion.</u> But what tilts the balance in this appeal is that the case is, in fact, not 'doomed to fail', although again I refrain from going any further. For the avoidance of any doubt, I should add that, if the application or order had been framed within the terms of Order 19, Rule 28, I would have reached the same conclusion." (emphasis added.)

<u>The procedural issue: was the High Court entitled to hear the fresh motions?</u>

20. The *dicta* of MacMenamin J., on a number of occasions and in a number of ways, explicitly refer to the jurisdiction of the court to make appropriate orders to do justice in the case (see especially para 28 of the Supreme Court judgment set out above in para 15). The judgment also directly raises points which it says are not questions of evidence but rather matters of law; the extent of the protection provided for by s.18, whether the privilege is absolute or qualified, and is the entire article covered by privilege. The judgment explicitly states, without predetermining an outcome, that the newspapers are

entitled to remake their case on this notice of motion in the High Court. This can only have meant that the newspapers are entitled to remake in the sense of reformulating their case that the appellant's claims cannot succeed as a matter of law.

21. The case that the appellant's actions cannot succeed as a matter of law is precisely the case the newspapers have sought to make by the fresh motions. The appellant resolutely persists in his argument that this is not permitted. A great deal of his submissions was directed to a repetition of his claim that the articles were defamatory, malicious and caused him great personal and professional loss. Little was directed towards exactly why this course of action was not permitted apart from repeating that the only Order that the Supreme Court made was that the Notice of Motion brought pursuant to O. 19 r. 28 should be remitted to the High Court for re-hearing. It is difficult to understand his focus on the Supreme Court order which states that *"the appeal be allowed that the said Order of the High Court be set aside and that <u>this matter</u> be remitted to the High Court for a rehearing in accordance with law" (emphasis added).* While the wording of the fresh motions was perhaps not as precise as it ought to have been – counsel for the newspapers expressly indicated to this Court that he was not pursuing the relief in paragraph 1 – there was permission from the Supreme Court to seek alternative relief directed towards resolving the issue as to whether the appellant's case could not succeed as a matter of law.

22. I am satisfied that both the explicit judgment of MacMenamin J., and the order made by the Supreme Court which encapsulated the findings in that judgment, permitted the newspapers to reformulate the relief sought in the notices of motion. This was as a direct result of the Supreme Court finding that the claim could not be said to have no chance of success given the issues which had to be resolved. Yet the Supreme Court identified that there were issues outstanding that were to be remitted for a rehearing in

accordance with law. There is no substance to the appellant's complaints that it was impermissible for the newspaper to reformulate their motions.

23. The appellant made a number of other claims of procedural impropriety in the hearing of the motions before Meenan J. In circumstances where I have concluded (as set out below) that his appeal ought to be allowed on grounds related to the substantive relief granted by the High Court, it is not necessary to enter into an analysis of the claims made regarding any alleged breach of his rights to natural justice in the hearing of the motion.

The substantive issue: Was the trial judge correct in directing a preliminary hearing?

Procedural requirements for a motion seeking a direction for a preliminary hearing

24. The Supreme Court decision in *Duffy v News Group Newspapers Ltd (No.2)* [1994] 3 IR 63 – which dealt with an application for a preliminary trial on the issue of whether the words complained of were capable of bearing any meaning defamatory of the plaintiff – lays down the parameters in which a preliminary trial on a point of law may occur. In his judgment, with which the other members of the Supreme Court agreed, O'Flaherty J. said, with respect to Order 36 rule 7 (not at issue in this case), that it would be difficult to envisage a defamation case which might be set down for preliminary hearing. He referred to the difference in function between judge and jury; the judge must find if the words are capable of a defamatory meaning and then it is for the jury to find if they are in fact defamatory. He went on to say that there may be cases where it is possible to isolate words and to order a preliminary ruling on a point of law under Order 25.

25. In their motion seeking to have the High Court direct a preliminary trial of the matter, the newspapers relied upon two rules of the Rules of the Superior Courts: Order 25 rule 1 and Order 34 rule 2. It is by no means clear to me that either of those Orders were

entirely appropriate in light of the specific factors present in these proceedings at the time of the issue of the motions.

26. Order 25 rule 1 provides that:

> *"Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties, or by order of the court on the application of either party, the same may be set down for hearing and disposed of at any time before the trial."* (emphasis added)

In the present case, it is a surprising fact that, except in the Irish Times case, the newspapers had not delivered defences. Thus, there was no point of law raised in the pleadings in the other cases. The lacunae in those three proceedings were brought to the attention of counsel for the newspapers by the Court at an earlier listed hearing of this appeal (which could not proceed owing to the absence of the appellant). The three newspapers delivered a form of defence to the appellant shortly before the hearing of this appeal. This had to be seen in the context that prior to the newspapers issuing motions in 2010 to dismiss the proceedings as *inter alia*, bound to fail, the appellant had brought motions for judgment in default of defence. No leave was obtained to deliver these defences following the Order of the Supreme Court nor was the appellant's consent sought to the late delivery of the defences.

27. It is not possible or appropriate to make an order for a preliminary hearing under O. 25 r. 1 where the pleadings have not closed. The defences in the proceedings other than the Irish Times cases ought not, I believe, to be accepted at this time as having been properly served. The appellant objected to what had occurred. From the *Combined Counsels' and Solicitor Note of Motions* of the original hearing before the President of the High Court in 2011, it would appear that no order may have been made on the

appellant's motions for judgment as the President is noted as saying they were moot in light of his decision to dismiss the proceedings. As to how those three, non-Irish Times proceedings, may proceed in terms of whether the delivery of the defences is accepted is a matter for the parties to agree upon, and if necessary for the High Court to rule upon.

28. For the sake of completeness, I will add that the appellant also referred to his lack of consent to the setting down of the preliminary hearing and this was of relevance to O.25 r. 1. However, the making of an order under this rule does not depend on the consent of both parties; the rule specifically states *"or by order of the court"*. In those circumstances, the mere objection by the appellant to the making of the order under Order 25 is not a good basis for refusing to make the order.

29. This procedural aspect of the appeal must also address the argument that the newspapers made, in the alternative, namely, a direction for a preliminary hearing under O. 34 r. 2 and also relied upon the inherent jurisdiction of the court to make such an order.

30. Order 34 r. 1 and r. 2 provide as follows:

> *"1. The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the court. Every such special case shall be delivered into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the court to decide the questions raised thereby. Upon the argument of such case the court and the parties shall be at liberty to refer to the whole contents of such documents, and the court shall be at liberty to draw from the facts and documents stated in any such special case an inference, whether of fact or law, which might have been drawn therefrom if proved at a trial.*

2. *If it appears to the court that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the court may make an order accordingly, and may direct such question of law to be raised for the opinion of the court, either by special case or in such other manner as the court may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."* (Emphasis added)

31. O. 34 r. 1 appears to present an obstacle to the newspapers proceeding in the three motions not involving the Irish Times, as it provides, in part, that *"[t]he parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the court"*. Counsel for the newspapers accepted that this may not appear to be a special case under O. 34 r. 1 as the facts are not agreed, but he submitted that some of the other decisions setting down issues for preliminary hearing had proceeded on the basis of Order 34. Moreover, counsel wished to point out the absence of a requirement in Order 34 that the point of law has been raised in pleadings.

32. The appellant quite understandably objected to this manner of proceeding. These procedural issues were not dealt with in the judgments in the High Court, indeed, in the surfeit of paperwork, they may not have been brought to his attention by any party. The focus – such as it was – of the argument in the High Court was on whether, by reference to the judgments of the Supreme Court, the High Court could order the trial of a preliminary issue of law and not whether it should. Moreover, no explanation was placed before us as to why the absence of a defence was a matter that ought to be overlooked in those cases. Instead, there was a reliance on the court's inherent

jurisdiction to set down the matter. Unfortunately, however, there was little submitted by way of law as to the origins of this inherent jurisdiction or the extent of it.

33. In the ordinary course, before the exceptional step of setting down an issue in a defamation claim for preliminary hearing on a point of law, the pleadings ought to be closed or there must be a concurrence on the point between the parties. O. 25 r. 1 and O. 34 r. 1 require as much. It is certainly arguable, however that O. 34 r. 2 permits a court to make an order for a preliminary trial on a point of law as it gives, apparently, such a discretion to the court (see the underlined part of the rule quoted above). If it does provide such a discretion it could also arise at any point, even, such as here, where the pleadings were not closed in the High Court, but where the issues between the parties were clear. It is not necessary to make a final decision on whether Or. 34 r. 2 provides such a jurisdiction for the reasons set out below but, if such jurisdiction did exist, then in defamation proceedings it would only be in exceptional cases that such a jurisdiction would be exercised given the division of functions between judge and jury. It would have to be reserved to a case where the facts were agreed, or there was no real dispute as to the facts. As will be pointed out below, this is not such a case.

34. In light of the decision that is ultimately made here, it is also not necessary to deal with the question of whether the High Court (and this Court on appeal) may make such an order for preliminary trial of an issue pursuant to the inherent jurisdiction of the court save to say that the *dicta* of MacMenamin J. at para 28 of the judgment suggests that on hearing a motion as to whether the case is bound to fail the court may have such a jurisdiction. In a defamation case, given the division of functions between judge and jury, it is undoubtedly the case that only in the most exceptional cases could such an order be made pursuant to the inherent jurisdiction. This was not such a case as the facts are not agreed and that is a crucial element when deciding whether the publication

in question was a fair and accurate report of proceedings publicly determined by a court in this jurisdiction.

35. Of most importance here is that there is one case in which a defence has been delivered and therefore, it is appropriate to hear and determine the substantive issue arising on that appeal, namely whether a preliminary point of law was properly directed in the circumstances of this case. As will be seen, I determine that the High Court judge erred in law on the substantive issue of directing a preliminary hearing in this case. In those circumstances, even if defences had been delivered by the defendants in the other three actions, the same reasoning would apply to those cases and the appeals would therefore also have been allowed.

Whether the trial judge erred in directing a preliminary hearing in this case?

36. Counsel for the newspapers accepted that if there was a real dispute about whether the articles were fair and accurate it was not permissible to have a trial of a preliminary issue on a point of law. It was submitted by him, however, that there was no real dispute in the present situation; any dispute was manufactured and that ultimately a judge would have to make a decision on whether the articles were a fair and accurate report of the District Court proceedings. He submitted that in all the proceedings to date, the appellant had never averred in any affidavit that the reports of the proceedings were other than fair and accurate. Counsel emphasised that the appellant's claim was consistently that the articles defamed him as they said he was convicted in the District Court when the Order of that court said he was not convicted.

37. MacMenamin J. observed that the law on defamation was legally quite complex and that the appellant had chosen to represent himself as is his entitlement. He noted that the legal issues in the case had an interest to those beyond the parties in this case, referencing the media generally and the public. He wondered whether the interests of

justice and the public interest would be best served when a litigant in person is asked to argue an important and complex legal issue which may raise constitutional and European Convention on Human Rights issues. Neither the Supreme Court, nor I in this judgment, highlight this to in any way denigrate the appellant and his obvious abilities. I refer to it because, not only is the substantive resolution of the issues particularly complex, but so also is the issue of whether that resolution ought to take place before the trial (in a preliminary hearing) or at the trial itself.

38. The appellant's position has the benefit of being clear. He has submitted that he has been defamed; the articles are clearly defamatory on their face and these publications were also driven by malice. He submitted that he has an entitlement to a jury and claimed that this is an attempt to deny him a right to a fair trial. He insists that the Supreme Court had acknowledged that the article was not fair and not accurate. He relies on cases such as *Lennon v HSE* [2015] 1 IR 92 and *X (Teacher) v HSE* (Unreported, High Court, McCarthy J, 2015) from which latter case he relied upon the *dictum* that there is *"simply no jurisdiction to dilute the plaintiff's right to a jury trial".*

39. Some of the matters submitted by the appellant are incorrect factually. Contrary to what he submits about the findings of the Supreme Court, the Supreme Court expressly stated that it was not deciding any of the issues before them. It merely held that certain matters were at least arguable. The appellant's insistence that the articles are clearly defamatory because the District Court order records that the charge against him was dismissed pursuant to s. 1(1)(i) of the Probation of Offenders Act, 1907, unfortunately fails to engage with the legal issue that the newspapers have flagged throughout the proceedings as their line of defence; that these were fair and accurate reports of what was said in court and therefore they are privileged. Who gets to decide if they are fair and accurate reports, and at what stage of the proceedings that can be decided, is a

central feature of this appeal but it is one that the appellant has not really engaged with other than at the level of repetitive certainties about his views on the rightness of his case. I can only repeat that neither this Court nor the Supreme Court are expressing views on whether there is a provable defamation or whether the report was fair and accurate and therefore attracted privilege (and if so, what type of privilege it attracts). The concern of the Supreme Court was the appeal of the order striking out the proceedings as bound to fail. This Court's concern is an appeal against a decision directing a preliminary hearing *"as to whether the publication upon which the Plaintiff sues is protected by privilege".*

40. Counsel for the newspapers submitted that the issue of whether the report is fair and accurate ought to be dealt with by a judge at a preliminary stage because – he says – the facts are all agreed. He submitted that in the entire set of proceedings the appellant had never denied that what was stated in the article was actually said in the District Court. The question of whether the articles were fair and accurate was, on the facts of these cases, a matter for the judge to decide as a matter of law. If the report is found to be fair and accurate, a separate point would then arise as to whether the privilege was an absolute one and thus mean that there could be no defamation, or if it was qualified privilege, in which situation only malice could defeat the privilege. The issue of malice would then be an issue for the jury. It is the newspapers' intention to argue that the articles are a fair and accurate report of court proceedings and in those circumstances, they attract absolute privilege.

Standard of Review

41. Counsel for the newspapers argued that the standard of review that ought to be applied was that which applied to orders made in the context of case management. In particular counsel relied upon the decision of this Court in *Thomas v Commissioner of An Garda*

Siochána & Others [2016] IECA 203 in which Mahon J. (Irvine and Peart JJ. concurring) observed at para 31 that:

> *"A direction to try a particular matter by way of the preliminary issue procedure is an order made in the ordinary course of the management of litigation. While an appellate court retains the jurisdiction to review such directions and orders, it is, in general terms, slow to do so, and will only do so in the face of compelling reasons."*

42. The Court of Appeal in *Thomas v Commissioner of An Garda Síochána* also acknowledged that there was judicial reluctance to direct the trial of a preliminary issue in circumstances where, because of the complexity of the issue or the extent of evidence necessary to resolve it or for some other reasons, there is a risk that little time will be saved in the process. In the judgment, a factor in upholding the trial judge's decision to order a preliminary trial was the trial judge's familiarity with the case, having presided over a related trial which had run for a considerable time before him without a jury.

43. On the other hand, this Court ought not to overlook that the Supreme Court, in a decision handed down subsequent to *Thomas*, namely *O'Sullivan v Ireland* [2019] IESC 33, has observed that there are dangers in departing from a unitary trial principle in particular where the Statute of Limitations issue may be difficult to decide on limited evidence. As Finlay Geoghegan J stated: *"Any decision to try such a limited issue in advance of a full hearing requires very careful consideration to decide if it is in the interests of justice."*

44. Apart from discretionary factors, it seems to me that there is an important legal issue that arises at any point where it is requested that the determination of a preliminary issue be ordered as to whether a publication can be said to be fair and accurate within

the meaning of s. 18 of the 1961 Act. If, as a matter of law, the issue is to be decided by a jury only, then there was an error in principle by the trial judge; it would not be an order which was reasonably open to him to make. Moreover, the judgment of the High Court does not address the central issue of who gets to make the decision as to whether the publication was fair and accurate. This Court was not provided with the DAR of the hearing of the motion before the High Court, but the *ex tempore* decision focuses on whether the Supreme Court decision permitted the newspapers' 2010 motion to be supplemented so as to seek a preliminary hearing on these issues. It was the trial judge's view that he was *"giving effect to the order and judgment of the Supreme Court"* in making an order in the terms set out in terms of paragraph 2 of the notice of motion. It seems unfortunate therefore that the question of whether in this case there should be a preliminary hearing was not one actually addressed by the trial judge. It appears that the real issue may have been overlooked by reason of the focus of the submissions on whether there was any entitlement for the newspapers to *"remake"* their motions.

45. At the hearing before this Court, counsel for the newspapers did not contend for the position that the Supreme Court had directed a preliminary trial, although he submitted that considerable weight ought to be given to the views expressed therein. The written submissions, having referred to various *dicta* from the judgment of the Supreme Court, state that *"…the Supreme Court has said that this is a legal issue (not a matter of evidence) and has directed that it be determined by the High Court in accordance with law. It obviously must follow that the Supreme Court contemplated that this would be determined by <u>a Judge of the High Court</u> (emphasis in original)".* Before this Court however, it was accepted that there was no binding direction from the Supreme Court as to the mode of proceeding. In those circumstances, the trial judge's findings based upon an interpretation of the Supreme Court decision that is not being stood over, is not

one to which this Court must give the type of deference that it usually does to case management decisions.

46. For all these reasons, this Court must assess whether this is truly a case in which a preliminary issue ought to have been directed.

Fair and Accurate Reports

47. In light of counsel's submission that there was no real factual dispute between the parties as to whether the reporting accurately reflected what had been said in court and therefore that the question of whether it was fair and accurate was a matter of law to be tried by a judge, two issues arise. The first is whether there truly is no factual dispute between the parties and the second is whether it is appropriate, in this case, for a judge sitting alone to make that decision.

48. During the oral hearing, the Court asked counsel for the newspapers to address paragraph 13.46 of *Gatley on Libel and Slander* (10th Ed, 2004, Sweet & Maxwell), in which it is stated: *"Whether the report is a fair and accurate report is a question of fact for the jury, provided always there is some evidence of unfairness or inaccuracy to go to the jury. This is a question for the judge to determine."* Counsel agreed that in general this was a jury issue and that it was the function of the jury in a jury trial to determine areas of fact. This was, he submitted, an unusual case where there was no dispute and the matter would not be left to the jury to decide. Thus, counsel did not take issue with the legal position as outlined in *Gatley*, rather his argument was directed to how it was to be applied in this case where, he submitted, there was no factual dispute about whether the report, factually, reflected what was said in court. In those circumstances, he submitted, the issue of whether it was fair and accurate was to be determined by a judge.

49. A more recent version of *Gatley* (12th Edition) at Chapter 34 provides even greater clarity to the functions of judge and jury where at para 34.21 it says:

> *"If the existence of privilege, either at common law or by virtue of statute, is dependent on the words being a fair and accurate report, the fairness and accuracy of the report containing the words is a question of fact for the jury. The judge can withdraw the question from the jury if no reasonably minded jury properly directed could have come to any other conclusion than that the report was fair and accurate. …"* (Emphasis added)

50. Even at a general level, it is clear that a preliminary trial *"will only be ordered in limited circumstances where a discrete and precise issue or issues arise in proceedings that can be conveniently tried by reference to agreed facts and the determination of which may dispose or substantially dispose of the entire action or otherwise be likely to lead to a substantial saving in time and costs."* (para 14.15, *Delany and McGrath on Civil Procedure*, 4th Edition, 2018, Round Hall).

51. It is necessary to consider whether the parties are in agreement that the contents of the published article reflect what was said in the District Court. I have referred above to the pleadings in the cases and to the affidavit sworn by Mr. Tim Healy, the reporter, who exhibited his notes of what was said in court. Those notes purport to record what was said in the District Court Judge's judgment on the case. Each newspaper article, as is usual, does not contain the entirety of the court report but three of those articles record that the judge said he was satisfied there was an assault *"but it was of a very technical nature."* The report in The Star newspapers records that the *"assault, a push, was of a minor nature"*. The notes taken by Mr. Healy record that the judge said he was satisfied to convict the appellant of a very technical and minor assault. The judge then referred to the fact that the parties were neighbours and then, according to the

notes, the judge said: *"In the circumstances I will apply the Probation of Offenders Act"*. The notes then go on to record the judge as having said that *"The Probation of Offenders Act is a conviction but it does not carry any penalty"*.

52. The appellant did not swear any affidavit in the original motions of the newspapers. His wife swore an affidavit, but this related to matters pertaining to the appellant's medical concerns. The appellant swore a number of affidavits in response to the new motions. Subject to further discussion in relation to his affidavit of 20 October 2022, in those affidavits, although the appellant has repeated his assertions that the articles were clearly defamatory and repeats he was not convicted, he does not appear to have directly contradicted that the words attributed to the District Court Judge were not said. For example, in his replying affidavit of 12 March 2021, contained in the books of pleadings/evidence, the appellant states with reference to the Irish Independent proceedings that the fifth defendant *"has admitted in correspondence that the article contained a technical error in stating that [the appellant] was convicted with assault."* The appellant goes on to say that this was not an error but deliberate malicious statements by the defendants. He says:

> *"The difference between being convicted of an assault and not convicted of assault is not a technical one. The difference would not escape the notice of a journalist present in court, nor its serious implications for a person whose professional standing was known to the reporter and published in the article along with the home address of the person concerned. Nor would it escape the notice of an editor".*

The affidavit goes on to refer to the extraneous matters which he says have nothing to do with the case of assault, the subject matter of the article. The appellant says that those extraneous matters aggravated things because they said he was convicted of

assaulting another neighbour, *"which is also not true".* This latter reference was to the first line of the Irish Times article which stated: *"A man who last year took a noise nuisance action against his neighbour, a Circuit Court Judge, was yesterday convicted of assaulting another neighbour."* Similar wording appears in the other three articles. It is the appellant's case that this was defamatory because it said that he had been convicted of another, i.e. a second, assault of a neighbour.

53. The appellant swore an affidavit of 20 October 2022 which he states was sworn *"in response to the conduct of proceedings before the High Court of Ireland on 25 November 2021"*. In that affidavit, he says that on the 25 November 2021 counsel for the newspapers *"misled the court when he said that in applying the Probation Act, 1907 – Section 1(1)(i) the District judge said it was a criminal conviction."* The affidavit then said that counsel *"did not advise the court that one of his clients admitted in writing that it was an error to print that I was convicted."* This affidavit is certainly open to the interpretation that the appellant was stating that it was not said in court by the District Court judge that he had been convicted. In his concluding submissions at the oral hearing of the appeal, the appellant submitted that his issue was with the entire report and not just with the word *"conviction"*. He referred to the photograph published with one of the articles, the reference to the assault on *"another neighbour"* and that there were many matters in the note of Mr. Healy that were left out of the article. His final submission to the Court was that *"…the Judge did not say that he was applying the Probation Act but still he was imposing a conviction."*

54. It is somewhat unsatisfactory that the affidavits filed by the appellant were not as clear as his final submission to the Court and it is important to state that a submission is not evidence. Overall, however, what was stated in the affidavit of 20 October 2022 – the admission in evidence of which was not contested by the newspapers – puts in issue the

accuracy of the report of the court proceedings. In those circumstances, the issues between the parties as presented before this Court are entirely different to those which presented before the Supreme Court. There appears to be a factual dispute on the substance of what was said by the District Court. That compels the conclusion that this is not a matter in which there ought to be a preliminary hearing.

55. It is appropriate, I believe, to add that if it transpires that there is no real factual dispute at the trial that the comments attributed to the District Court judge were said by him, it would be a matter for the trial judge to determine if there was some evidence of unfairness or inaccuracy in the newspaper articles so that the matter could go to the jury. That, it seems to me, is a relatively low threshold for a plaintiff to reach in a defamation case. Providing there is *some* evidence of unfairness or inaccuracy in the report of the court proceedings, a plaintiff appears to have a right to have a jury determine the issue of whether the report is fair and accurate. In my view, it is appropriate that the trial judge, who will have heard the evidence, would be the one who will make a decision whether that threshold has been reached. Given that the appellant's case has always been that *"extraneous events"* (see para 5 under the heading Particulars of Personal Claim in his statements of claim) were interlinked with other matters, the issue of whether these matters were unfair or inaccurate was always a live one. This is not to say that a judge ought to find that there is enough to go to a jury, it is merely to point out that this is not a straightforward claim where the report in the newspaper reflected word for word, and only word for word, exactly what was said in the courtroom on a given day. Significant consideration will have to be given to the context of the articles and in this case, it seems to me that the appropriate way is to have all the evidence heard in a single unitary trial at which the judge can make the appropriate decisions in accordance with law as to whether the reports were fair and

accurate and whether that can appropriately be left to the jury to determine as a matter of fact.

Qualified or Absolute privilege

56. Counsel for the newspapers submitted that even if this Court concluded that the issue of whether the report was fair and accurate was wrongly sent to be considered at the preliminary hearing, the issue of the nature of the privilege which might attach to a fair and accurate report was a proper one to be determined at a preliminary trial. It was, it was said, appropriate to do so as that would have the potential to reduce the amount of evidence to be heard at a jury trial, if, for example, the report was held to attract absolute privilege. Then, it was submitted, evidence purporting to relate to a claim of malice would not be relevant to the trial and therefore time and costs would be saved by having the preliminary ruling.

57. Section 18 of the Defamation Act, 1961, provided that a *"fair and accurate report"* of proceedings publicly heard before any court established by law and exercising judicial authority within the State or in Northern Ireland should, if published or broadcast contemporaneously with such proceedings, be privileged. MacMenamin J. observed that, as the leading textbooks in the area point out, the section does not say whether this privilege is absolute or qualified in nature. At common law, it appears the privilege was qualified, while s.17 (2) of the Defamation Act 2009 provides for an absolute legal privilege.

58. For reasons that lawyers will readily understand, there is no doubt but that the issue of whether s. 18 provides for a qualified or an absolute legal privilege is one that will have to be decided by a judge. But at what stage in the proceedings must that be determined? Pre-trial or during the trial, and if during the trial, what stage during the trial? Most importantly, at what stage ought it to be determined in this particular case?

59. It is important to explain, in particular for this appellant who is not a lawyer, why it can be said that a judge will decide whether the privilege is a qualified or an absolute one. The difference between decisions on issues of a legal nature and decisions of a factual nature are crucial to that understanding. Whether in a criminal trial or in a civil trial, juries decide questions of fact and the judge decides questions of law. That is an important distinction that is at the core of our legal system. A judge, who by law is required to have legal qualifications, is entrusted with the interpretation of law and making decisions as to what law is to be applied when considering the facts of a case. In cases where the law does not permit (or require) the case to be heard with a jury, the judge will also decide facts of the case. In jury trials, it is the jury that decide the facts. Indeed, judges may often charge a jury, i.e. give directions to a jury, that *"they (the jury) must take the law from the judge, but the facts are entirely a matter for them (the jury) to make decisions upon".* Not only is it the position that judges have specialist knowledge and experience when it comes to legal matters, it is also clear that for a jury to function properly there must be one source of agreed law upon which they (the jury) will operate. That is the law as interpreted by the trial judge. The jury has its own important role in the proceedings; that is to decide the facts. To that end they can be described as *"judges of fact"* but they cannot ever be described as *"judges of law"* because that is not within the parameters of their role.

60. The cases that the appellant has relied upon, for example *Lennon v HSE* and *McGee v MGN Ltd* [2003] 11 JIC 1402 do not in any way detract from that essential feature of our legal system which divides the role of the judge and the role of the jury as described. For example, in *McGee* the issue was whether the case should be dismissed as an abuse of process where it was argued that given the plaintiff's history of serious convictions including mass murder he could not be defamed as he had no reputation that would be

lowered in the eyes of right-thinking members of society. The circumstances of the case, however, involved consideration of the historic Belfast/Good Friday Agreement and whether the openness to reconciliation and tolerance displayed by society might affect society's opinion of the reputation of someone in the position of the plaintiff. McKechnie J. was referring to society's opinion being capable of change when he said *"given this crucial role which a jury plays on an issue such as this in a libel action"*, he could not conclude that right thinking members of society generally could not hold in the plaintiff's favour that the article was defamatory. Nonetheless McKechnie J. went on to say that this conclusion had no implication for what a trial judge might do in the event of an application at the conclusion of the evidence that the case be withdrawn from the jury. Thus, the issue of whether as a matter of law there was enough to go to a jury was recognised as a matter still within the hands of the judge.

61. *Lennon v HSE* involved an appeal against a decision to direct that the appellant's separate judicial review and defamation proceedings be listed together for hearing before a judge sitting without a jury. The decision of the Court of Appeal was to confirm that the right to a jury at common law had been preserved by s. 48 of the Supreme Court of Judicature Act, 1877 and had not been deleted by subsequent legislation. As this was a legal right, the High Court had no jurisdiction to abrogate the right to jury trial in a defamation action.

62. Nothing that is said in *Lennon v HSE* affects the division of functions between judge and jury. A right to trial by jury necessarily requires a trial in accordance with law. A trial in accordance with law requires that the judge will rule on contested issues of law (admissibility of evidence and who bears the burden of proof in respect of different issues are two such examples) and that a jury be properly directed on the law that applies to the factual issues that they are required to determine.

63. Unfortunately, the specific issue of whether the nature of the privilege attached to these publications (if fair and accurate) ought to be determined by a judge sitting alone was not fully argued before the High Court. Indeed, it does not appear to have ever been contemplated by the newspapers that such an issue that might, *on its own* (separate from the fair and accurate issue), require to be decided at a preliminary hearing. The affidavit of David Phelan, solicitor of Hayes Solicitors sworn on behalf of the Irish Times grounding the fresh motion, is indicative of the approach of all the newspapers. The affidavit gave a contextual and chronological background to the proceedings including significant reference to the contents of the Supreme Court judgment. In referencing the Supreme Court judgment Mr. Phelan avers at paras 13 and 14 of his affidavit:

> *"In the course of its Judgment in the Irish Times proceedings (which reasoning was then applied by the Supreme Court to the appeal in respect of the three related sets of proceedings), MacMenamin J. (at paragraph 39) identifies a number of questions which he says are 'matters of law' arising in relation to the Defendants' defence including the extent of the protection afforded by Section 18 of the Defamation Act 1961 or the common law. Mr. Justice MacMenamin notes, in paragraph 42 of his Judgment, that:*
>
> > *'The legal issues in question are of some significance, and concern both the rights of these parties, but also, potentially, concern the broader rights of newspapers and other media to publish material contemporaneously or otherwise, with court proceedings. Additionally, there is the issue of the extent of the protection in <u>this</u> article, where the question of what was said in court, and the extent of the privilege in that situation, also may arise. The <u>parties</u> are entitled to have those issues determined by a court of first instance.' (emphasis in original)*

In light of the Supreme Court's observations (and arising from the generality of its Judgment in the Irish Times proceedings), the Defendants believe that it would be appropriate for the High Court to direct the trial of a preliminary issue, namely whether the publication in respect of which the Plaintiff sues, is protected by the fair and accurate reporting privilege in Section 18 of the Defamation Act, 1961 and/or the common law. I say and believe that this question raises quintessentially legal issues (as the Supreme Court has obviously determined) and is most suitable for determination by way of trial of a preliminary issue."

64. Mr. Phelan references the defence of the Irish Times, which pleads that absolute privilege applied to the publication but in the alternative qualified privilege applied. Later in his affidavit, under the heading *"The Defendants contend that the Irish Times article on which the Plaintiff sues is privileged",* having referred to Mr. Healy's affidavit in the original motion, Mr. Phelan averred as follows (at paras 36, 37 and 38):

"I say and believe that the article in the Irish Times constitutes a contemporaneous, fair and accurate report of proceedings publicly determined by a Court in this jurisdiction. I thus say and believe that the article is plainly privileged. I say and believe that the Defendants' contention that privilege applies, is ultimately a matter to be developed by way of legal submissions. However, I say and believe that in the circumstances the protection afforded by section 18 of the Defamation Act 1961 clearly applies. Further or alternatively I say and believe that the publication is clearly protected by privilege at common law.

I respectfully say and believe that there is very considerable merit and logic in fixing the trial of a preliminary issue, so that this issue can be determined. Were

that preliminary issue to be determined in favour of the Defendants, that would be dispositive of these proceedings, and would lead to a significant saving in Court time and in the costs of these proceedings. I further say and believe that the issue sought by the defendants to be tried by way of preliminary issue is a question of law which is singularly suitable and appropriate to have determined by way of preliminary issue.

Whilst also perhaps ultimately a matter for legal submission, I say and believe that trying the said issue as a preliminary issue would be a logical, appropriate and sensible course, arising from the Judgment of the Supreme Court on 30 July 2019 in the Irish Times proceedings."

65. From reading those paragraphs, the precise nature of the order that the Irish Times was seeking is not readily apparent. The wording of the paragraphs suggests they are seeking a general order as to whether the publication at issue is protected by the fair and accurate reporting privilege under s. 18 of the 1961 Act. Despite the references to the Supreme Court judgment, nowhere does the affidavit spell out that what is required to be determined in a preliminary hearing is whether, as a matter of law, the privilege to be applied is a qualified or an absolute one. The quote from para 42 of the judgment of MacMenamin J. certainly refers to the extent of privilege but does so in respect of *this* article, with a special emphasis on the word *this*. Paragraphs 36, 37 and 38, which are the final substantive paragraphs in the affidavit, expressly state that were the preliminary issue to be determined in favour of the defendant that this *"would be dispositive of the proceedings."*

66. That latter averment was directed towards the situation where the judge, on the preliminary hearing, would hold that it was a fair and accurate report and was entitled to absolute privilege. Of course, if the judge held that as a matter of law the privilege

was not absolute, then in circumstances where malice was pleaded the case would have had to be heard by a jury. In light of what I have said earlier about the determination of whether the article was a fair and accurate report of proceedings being a matter for the jury provided there is some evidence of unfairness or inaccuracy to go to the jury, it is clear that the decision on the preliminary hearing, even if the privilege is held to be absolute, cannot be determinative of these proceedings.

67. At the oral hearing of the appeal, counsel for the newspapers referred to the preliminary hearing being of benefit where it could result in the exclusion of irrelevant evidence directed towards the proof of malice at the trial. It is not entirely clear as to what particular evidence might be excluded from the trial in those circumstances. The affidavit of Mr. Phelan filed on behalf of the newspapers never engaged with that aspect; as set out above his view was that if the issue was determined in their favour the entire proceedings would be at an end. That would appear to be a fatal flaw in this application as it was incumbent on the newspapers to put before the High Court information as to why it was appropriate that a preliminary hearing of the issue be directed.

68. Even if one accepts a general submission that if the issue of malice is taken out of proceedings those proceedings will be shorter and less costly, that general submission may not yield such an outcome in this particular case. The appellant has pleaded his case in his statement of claim by making frequent claims of malice. These claims are made in circumstances which appear to relate not just to the question of privilege or whether qualified privilege can be defeated. Instead, it is at least arguable that they relate to the essence of the publication and therefore to the question of whether the report was *fair and accurate*. His *"Particulars of Personal Claims"* pleads on a number of occasions that this case concerns the publication of *"maliciously defamatory false*

statements". He says that the defendants' actions were actuated by malice. Another example to which I have already referred, concerns what the appellant calls the *"extraneous matters"* in para 5 of the Particulars of Personal Claim. Any decision on whether there were costs savings or shortening of court time achievable by having a decision in advance would have had to have addressed the issue of how precisely, in the circumstances of *this* case, the issue of malice could be kept out of the evidence where a significant part of the appellant's case is that the matters extraneous to the report of the District Court proceedings were published with malice and with the intent to harm him. In so far as a jury may need to understand the context of the reference to these extraneous matters, it may well be that certain evidence of earlier events is admissible in the circumstances of this case. That it seems to me is a matter for the trial judge and not one that ought to be examined in advance of the trial.

69. I do not consider therefore that, in the circumstances of this case, a sufficient evidential basis has been established to say that there would be any saving of court time and/or costs. For the avoidance of any doubt however, I wish to make it clear that the trial judge would be entitled to decide, and could decide at the trial of these matters, that any particular piece of evidence directed towards proving malice is inadmissible for reasons such as relevance. If the privilege were held to be an absolute one, it could well be that the judge would be entitled to rule certain evidence relating to claims of malice as inadmissible due to irrelevance.

70. Another issue that was not addressed in the High Court nor on appeal to this Court is whether the question as to the nature of the privilege (either qualified or absolute) attracted by the report, if fair and accurate, could be determined by the trial judge at an early stage of the trial. Immediately after the jury being sworn in may well be the appropriate time to decide that issue. In this particular case, it is perhaps possible that

in the context of case management in the High Court, the trial judge could direct that written submissions on that issue be furnished prior to the commencement of the trial. Oral submissions on the issue would not necessarily be too long and the issue could be determined relatively quickly. The trial could then proceed. However, these are case management and trial management issues for the High Court judge.

71. In the circumstances, the appeal in the Irish Times case must be allowed. It is also clear that the appeals in the three remaining sets of proceedings must also be allowed because a) no defences had been delivered and the newspapers could not rely upon O. 25 rule 1, b) even if it were possible to make an order for preliminary trial under O. 32 r. 2 or the inherent jurisdiction of the court in circumstances where no defence had been delivered, the material facts as to whether the reports were *fair and accurate* were not agreed and c) there was no free standing issue of law that ought properly be determined at a preliminary hearing.

Conclusion

72. There was no procedural irregularity in the newspapers' reformulation of their original motions into the fresh motions in which they sought preliminary hearings of whether the publication upon which the appellant sues is protected by privilege under s. 18 of the Defamation Act 1961 and/or at common law.

73. The Irish Times were entitled to seek an order for the determination of a preliminary issue pursuant to O. 25 r. 1 in circumstances where they had filed a defence. Such an entitlement does not apply to the defendants in the other three proceedings. While it is arguable that there is a jurisdiction under O. 34 r. 2 or under the inherent jurisdiction in the High Court to order a trial of a preliminary issue where one party objects and/or pleadings have not closed, it is not necessary to reach a final conclusion on the availability of such a jurisdiction. This is because such a jurisdiction could only arise

on an exceptional basis in defamation proceedings where the facts at issue are agreed and a clear free standing issue of law suitable for preliminary hearing arises. That is not the position in any of these cases.

74. The evidence reveals that there is a factual dispute relating to whether the contents of each of the publications are a factually accurate reflection of what was said by the District Court judge in the courtroom. There are also issues about the addition of extraneous matters in these articles. The decision as to whether a publication is a fair and accurate report of court proceedings is a matter for a jury *provided* that there is at least *some* evidence to show that the publication is unfair and inaccurate. In all the circumstances, the issue as to whether the articles are fair and accurate is properly left in the first instance to the trial judge.

75. The legal issue as to whether the privilege in s. 18 of the 1961 Act is qualified or absolute is a matter of law which must be decided by a judge alone. This does not interfere with the right to trial by jury as the jury does not make decisions as to the law but makes decisions as to the facts. In the particular circumstances of these cases, the evidence before the court does not demonstrate how there would be a saving of time or costs by having this matter heard as a preliminary issue.

Costs

76. As the appellant has been entirely successful in his appeals, it appears he is presumptively entitled, as a litigant in person, to his reasonable outlay and out of pocket expenses. If the newspapers wish to contend for a different order they may file written submissions no longer than 1,000 words as to why that is so within a period of 14 days after this judgment is issued. The appellant will then have a further 14 days to make his submissions. If no submissions are filed, the order will be drawn up in the terms set out.

As this judgment is being delivered electronically my colleagues Haughton and Allen JJ have authorised me to record their agreement with the judgment and the orders proposed.