AN CHÚIRT UACHTARACH

THE SUPREME COURT

Record No: S:AP:IE:2021:000056

[2022] IESC 13

MacMenamin J.
Dunne J.
Baker J.
Woulfe J.
Hogan J.

BETWEEN/

PADRAIG HIGGINS

APPELLANT

and

THE IRISH AVIATION AUTHORITY

RESPONDENT

JUDGMENT of Mr. Justice Gerard Hogan delivered on the 7th day of March 2022

Introduction

1. Although for reasons which I will presently set out I find myself unable to accept either key aspects of the reasoning or many of the conclusions of the majority of my

colleagues, I nonetheless gratefully adopt the summary of the facts which MacMenamin J has just set out so comprehensively in his judgment for the majority. In these circumstances I can immediately proceed to consider the significant legal issues which arise in this appeal from the judgment of Binchy J for the Court of Appeal. At its heart this appeal raises important questions regarding the role of appellate courts in respect of jury awards, the extent to which it falls to the judiciary to ensure that there is some consistency and proportionality as between jury awards per se and the circumstances in which aggravated damages may be awarded by a jury to a plaintiff.

2. As MacMenamin J has noted, the jury in the present case awarded €300,000 in general damages to the plaintiff/appellant, Captain Higgins, in respect of a series of emails sent by members of the Irish Aviation Authority ("the Authority") to their UK counterparts, the Civil Aviation Authority ("the CAA"). The jury awarded a further sum of €130,000 in respect of aggravated damages. This figure was reduced by 10% to reflect the offer of amends which the Authority had made. In a comprehensive judgment delivered by Binchy J the Court of Appeal found that these sums were excessive: see [2020] IECA 157. The general damages were reduced to a figure of €70,000 and the aggravated damages to the sum of €15,000. The 10% reduction was, however, left unchanged, so that the reduced amount of the award was €76,500.

3. The email correspondence itself arose from the landing of two microlight aircraft in Wales in very challenging weather conditions in April 2013. The two microlights were being flown from Italy to Ireland and Captain Higgins was piloting one of the planes. Under the guidance of Captain Higgins, the two aircraft were forced to carry out precautionary landings by reason of these adverse weather conditions. Both aircraft managed to land safely (albeit with some minor damage to the aircraft which Captain Higgins was piloting). It is not in dispute but that Captain Higgins showed great

professionalism, skill and leadership in ensuring that the two planes landed safely without serious injury (or worse) on what amounted to makeshift landing spots at a building site owned by the University of Swansea. Captain Higgins subsequently arranged for the aircraft to be transported back to Ireland by truck.

4. While at most only five members of the CAA were circulated with the emails in question (and, in the case of one particular email, only one other person), it is not disputed but that these emails seriously called into question the plaintiff's capacity and suitability as an airline pilot, including, for example, whether these flights lawfully complied with relevant regulatory requirements and whether his rating as a microlight pilot would have enabled him to fly in either Italian or UK airspace. The emails ultimately raised questions regarding aviation safety, since at least on one view they insinuated that Captain Higgins had adopted a casual or cavalier attitude to aviation safety.

5. If the allegations contained in these emails were correct, there is no doubt but that they would have had life changing consequences for Captain Higgins, resulting almost certainly in not only the loss of a livelihood, but his professional reputation, and more generally, a passion and love for flying which has defined his adult life. Had, indeed, these allegations been sustained, Captain Higgins might well have faced criminal charges in the UK and the possible threat of a custodial sentence was a real one. Airline safety is not, of course, a purely personal matter for the pilot. The lives of passengers and crew depend on the professionalism of the pilot and an allegation of casualness directed at an airline pilot is an intrinsically serious one.

6. The Authority has subsequently apologised for these emails which it accepts were defamatory. To this I would personally add that it is plain that Captain Higgins is an airline pilot of exceptional ability, courage and dedication. There is no question at all

but that he deserves to be compensated – and compensated handsomely – for the profound worry and upset that these emails have caused him. The unpleasantness of this episode might well have destroyed a lesser person, although it is important to stress that this, fortunately, did not occur. It is also important to stress that the events which Captain Higgins feared might at once stage come to pass – such as a loss of his pilot's licence or his position as a senior pilot with Aer Lingus – never materialised.

7. The essential question, however, is whether Captain Higgins deserves to be compensated at the level measured by the jury, namely, €300,000 general damages, plus €130,000 for aggravated damages, together with an overall reduction of that award by 10% to reflect the offer of amends? Or should these figures be reduced in the manner indicated by Binchy J in his judgment for the Court of Appeal to a figure of €70,000 for general damages and €15,000 for aggravated damages, together with the 10% discount?

8. The issues which confront this Court, however, raise wider questions which go well beyond the particular circumstances of Captain Higgins, involving as they do important questions regarding the operation of the Defamation Act 2009 ("the 2009 Act"), the need to ensure general consistency and proportionality in defamation awards and the role of appellate courts when reviewing jury awards of this nature. I propose to commence with an examination of the latter question.

The Role of Appellate Courts when Reviewing Jury Awards for Damages for Defamation

9. It is true that up to now perhaps the accepted wisdom was that appellate courts should be slow to interfere with jury awards of damages in defamation cases. Even in relatively recent times there have been authoritative statements from this Court to this effect which reflect the orthodox common law position. And so, for example, in *Barrett v.*

Independent Newspapers Ltd. [1986] IR 13 at 19 Finlay CJ could observe that the assessment by a jury of damages for defamation "has a very unusual and emphatic sanctity", adding that the decisions "clearly establish that appellate courts have been extremely slow to interfere with such assessments, either on the basis of excess or inadequacy". In *de Rossa v. Independent Newspapers plc* [1999] 4 IR 432 Hamilton CJ observed (at 463) that an award could only be set aside if it was so disproportionate that "no reasonable jury would have made such an award." Likewise, in her judgment in another case governed by the pre-2009 Act law, *Leech v. Independent Newspapers* [2014] IESC 79, [2015] 2 IR 214, Dunne J observed (at 265):

> "Thus it is clear that while the assessment by a jury of damages for defamation is not sacrosanct, it does carry considerable weight such that appellate courts have been slow to interfere with assessments by a jury and an appellate court should only set aside such an award if the appellate court is satisfied that the award is so disproportionate to the injury suffered and wrong done that no reasonable jury would have made the award in all the circumstances of the case."

10. For my part, however, I think that the law has moved on from this traditional common law position. I take this view for two reasons. First, it is clear from the general tenor of the 2009 Act that the Oireachtas intended that juries should have available to them greater judicial guidance and supervision in respect of the amount of damages awards. It is in this vein that s. 13(1) of the 2009 Act provides:

> "Upon the hearing of an appeal from a decision of the High Court in a defamation action, the Supreme Court may, in addition to any other order that it deems appropriate to make, substitute for any amount of damages awarded to the plaintiff by the High Court such amount *as it considers appropriate*."

11. Section 13(2) of the 2009 Act further makes it clear that the reference to "a decision of the High Court" extends to "a judgment entered pursuant to the verdict of a jury".

12. It is true that s. 96 of the Courts of Justice Act 1924 (as applied by s. 48 of the Courts (Supplemental Provisions) Act 1961) had already long provided that the Supreme Court might "in lieu of ordering a new trial, set aside the verdict, findings, and judgment appealed against and enter such judgment *as the court considers proper*" (emphasis added). These italicized words ("as the court considers proper") were evidently not regarded – rightly or wrongly – as sufficient in themselves to disturb a tradition of a long standing regarding the special sanctity which up to now has attached to jury verdicts in defamation cases, although it would also have to be acknowledged that the matter seems never directly to have been put to the test.

13. At one level this might be regarded as somewhat surprising given that in *Holohan v. Donohue* [1986] IR 45 this Court held that s. 96 of the 1924 Act was an enabling provision designed to ensure that the Supreme Court had a full range of powers available to exercise its appellate functions with the result that the section was held to enable this Court to determine the quantum of damages in a personal injuries case itself without having to remit the case to a jury in circumstances where the Court had concluded that the original jury award was excessive. (Juries remained in personal injuries actions until the coming into force of the Courts Act 1988). As Henchy J pointed out in his judgment in *Holohan*, these were powers which, incidentally, this Court would always have enjoyed by virtue of Article 66 of the Irish Free State Constitution and (post-1937) Article 34.4.3 of the Constitution and (one might equally say) post the coming into force of the Thirty-Third Amendment of the Constitution Act 2013, the present Article 34.5.3 and Article 34.5.4 of the Constitution.

14. While the decision in *Holohan* was given in the context of a jury award in a personal injuries appeal, judging at least by the language of s. 96 of the 1924 Act, it would seem to be broad enough to have permitted a similar review in respect of a damages award in a defamation case, including the power to substitute its own award of damages. Indeed, in his judgment in *McDonagh v. Sunday Newspapers Ltd*. [2017] IESC 59, [2018] 2 IR 79 O'Donnell J observed (at 110) that, in the light of *Holohan, "*the better view is that the court has always had jurisdiction and the reason that the jurisdiction was rarely exercised was because of prudential rather than jurisdictional limits." In passing one might also observe that in *MN v. SM (Damages: Costs)* [2005] IESC 17, [2005] 4 IR 461 this Court reduced a jury award in a civil action for assault arising from sustained sexual assaults and rape of a minor from €600,000 to €350,000. All of this is sufficient to show that this Court plainly enjoyed a statutory jurisdiction by reason of s. 96 of the 1924 Act to substitute its own findings as to the appropriate level of an award in appeal from a jury.

15. Yet even bearing in mind the presumption against unclear changes in the law (illustrated in the leading judgment of Henchy J in *Minister for Industry and Commerce v Hales* [1967] IR 50), I consider that the words of s. 13(1) of the 2009 Act which I have taken the liberty of highlighting ("*as it considers appropriate*") must nonetheless be taken as empowering the Supreme Court (or, as the case may be, the Court of Appeal) to substitute *its own view* of what the appropriate level of damages should be. The language of s. 13(1) of the 2009 Act is not only more specific than s. 96 of the 1924 Act, but the context of s. 13(1) is also a good deal more particular than the perfectly general words of s. 96 of the 1924 Act. In contrast to that latter section, s. 13(1) of the 2009 Act is expressly directed to the very issue at hand, namely, the power of this Court

to review damages awards made by juries in defamation cases and to that extent it goes further than s. 96 of the 1924 Act.

16. It should also be noted that prior to the enactment of the 2009 Act, the other principal post-1922 item of legislation governing the law of defamation was the Defamation Act 1961. While the 1961 Act was repealed in its entirety by s. 4 of the 2009 Act, it is also worth noting that the 1961 Act said nothing at all about the jurisdiction of the Supreme Court to review a jury award of damages. Accordingly, prior to the commencement of the 2009 Act, the relevant statutory provision governing appellate review of damages award in the High Court was s. 96 of the 1924 Act itself. Section 96, however, remains in force and there is nothing in the 2009 Act which seeks to modify, amend or repeal that particular statutory provision.

17. This Court has often acknowledged the principle that there is a presumption that all the words of a statute bear a meaning. Thus, for example, in *Cork County Council v. Whillock* [1993] 1 IR 231 O' Flaherty J said (at 237) that "a construction which would leave without effect any part of the language of the statute will normally be rejected." Egan J likewise endorsed the same principle, stating (at 241) that there was abundant authority "for the presumption that words are not to be used in a statute without a meaning and are not tautologous or superfluous" so that "effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words nor say anything in vain."

18. If this is true regarding particular statutory words, it would seem to be true *a fortiori* regarding an entirely new section. One might therefore ask: what was the statutory objective of s. 13(1) of the 2009 Act? If the Oireachtas was content with the existing law, there would, of course, have been no need to address this issue, not least given the continued existence of s. 96 of the 1924 Act. The fact, however, that it took the trouble

to address this issue via a provision as specific as s. 13(1) of the 2009 Act is, to my mind, strongly suggestive of a desire to effect legislative change.

19. It is true that in Cox and McCullough, *Defamation Law and Practice* (Dublin, 2022) the wording of s. 13 is described (at paragraph 11-231) as "symbolic." One might, however, respectfully ask in response: symbolic of what? For my part I cannot understand what the symbolism behind this provision might be unless it is itself a symbol of legislative unease with the traditional practice of judicial deference to the level of damages awarded by juries. In any event I come back to the point that standard principles of interpretation lean against any suggestion that the Oireachtas enacted a new section in vain or, if you will, as a type of symbolic surplusage.

20. For all of these reasons, therefore, I cannot interpret s. 13(1) of the 2009 Act as anything other than a direction by the Oireachtas that the pre-existing judicial practice of deference to jury awards in defamation cases should be changed.

21. This is not for a moment to suggest that any damages award made by a jury is not entitled to a great deal of respect and any appellate court reviewing that award must naturally allow that jury verdict some tolerance and latitude (a point to which I will return shortly). Yet in the wake of the enactment of s. 13(1) of the 2009 Act it can, I think, no longer be true to say that a jury verdict in respect of damages has some unusual sanctity which means that it must be treated as almost inviolable. Instead, the effect of s. 13(1) of the 2009 Act is that this Court is empowered to set aside that award and to reach its own assessment of what level of damages are appropriate.

22. Such a change in emphasis is also at least implicitly sanctioned by s. 31 of the 2009 Act. Section 31(2) states that in a defamation action brought in the High Court, "the judge shall give directions to the jury in relation to the matter of damages." Section 31(3) provides that regard shall be had to all the circumstances of the case and s. 31(4)

itemises a range of circumstances to which the High Court (including the jury) shall have regard. These provisions accordingly clearly envisage a higher degree of judicial guidance to and supervision of the jury than was the case prior to the commencement of the 2009 Act. It would be strange, for example, if the jury by their award effectively disregarded the judge's direction or clearly failed to have regard to the enumerated list of factors mentioned in s. 31(4) and yet the ensuing award was held to be beyond the boundaries of effective appellate review because of the unusual sanctity which by tradition had attached to the jury verdict.

23. One might of course say that a jury which had delivered a verdict of this nature was scarcely acting reasonably, so that in any event the jury's award would be open to appellate scrutiny. The key point, however, is that the Oireachtas clearly intended via the 2009 Act that such verdicts would in general be subjected to increased judicial scrutiny at appellate level.

24. In her judgment in *Kinsella v. Kenmare Resources plc.* [2019] IECA 54, [2019] 2 IR 750 at 816-817, Irvine J, although speaking of a pre-2009 Act jury award, made this very point in a slightly different way:

> "…the jury, like all juries in defamation proceedings which predate the 2009 Act, was asked to assess damages with little or no guidance as to how it should carry out that task. Jury members are not lawyers. They know nothing of the law of damages or the levels of awards that have been approved of by appellate courts in other defamation actions. Their unpreparedness for the task of assessing damages is to be contrasted with the knowledgeable preparedness of the members of the appellate court who will later sit to adjudicate on the reasonableness of their decision. When doing so the members of the court will, of course, call upon their own legal training and their familiarity with the law

> of damages. More importantly they will get to make their decision guided by the knowledge of all past awards of damages earlier approved of in defamation proceedings, as well as the prevailing level of damages in personal injury actions. Further, judgments made in a collegiate setting naturally benefit greatly from the pooled knowledge and expertise of the individual members of the court. Much harder is the role of the jury who, although charged with achieving the same end, namely the making of a fair and just award of damages, are expected to do so absent legal training or any of the tools made available to the professionals."

25. It is true that in the present case the jury were informed by counsel of the level of awards made in other recent defamation cases and they were invited to compare and contrast Captain Higgins' case with these other cases. This appears to have been the first time that this was ever done. The point made by Irvine J nonetheless holds true in that juries cannot be expected to have the same level of knowledge of these matters as professional judges.

26. All of this serves to reinforce the general conclusion that a key objective of s. 31 of the 2009 Act is to ensure that judges bring their own overall familiarity with the law of damages (including the level of damages in personal injury cases) to bear in any overall assessment of the jury award, even if the important role of the jury was – subject to this change – still preserved. It is implicit in all of this that the Oireachtas envisaged that the judiciary would ensure some general level of consistency in defamation awards, even if the unique and almost s*ui generis* nature of defamation serve to make the calibration of the seriousness of individual defamatory publications more difficult than in the case of personal injuries. The new powers of s. 31 of the 2009 Act accordingly

suggest that appellate courts have a duty to interfere with jury awards where it is felt that the award in question is excessive.

27. Second, as this Court has frequently observed, the general law of defamation reflects a balance of sometimes competing constitutional rights, namely, the right of free expression and opinion on the one hand (Article 40.6.1.i) and the right to a good name (Article 40.3.2) on the other. In passing, I should say that I agree with MacMenamin J inasmuch as he suggests that the law of defamation also serves the objective of securing the dignity of the individual recognised in the Preamble to the Constitution. This point had previously also been made by Henchy J in his judgment in *Garvey v. Ireland* [1981] IR 75 at 99 when he said that the commitment in Article 40.3.2 to protect the good name of every citizen should be informed by what he described as the "broad motivating and purposive considerations" of the Preamble's commitment to human dignity.

28. The ultimate duty falls, therefore, on either the Court of Appeal or this Court to ensure that these various constitutional rights are appropriately balanced in a proportionate fashion. As O'Flaherty J said in *Dawson v Irish Brokers' Association* [1998] IESC 39, "…unjustifiably large awards…deals a blow to the freedom of expression entitlement that is enshrined in the Constitution". This in turn means that any appellate review of the jury award cannot be fettered in the somewhat artificial manner in which it was at common law. One could equally say – adopting for this purpose the language of the European Court of Human Rights in *Independent Newspapers (Ireland) Ltd. v. Ireland* (App 28199/15) (2018) 66 EHRR 33 (at paragraph 104) in the context of the free expression guarantees in Article 10 ECHR – that "unpredictably" high awards in defamation cases are capable of having a chilling effect on free expression and that "they therefore require the most careful scrutiny and very strong justification." These

requirements of "most careful scrutiny" and "very strong justification" are unlikely to be satisfied where an appellate court can only intervene if it is satisfied that the award given by the jury was so excessive as to be unreasonable in the sense described in cases such as *Barrett* and *de Rossa*.

Whether the decisions in *de Rossa* and *O'Brien* should be followed

29. In expressing this view, I am of course conscious that this particular argument – couched in terms of reliance on both Article 40.6.1.i of the Constitution and Article 10 ECHR – was rejected in both *de Rossa* and *O'Brien.* It is true that, as Henchy J observed in *Hynes-O'Sullivan v. O'Driscoll* [1988] IR 436 at 450, a previous decision of the Court "should not be overruled unless the point at issue has been duly raised and adequately argued." While I agree that it is unfortunate that this issue was not squarely before the Court on this appeal, we are, perforce, nevertheless obliged to confront it.

30. While, therefore, it would have been far preferable if this specific matter was the subject of direct argument, I nonetheless feel that I cannot properly address this wider issue (which itself was squarely before the Court) without expressing a view on the correctness of this particular aspect of these decisions. Although I do so with a manifest reluctance in these circumstances, for my part, I cannot help thinking, however, that in this respect both decisions are clearly wrong in the *Mogul* sense of the term (*Mogul of Ireland v. Tipperary (NR) County Council* [1976] IR 260) and should not now be followed. In any event, this Court has long recognised (see, e.g., the comments of O'Donnell J (as he then was) in *Director of Public Prosecutions v JC* [2015] IESC 31, [2017] 1 IR 417 at 490) that the principle of *stare decisis*, while of the utmost importance, does not operate with quite the same force in constitutional matters. It is, of course, different where – as with *Mogul* – the decision concerns statutory

interpretation or even the interpretation of a common law rule because in those instances the Oireachtas is simply free to enact legislation to reverse an earlier judicial decision which is thought to be unsatisfactory.

31. To my mind, however, the decisions in *de Rossa* and *O'Brien* should not be followed so far as they concern this issue of the scope of appellate review. Quite independently of the change which I consider the s. 13 of the 2009 Act has necessarily brought about, I say this for the following reasons.

32. First, it is plain that the European Court of Human Rights in the meantime has had its say on this question in *Independent Newspapers.* That Court has concluded that appellate courts must give – and be free to give – large defamation awards the "most careful scrutiny". To that extent the analysis of the Article 10 ECHR issue by Hamilton CJ in *de Rossa* and by Keane CJ in *O'Brien* has been subsequently overtaken by events.

33. Second, our task is, of course, to ensure that the relevant constitutional provisions are, to adopt the words of O'Byrne J. in *Buckley v. Attorney General* [1950] I.R. 67 at 81, given "life and reality". Admittedly, as I pointed out in my (dissenting) judgment in *Director of Public Prosecutions v. Independent Newspapers Ltd.* [2017] IECA 333, we have not had, I think, the same respect for the constitutional protection of free speech which has been one of the great glories of the U.S. constitutional tradition since the days of Holmes and Brandeis. But the right of free speech and free expression is the life blood of the democratic, rule of law based State envisaged by Article 5 of the Constitution and this, I suggest, must inform our understanding of the extent and scope of the guarantee of the free expression of convictions and opinions in Article 40.6.1.i. All of this means that the Court of Appeal and this Court must stand prepared to supervise and review jury awards – untrammeled, if necessary, by any previous rule of judicial practice – to ensure that the necessary proportionality between the protections

of the right of good name and dignity of the individual on the one hand and free expression on the other.

34. Nor do I overlook in this context the fact that the Authority is a State body and not a media outlet. It is also true that Article 40.6.1.i may be said to envisage a privileged role for the media inasmuch as their role in holding the Government to account is specifically acknowledged and that this consideration is not present here. But the chief right protected by Article 40.6.1.i is nonetheless the right of citizens "to express freely their convictions and opinions", which right is also naturally enjoyed by public servants. This, indeed, is precisely what happened in the present case, inasmuch as the various emails sent by members of the Authority were the expression of convictions and opinions. As it happens, as the Authority has now acknowledged, these opinions were not only erroneous, but were also defamatory of Captain Higgins. But they were nonetheless expressions of opinion and, accordingly, the appropriate constitutional balance between good name and free expression must be maintained.

When should an Appellate Court be prepared to reverse a Jury Award of Damages in Defamation?

35. In her judgment in *Kinsella* Irvine J also drew attention ([2019] 2 IR 750 at 787-788) to the fact that:

> "…a party who seeks to have an award in a defamation action set aside as disproportionate, faces a more uphill battle and perhaps must reach a higher or different threshold to that which must be achieved by a party who seeks the same relief in an appeal against an award of damages in a personal injury action. In a personal injury appeal the appellate court will form its own assessment of what it considers would have been a just, fair and proportionate award of

damages. As a somewhat general rule, if its own assessment is more than 25% above or below that awarded by the High Court, it will usually substitute its own award for that of the trial judge (see judgment of McCarthy J. in *Reddy v. Bates* [1983] IR 141 at 151). However, having regard to the sanctity of the role of the jury in defamation actions and the often highly subjective nature of the injury inflicted, upset and hurt being injuries that are not easily assessed by reference to what are often described as the arid and cold pages of a transcript, it seems to me that the appellate court in a defamation action would not necessarily interfere with an award made by a jury based on a similar type of assessment."

36. It must be stressed, however, that *Kinsella* was a pre-2009 Act case and insofar as those comments were directed towards the pre-2009 Act judicial practice, one could not but agree. As it happens, elsewhere in her judgment Irvine J acknowledged that matters might change in respect of future cases by reason of s. 31 of the 2009 Act (the power of the trial judge to give directions to the jury).

37. While I find myself in respectful general agreement with these comments, for the reasons I have just given I would nonetheless go somewhat further: I consider that the overall effect of ss. 13 and 31 of the 2009 Act is to enable this Court to form its own view of the appropriate level of damages and that the special sanctity which hitherto attached as a matter of judicial practice to the jury's award of damages can no longer be justified. While fully acknowledging that the assessment of damages is more subjective and infinitely more variable in defamation as compared with personal injury cases, one clear objective of the 2009 Act was to ensure consistency and proportionality in defamation awards. It follows, therefore, that the *Reddy v. Bates* formula of up to

25% tolerance in personal injuries may well be capable of adaptation in the field of defamation awards.

38. Contrary, therefore, to what was the case prior to the 2009 Act, this Court (or, as may be, the Court of Appeal) must be prepared to intervene where it considers that the jury award is excessive in approximately the same way as it would do in the case of a personal injuries award. Again, contrary to what was the accepted practice prior to the 2009 Act, it is not necessary for this purpose to demonstrate that the jury's award was in some way manifestly unreasonable. Of course, just as with a personal injuries award made by a High Court judge, a margin – perhaps even a considerable margin – of appreciation or tolerance must be allowed in favour of the jury award. It is, after all, the body which saw and heard the witnesses and to that extent the jury members enjoy a significant advantage as compared with the judges of the Court of Appeal or the Supreme Court. There is also the further point that, as again observed by O'Donnell J in *McDonagh* (2017), the defamation and the damages are inextricably bound up with the character of the plaintiff as assessed by the jury in a way that is rarely true in the case of personal injuries: the sum properly awarded in respect of pain and suffering for a broken leg will be the same irrespective of whether the plaintiff is of good or bad character, but this is not the case for defamation.

39. I suggest, therefore, that in line with the practice in personal injuries cases, the Court should be prepared to intervene – save, perhaps, for special and unusual cases – where the jury award deviates by more than 25% from its own assessment of what the appropriate level of damages should be. This, I suggest, is the clear effect of s. 13(1) and s. 31 of the 2009 Act.

The Approximate Scale revealed by a Comparison of the Case-Law

40. If one surveys the major defamation cases over the last thirty years or so one can see that a spectrum has begun to emerge. In this context one can, I think, leave the decisions in both *de Rossa v. Independent Newspapers* and *Leech v. Independent Newspapers* to one side. The defamatory comments in *de Rossa* involved allegations of anti-Semitism, toleration of serious crime and endorsement of violent Communist oppression. *Leech* was also quite an exceptional case where the defamation was in every respect odious. Perhaps this is even too small a word to capture the enormity of the grave, sustained, repeated, deliberate and malicious nature of the defamatory publications in that case, publications which caused the plaintiff intense suffering and grief. If, however, these two exceptional cases and the exceptionally large damages awards which attended them are put to one side, then one can begin to see a pattern of cases somewhere approximately between €50,000 towards the bottom of the High Court scale and €250,000 towards the top.

41. Here it may be useful briefly to summarise the leading cases so that some general conspectus of the scale can begin to emerge. I propose to divide the cases into approximately three groups comprising, first, modest to moderate defamation, second, more serious allegations of defamatory conduct and, finally, very serious allegations of defamation. Before doing so it might be appropriate to observe that this scale is intended principally to assist in the resolution of what the appropriate award in this particular case should be. It is not intended to amount to a formal guideline, but it may be that this rather rough and ready summary of the recent case-law may possibly prove helpful (including to juries) in some later cases.

First Category of Cases: instances of modest to moderate defamation

42. One may start with *Barrett v. Independent Newspapers Ltd.* [1986] IR 13. Here the defamatory publication consisted in an account in an evening newspaper of how it was said that a Dáil Deputy had "leaned over and pulled the beard" of an unfriendly journalist following a closely contested leadership contest in the Fianna Fáil parliamentary party. In April 1985 the jury awarded the plaintiff the sum of IR£65,000 in damages which sum would be worth approximately €162,000 today. Setting aside this award as excessive, Henchy J observed that he considered that the jury might have been asked to place "this allegation into its appropriate place in the scale of defamatory remarks to which the plaintiff might have been subjected." He continued ([1986] IR 13 at 24):

> "Had they approached the matter in this way, I venture to think that having regard to the various kinds of allegations of criminal, immoral and otherwise contemptible conduct that might have been made against a politician, the allegation actually complained of would have come fairly low in the scale of damaging accusations… if £65,000 were to be held to be the appropriate damages for an accusation of a minor unpremeditated assault in a moment of exaltation, the damages proper for an accusation of some heinous and premeditated criminal conduct would be astronomically high."

43. In *Christie v. TV3 Television* [2017] IECA 128 the plaintiff was a solicitor. The defendant television company had broadcast a short clip on its evening television news which showed him walking into the Criminal Courts of Justice at a time when his client was on trial in respect of allegations of deception arising from a notorious mortgage fraud. The film clip unfortunately confused him with his client. The Court of Appeal took the view that the starting point for the award of damages was €60,000. As I explained in my judgment (at paragraphs. 36-40):

"The present case is admittedly more serious than the defamation at issue in *Barrett*. The casual viewer of the programme might well confuse Mr. Christie with Mr. Byrne. Those who knew Mr. Christie simply to see might think that he was actually Mr. Byrne. In the wake of the transmission of the newscast the potential for confusion, distress and embarrassment was admittedly considerable. It is also possible that some existing – and perhaps especially potential – clients would have been tempted to give him a wide berth in the light of the broadcast.

At the same time, there is, I think, much force to Mr. McCullough's fundamental submission, namely, that it had been (wrongly) assumed in the course of the High Court judgment that all the viewing public would confuse Mr. Christie's identity with that of Mr. Byrne. Those closest to Mr. Christie – his immediate family, his colleagues, friends and clients – would all know that this was simply not so and that the broadcast was *obviously mistaken in showing images of Mr. Christie while speaking about Mr. Byrne.*

It should also be recalled that Mr. Christie was not identified by name in the course of the broadcast and it is easy to see how errors of a different category would have made the defamation far worse. Had, for example, the broadcast stated in error that Mr. Christie was on trial for fraud offences and implied that he was a disgraced solicitor the defamation would have been infinitely more serious than what actually occurred.

None of this is to say that it was not a serious defamation, because it was. As I have already observed, the potential for confusion, distress and embarrassment was considerable and should not be minimised. It is rather to say that it was not a defamation of such a character as would merit a starting point in the region of

> €200,000 in terms of the assessment of damages. If that were indeed the starting point in a case of this kind, then, adapting the language of Henchy J. in *Barrett*, the damages in respect of a deliberate, calculated accusation of serious wrongdoing by the plaintiff in which he had been mentioned by name would be 'astronomically high.'
>
> For my part, taking account all relevant factors – a once-off nine second broadcast, the fact that the plaintiff was not named, the very limited range of viewers who might think that the news item referred to Mr. Christie, the absence of any animus towards the plaintiff, coupled with the fact that it was plainly a case of mistaken identity – I consider that these mitigate the otherwise very serious nature of the defamation. In the light of these factors, therefore, it is sufficient to state that this is not a defamation which would warrant a starting point in damages of €200,000 identified by the trial judge and that in these circumstances a starting point of €60,000 is appropriate and proportionate."

44. We can next examine the cases falling into the intermediate category of more serious allegations of defamation.

<u>Intermediate Category: more serious defamatory allegations</u>

45. The plaintiff in *McDonagh v. News Group Newspapers Ltd.*, (Unreported, Supreme Court, 23rd November 1993), was a barrister. He had been appointed by the Government to act as an observer at an inquest in Gibraltar where three members of an illegal organisation proscribed under the Offences against the State Act 1939 had been shot dead in controversial circumstances by members of the British security forces. A British popular newspaper published an article under the headline "Leftie Spies pack Gib Inquest". The article itself had further details, including the claim that "Members of Leftie groups have been given privileged seats at the inquest into the shooting of

three IRA terrorists so they can draw up bulky dossiers for their leaders." While the plaintiff was not named in terms, the article did refer to the fact that there was an Irish Government observer.

46. The jury held all of this to mean that the plaintiff was a left wing spy, a terrorist sympathizer and was lacking in integrity. Finlay CJ upheld an award of IR£90,000 (approximately €185,000 in today's monetary values), noting that the accusation was aggravated by reason of the fact that it impugned the integrity of the plaintiff in his chosen profession. The Chief Justice described this as "an extremely grave accusation of professional misconduct by the plaintiff." He continued:

> "A statement [that the plaintiff was abusing the professional function entrusted to him by his client] and in addition makes the accusation of sympathy with terrorist causes would be extraordinarily damaging to any person, irrespective of their calling or profession. I, as I have indicated, take the view that the assessment of damages made by this jury, though undoubtedly high and at the top of the permissible range, is not beyond that range in the sense that it is so incorrect in principle that having regard to the general approach of an appellate court to damages assessed by a jury for defamation it should be set aside."

47. The Chief Justice viewed the award, however, as being towards the top of the scale of a sum that might properly be awarded in respect of a defamation of this nature.

48. A case that stands comparison with *McDonagh* (1993) is that of *O'Brien v. Mirror Group* [2000] IESC 70, [2001] 1 IR 1. Here an allegation was published in a popular newspaper to the effect that the plaintiff – a prominent business man – had bribed a politician. The jury awarded the sum of IR£250,000 (which would approximate to some €490,000 in today's monetary values). While this Court agreed that this was a serious defamation, it nonetheless concluded that this figure was excessive. While the serious

nature of the libel was not disputed, Keane CJ nonetheless observed that the libel "cannot be regarded as coming within the category of the grossest and the most serious libels which have come before the courts."

49. The Chief Justice then continued ([2001] 1 IR 1 at 20-21):

> "In this context, a comparison with *De Rossa* is to some extent at least illuminating. In the latter case, the libel complained of could not have been of a more serious character, alleging, as it did, that the plaintiff supported some of the vilest activities of totalitarian regimes in the twentieth century and was personally involved in or condoned serious crime. On any view, that is a significantly more damaging and serious libel than the admittedly serious statements made concerning the plaintiff in the present case…"

50. Keane CJ then went on to compare the case with *McDonagh* (1993) where the allegation was also one of serious personal impropriety in the conduct of one's profession where the damages awarded were regarded as having been at the top of the scale, even though the plaintiff in *McDonagh* (1993) was "almost wholly unknown" outside the legal profession. By contrast, in terms of his public reputation:

> "… the plaintiff in the present case would undoubtedly enjoy a more extensive reputation with the general public than the plaintiff in *McDonagh*, but, as I have already indicated, a significantly more confined reputation than the plaintiff in *De Rossa*. As against that, the allegation concerning the plaintiff in that case was at least as serious as, if not more serious than, the allegation concerning the plaintiff in the present case."

51. In *Crofter Properties Ltd. v. Genport Ltd. (No.2)* [2005] IESC 20, [2005] 4 IR 28, an agent of the defendant had made a telephone call to police in the UK alleging (maliciously) that the plaintiff's hotel was being used as a front for money laundering

by members of an illegal organisation. In the High Court McCracken J had awarded IR£50,000 for general damages and a further IR£250,000 for exemplary damages. On appeal this Court reduced the award of exemplary damages to IR£100,000, making a total sum of IR£150,000, a sum equivalent to approximately €225,000 in today's monetary values.

52. This has some similarities with the present case in that it involved the circulation of material to a very restricted – if nonetheless very influential – group of people making serious allegations in the process. As Denham J observed ([2005] 4 IR 28 at 33):

> "…the fact that the publication was to the limited number of people is not a ground to reduce the award of general damages given the influential people to whom it was published and the fact that the publication was made with a view to damaging the defendant."

53. Yet there are differences. The actions in *Crofter Properties* were malicious and involved express allegations of serious and disreputable criminality. The case also involved companies – not individuals – and while the extent of that actual loss suffered by the plaintiff company was unclear, it was plain that the reputation of the hotel had been affected.

54. In *Ward v. Donegal Times Ltd.* [2016] IEHC 711 the two plaintiffs sued a local newspaper in respect of two articles which effectively alleged that as chief executive officer and auditor respectively they had embezzled a local community organization in which they were involved. Both gave unchallenged evidence as to the degree of social ostracisation which he and his family had experienced in the locality following these publications.

55. Following an apology and offer of amends, the assessment of damages fell to be assessed by McDermott J sitting without a jury. Acknowledging that the circulation of

The Donegal Times was limited – some 5,000 copies in all – McDemott J nonetheless observed that "in a small rural area a newspaper can have a very large effect on local views and the regard and esteem that neighbours will have for each other." These remarks have some resonance for the present case given the very restricted number of persons who received the defamatory emails in the present case. The figure for general damages awarded by McDermott J prior to any discount was €120,000 to each plaintiff.

56. In *Speedie v. Sunday Newspapers Ltd.* [2017] IECA 15 the allegation was that the plaintiff, a former professional footballer of some repute, had associated with known criminals. The jury awarded the sum of €85,000 in damages. In my judgment I rejected the argument that the Court of Appeal should increase the size of the award, saying that it could not be said that the award somehow failed to recognize the gravity of the libel.

The most serious cases

57. The final category of cases represent among the most serious libels, excluding, of course, for present purposes the decisions in *de Rossa* and *Leech: McDonagh v. Sunday Newspapers Ltd*. [2017] IESC 59, [2018] 2 IR 79, *Kinsella v. Kenmare Resources Ltd.* [2017] IECA 54, [2019] 2 IR 750 and *Nolan v. Sunday Newspapers Ltd.* [2019] IECA 141, [2020] 2 IR 490.

58. The allegation in *McDonagh* (2017) was that the plaintiff was a drugs mastermind. Although the plaintiff had not been identified by name, he was identifiable from the headlines on a popular Sunday newspaper. The jury awarded the sum of €900,000. This Court held that this was an excessive sum, not least given that the plaintiff had, by his own account, far from an unblemished reputation.

59. In *Kinsella* an allegation that the plaintiff had made improper sexual advances to a female colleague received very considerable publicity as a result of a press release

published by the defendant. The jury awarded the sum of €9m in general damages together with €1m in aggravated damages. This was reduced on appeal by the Court of Appeal to €250,000.

60. In *Nolan* a newspaper obtained unauthorised access to intimate photographs of a sexual nature which were then published and given widespread publicity. It was also falsely alleged that the plaintiff had organised what were described as "swingers' parties" when in fact he had merely attended them. These allegations were personally devastating for the plaintiff: he was effectively obliged to give up a range of voluntary and community activities and his estranged wife changed the names of their children in order to protect them at school. The Court of Appeal essentially upheld the decision of O'Connor J sitting with a jury to award €250,000 damages, although that jury award was varied to ensure that €50,000 of that sum was attributable to damages in respect of the breach the plaintiff's constitutional rights to privacy.

61. It seems to me that *McDonagh* (2017), *Kinsella* and *Nolan* involved intrinsically more serious allegations than the present case. All three publications involved very significant publicity and each of these two cases were defended on their merits. In the latter two cases the publications had serious consequences for each of the plaintiffs and their families in terms of reputation, humiliation and shame. While again not taking from the fact that the allegations in the present case had potentially serious consequences for the plaintiff (including the possibility of a career ending criminal conviction if the allegations were proved to be true) and while not overlooking the fact that they were published by and to aviation regulators, the fact remains that the publication was to a very select group of persons and the allegations, while serious, were not of the same intrinsic degree of seriousness as in these other cases.

62. Before, however, seeking to place the plaintiff's case on this admittedly somewhat rough and ready scale, it may be useful first to consider the personal injury guidelines.

The Personal Injury Guidelines

63. It is, of course, plain that there is no – and could not be – any direct co-relation between awards in personal injury cases and those made in the case of defamation. As O'Donnell J, however, remarked in *McDonagh* (2017) ([2018] 2 IR 79 at 118), such comparisons can nevertheless provide "some sense check for the assessment of damages because they represent a system which attempts to put monetary values on injuries whether physical, psychological, or reputation", even if, of course, "they cannot be treated as precise guidance." Such a comparison with the general damages made in the most severe personal injury cases can, accordingly, in the words of Irvine J in *Kinsella,* "provide a good moral compass to guide a jury or an appellate court towards the making of a proportionate and fair award in a defamation claim": see [2019] 2 IR 750 at 813.

64. To put the figure of €300,000 of general damages awarded by the jury in this case in some perspective, it represents the highest sum which could properly be awarded for the amputation of an arm, or for the below the knee amputation of *both* legs. The figure is within the range of the entire loss of both legs (€280,000 to €400,000) and it corresponds to a figure (at the lower range, admittedly) that might be awarded in respect of serious brain injury where the victim is left totally incapacitated as a result. It was in this general vein that in her judgment in *Kinsella* Irvine J asked herself how, in the context of a jury award of €9m in respect of (an admittedly widely publicised) allegation of sexual impropriety, she could explain ([2019] 2 IR 750 at 814):

> "…to a young person rendered quadriplegic as a result of the negligence of a third party, and who as a result had received an award of general damages of

> €500,000 to compensate them for the lifetime of pain, suffering and loss that they would endure, that Mr. Kinsella, a man who had lived a full and happy life until he was 64 years of age, could justly and fairly receive a sum of €9m as compensation for the hurt and upset he experienced as a result of the fact that it was widely published about him that he had made an inappropriate sexual advance to a female colleague and in order that he might vindicate his good name. Apprised of Mr. Kinsella's personal circumstances, they would, I am sure, reflect upon the fact that notwithstanding what was published about him, he continued to enjoy a happy marriage, the support of his children, friends and colleagues, was able to participate in all of his much-valued sporting and leisure activities and, with the exception of the occasional upsetting incident, continued to enjoy the very full and rewarding life that he had lived prior to that publication."

65. While the jury award here is nothing of the same magnitude, one could nonetheless perform a similar exercise. It would, I think, be difficult to explain to a plaintiff who had lost both legs as a result of the negligence of another and who had received an award of general damages of €300,000 to compensate them for the lifetime of pain, suffering and loss that they would endure why their compensation was exactly the same as that awarded to the plaintiff in the present case. While not in any way minimising the hurt, distress and upset which the Authority's defamatory remarks undoubtedly caused the plaintiff or the stress and strain which these events placed upon his family and professional life, the fact remains that the plaintiff remains in post, no action was ever taken against him, the Authority has (admittedly belatedly) apologised and, to a large extent, Captain Higgins has managed to put these distressing events behind him.

By contrast, the double amputee will be reminded daily of the horrible, painful and life changing consequences of the event for which he or she has been compensated.

66. One might in any event remark that the State's constitutional duty is the same in both instances: Article 40.3.2 requires the State by its laws to "protect as best it may from unjust attack" and, in "the case of injustice done", to vindicate the person and good name of every citizen. This the State does via the mechanism of personal injuries law in the case of injury to the person and by the law of defamation in the case of injury to good name. But there is nothing here to warrant the suggestion – which, perhaps, at times lurks in some of the earlier case-law – that the victim of defamation stands in a special category of hurt, distress and upset. On the contrary: the very wording of Article 40.3.2 implies that there should be a general consistency of response on the part of the State's law of tort.

The decision of this Court in *MN v. SM (Damages: Costs)*

67. Finally, I would also draw attention to the decision of this Court in *MN v. SM (Damages: Costs)* [2005] IESC 17, [2005] 4 IR 461. Here the plaintiff had been subject to a variety of repeated sexual assaults culminating in rape over a five year period while she was a teenager. She was awarded the sum of €600,000 by a jury in an action for civil assault against the perpetrator, but this was reduced on appeal by this Court to the figure of €350,000. In her judgment Denham J said that the damages to be awarded should be fair and proportionate, so that ([2005] 4 IR at 474) there was "a rational relationship between awards of damages in personal injuries cases [and cases of this kind]. Thus the level and limitations of awards of general damages in personal injuries actions are informative."

68. All of this serves to put the level of the jury award in the present case in some perspective. There was a fairly low level of inflation between 2005 (the date of the

judgment of this Court) and 2018 (the date of the jury award in this case). While once again not taking from the very unpleasant nature of the defamation in the present case, it cannot be right that the plaintiff's overall jury award would be at approximately the same level of damages as that awarded by this Court to the plaintiff in *MN* in respect of the various hideous assaults which she was required to endure over a long period.

Where does the present case fit in this range of case-law?

69. Where, then, does the present case fit in this range of case-law? Clearly the defamatory comments in the present case are more serious than either *Barrett* or *Christie*. As Henchy J explained in his judgment for the majority in that case, on any view the claim in *Barrett* came in towards the lower end of the scale, as the accusation was (taken at its height) one of a purely technical assault. The defamation in *Christie* was admittedly more serious. Taken in isolation it might suggest a serious imputation against a professional person. Critically, however, it was clear that those closest to Mr. Christie would know that it was simply a case of mistaken identity: this was a critical factor in reducing the level of damages which might, in other circumstances, have been awarded. The fact, moreover, that it was one of mistaken identity was also quickly known and apparent: unlike the present case, there was no question of Mr. Christie having to fight to clear his name or having to await the outcome of a possible investigation.

70. The decisions in *Kinsella* and *Nolan* lie at the other end of the scale. If one treats *Nolan* for present purposes as a pure defamation case (although – as Peart J pointed out in his judgment for the Court of Appeal in that case – in truth it was almost as much a case where damages were awarded for breach of a constitutional right to privacy as anything else), then both cases are instances of where €250,000 was awarded in respect of serious allegations of sexual impropriety. In both instances the allegations received widespread

and extensive publicity. The plaintiff in *Kinsella* had to suffer much personal humiliation and in *Nolan* the plaintiff testified that he had been personally ostracised by his friends and neighbours to the point where his estranged wife had actually changed the surnames of his two young children in order to protect them.

71. While again not minimising in any way the distress caused to the plaintiff and his family by these defamatory comments, the allegations in *Nolan* and *Kinsella* were intrinsically far more serious and disreputable and, moreover, received far greater publicity than was ever the case here. And while again acknowledging that the Personal Injury Guidelines admittedly have no direct connection to defamation awards, the "moral compass" of which Irvine J spoke in *Kinsella* is nonetheless a useful guide: it would, I think, be difficult to stand over an award of €300,000 general damages in the present case if one were also to reflect on the fact that a similar sum would be awarded to a double amputee.

72. To my mind, the present case falls into the intermediate category of cases, with the decisions in *McDonagh* (1993) and *Ward* being perhaps the closest comparators in that both cases involve allegations in respect of the discharge of functions qua professional person. It is true that the award in the former case of some €185,000 (in modern values) was significant, but it must be recalled that Finlay CJ thought that the jury award was at the top of the scale and, furthermore, the allegation was widely circulated in a British popular newspaper which commanded a very large audience.

73. In some ways the decision in *Ward* represents an even closer comparator. Here the allegations were published in a local newspaper with a small circulation, albeit one that clearly did influence public opinion. The allegation was probably intrinsically more serious (embezzlement) than the present case and it received greater publicity, although nothing like the publicity in *McDonagh* (1993). A further factor is that the plaintiffs in

Ward both gave evidence that they were shunned in the local community following these publications. While the plaintiff in the present case unquestionably suffered considerable upset and distress and the events in question affected his confidence and his family life, there was no evidence of ostracisation in this manner, either in general or by his colleagues.

74. In these circumstances, I consider that the present case falls between *Christie* and *Ward.* It is appreciably more serious than the former, but slightly less serious than *Ward.* To that extent, I think, with respect, that the sum awarded for general damages by the Court of Appeal was too low. I would substitute therefore the sum of €100,000 (subject to discount) and I would allow the appeal in that respect.

Aggravated Damages

75. Section 32(1)(b) of 2009 Act provides that where a defendant conducts its defence "in a manner that aggravated the injury caused to the plaintiff's reputation by the defamatory statement", the court may order the defendant to pay aggravated damages "of such amount as it considers appropriate to compensate the plaintiff for the aggravation of the said injury." Section 32(3) defines "the court" as meaning "in relation to a defamation action brought in the High Court, the jury, if the High Court is sitting with a jury."

76. As I have already noted, the jury awarded €130,000 under this heading, a figure reduced on appeal by the Court of Appeal to €15,000. There has been no appeal by the Authority in respect of this award, but Captain Higgins has urged us to re-instate the original sum awarded by the jury under this heading.

77. For my part, I see no basis upon which aggravated damages could properly have been awarded in the present case. I would not wish to be misunderstood: I entirely agree that

the manner in which the Authority conducted its defence would win few prizes. While it was naturally entitled to consider its position in response to the commencement of the present proceedings, the Authority first sent a somewhat forceful letter via its solicitors on the 14th November 2014 indicating that it would defend the case on the merits and warning Captain Higgins that its defence would include a plea of qualified privilege.

78. The Authority later indicated in May 2015 that it would make an offer of amends. There then followed some rather tedious correspondence in which both sides somewhat indignantly stood on principle regarding the nature of the apology which was to be offered. Such differences as existed between the parties on the issue of an apology were, as Binchy J aptly put it in his judgment, "frustratingly minor". The trial itself was delayed while the issue of whether the plaintiff was entitled to a jury trial was ultimately determined by this Court. The actual hearing took some seven days.

79. Without ascribing blame to either side, I will merely say that these delays and the fencing correspondence between the respective solicitors which subsequently ensued really take from the effectiveness of the offer of amends procedure. As the Court of Appeal pointed out in *Christie* the 2009 Act encourages defendants who wish to apologise to do so as early and as fulsomely as possible and the sooner that this is done, the higher discount on the damages will be. The fact that – for whatever reason – this did not occur here all takes from the level of discount which the damages award might otherwise have attracted. Perhaps in partial recognition of this, all parties agreed with the 10% discount figure.

80. None of this in itself means, of course, that the plaintiff is entitled to aggravated damages within the meaning of s. 32(1)(b) of the 2009 Act. One might ask: what exactly did the Authority do in its conduct of the defence which merited the award of

aggravated damages? While again recording the fact that the Authority could have and should have apologised earlier and should have done so more fulsomely, I nonetheless find myself unpersuaded that their conduct merited the award of aggravated damages.

81. In this context, the judgment of Irvine J in *Kinsella* is again very instructive. This was a case in which it had been suggested by the defamatory publication that the plaintiff had made an improper sexual advance to a female colleague. A key part of his testimony was, however, challenged in cross examination and it was suggested that his evidence was a fabrication. The defence promised to call a witness to contradict this evidence, but in the event it did not. The jury awarded the plaintiff the sum of €1m. aggravated damages.

82. While Irvine J considered that this failure to call the witness should never have happened and was regrettable, she nevertheless did not think that this in itself was sufficient to merit the award of aggravated damages saying ([2019] 2 IR 750 at 818-819):

> "While that is indeed regrettable and should not have occurred, in my experience that type of conduct on the part of a litigant and/or their counsel has never been treated as sufficiently high-handed or malevolent to warrant an additional award of aggravated damages. In the vast majority of cases when counsel challenges the evidence of a witness by stating that their evidence will be contradicted by some other named witness, counsel has every intention of calling that witness to give evidence. However, very occasionally, and usually for reasons that were not to be anticipated when the challenge was made, it becomes clear that there is no longer any good reason why the named witness should be called. While the failure to call the witness promised by counsel on cross-examination may result in a reprimand from the trial judge, if complained

> of by the opposing party, I know of no case in which such an approach has, *of itself*, ever led to an award of aggravated damages."

83. Irvine J then went on to say (at 819) that while the situation "might have been different had the questioning upon which Mr. Kinsella relied as objectionable been part of an overly prolonged or hostile cross-examination", the fact that this charge was directed towards him was not in itself enough:

> "…the additional upset caused by that challenge could not have inflicted upon him an injury of the type or magnitude that would have warranted the award of an additional sum by way of aggravated damages. There are few witnesses who leave a witness box unchallenged as to the truth of their evidence or who do not feel somewhat bruised and upset as a result of the oftentimes hard-hitting consequences of an adversarial system of litigation."

84. Applying, therefore, the principles in *Kinsella* to the present case I can find little which might plausibly justify the award of aggravated damages. It is true that, as I read the cross-examination of the plaintiff and his witnesses, the Authority sought at all times to minimize the severity of the defamation and by extension to exculpate its role in the matter to the greatest possible extent. But – again echoing the analysis of Irvine J in *Kinsella* – such is really standard fare so far as defamation actions are concerned. By contrast with *Kinsella,* the proceedings here were not defended on the merits and no suggestion was made to the plaintiff that a key part of his evidence was a fabrication.

85. Here it might also be noted that the present case is quite different from the situation in *Ward* where, rather remarkably, the substance of the defamatory articles was republished by the defendant after the offer of amends under s. 22 of the 2009 Act had been made. Even then while McDermott J thought that "in certain circumstances the publication of the latter two articles might constitute a basis to consider an award of

aggravated damages", he did not in fact do so, preferring instead to deal with the matter under the heading of reducing the level of discount that might otherwise be applicable following the apology. Nothing like this occurred in the present case.

86. None of this, of course, takes from the fact that the Authority delayed in making the offer of amends and that when it came it might have been more fulsome. The Authority's failures in this regard are reflected in the low level of the percentage discount of 10%, its apology notwithstanding. There is nevertheless no basis for the award of aggravated damages. As I have noted, the Court of Appeal reduced the jury award under this heading from €130,000 to the sum of €15,000. Given that there was no cross-appeal by the Authority in respect of this award, I would leave it undisturbed. I would nevertheless reject the plaintiff's appeal insofar as he sought to have the original award of aggravated damages re-instated.

Conclusions

87. In summary, therefore, I would vary the order made by the Court of Appeal by increasing the damages award from €70,000 to €100,000. To that extent – but to that extent only – I would also dismiss Captain Higgins' cross-appeal in respect of the award of aggravated damages and leave undisturbed the decision of the Court of Appeal to award €15,000 under this heading. As this total sum of €115,000 is to be reduced by 10%, that means that the final sum which I would have awarded to the appellant amounts to €103,500.