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IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

KING'S BENCH DIVISION

BETWEEN:

Gerard Kelly

Plaintiff

and

Malachi O'Doherty

Defendant

_____

Mr McKenna (instructed by Ó Muirigh Solicitors) for the Plaintiff

Miss Herdman (instructed by Shean Dickson Merrick Solicitors) for the Defendant

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Master Bell

Introduction

[1] On 21 August 2019 Malachi O'Doherty, the award-winning journalist and author, conducted radio interviews with Frank Mitchell on U105 and with Stephen Nolan on BBC Radio Ulster.

[2] In the course of his interview on U105 the following exchange took place:

> Frank Mitchell: "These women are right at the cutting end with the terrorism. They aren't stealing chocolate out of a shop."

> Dr O'Doherty: "And that makes them no different from a lot of people that we know and work among in Belfast and in Derry. You know that is the reality. You and I. I'm not going to start naming names. Well, Gerry Kelly for instance. Gerry Kelly MLA has spoken very frankly about shooting a prison warder in the head, right? He did that. He shot a prison warder in the head. We interview him on the radio, we … talk to him about his responsibilities as a minister or the intentions of his party, and we don't say 'I'm having nothing to do with you because you shot a prison warder in the head.' We just say … we have just decided that that was political motivation and he's moved on and we don't expect him to shoot any more prison warders in the head …"

[3] During his BBC interview Dr O'Doherty had the following exchange:

> Stephen Nolan: "Do you let people connected with paramilitaries on air so that they could be challenged? Or do you keep them off air and they don't get a voice? What's the answer to that, Malachi?
>
> Dr O'Doherty: "… And we were discussing this in the Good Morning Ulster office and saying, well how could we even function in Northern Ireland if every time we were going to interview Gerry Kelly, we had to notify the family of the prison officer he shot?"

[4] On 20 August 2020 Mr Kelly, the Member of the Northern Ireland Assembly for North Belfast, issued a writ claiming damages for libel in respect of the words used by Dr O'Doherty during those two interviews.

[5] Following on from the issue of his writ, Mr Kelly served his Statement of Claim on 31 May 2022 alleging that, in their natural and ordinary meaning, the words used by Dr O'Doherty meant:

> (a) That the plaintiff killed a prison officer by shooting him in the head;
> (b) That the plaintiff assaulted a prison officer intending to kill or cause grievous bodily injury or other personal injury to him;
> (c) That the plaintiff deliberately discharged a firearm at a prison officer's head or at his person thereby assaulting him;
> (d) That the plaintiff unlawfully discharged a firearm;
> (e) That the plaintiff was in unlawful possession of a firearm and/or ammunition with the intent to endanger life
> (f) That the plaintiff was in unlawful possession of a firearm and /or ammunition.

[6] As a result of these words, Mr Kelly claims that he has been gravely damaged in his character and reputation. Further, his standing as a respected public representative of all those in the constituency of the Northern Ireland Legislative Assembly in which he was elected has been called into disrepute.

[7] Dr O'Doherty then issued a summons on 23 September 2022 seeking that the court strike out Mr Kelly's claim under Order 18 Rule 19 of the Rules of the Court of Judicature. Grounding the application are two affidavits by Ms McCloskey and one by Ms McKay, exhibiting Mr Kelly's two books. In response to Dr O'Doherty's application, an affidavit by Mr Ó Muirigh has been filed, exhibiting a copy of the written judgment of Lowry LCJ in the trial of *R v Burns and others* which dealt with the offences charged following the escape from the Maze prison.

[8] I am grateful to Miss Herdman and Mr McKenna for their helpful oral and written submissions.

[9] Mr Kelly has also commenced similar defamation proceedings against another well-known freelance journalist, Ruth Dudley Edwards, for making essentially the same statement about the shooting of Mr Adams during the Maze escape. That statement was published in the Belfast Telegraph. Miss Edwards has similarly filed an application to strike out Mr Kelly's proceedings. Mr Lockhart of counsel appeared on behalf of Ms Edwards and it had been hoped that, given the considerable overlap in the two applications, her application to strike out Mr Kelly's litigation could have been dealt with at the same hearing as Dr O'Doherty's application. However, Mr McKenna was not in a position to deal with both applications. Rather than having Ms Edwards' application listed shortly after the O'Doherty application, Mr Lockhart has indicated that his client would await the decision of the court with regard to Dr O'Doherty's application.

The Law: The Test For Striking Out

[10] Order 18 Rule 19 of the Rules of the Court of Judicature provides:

> "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the court,

> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1)(a)."

[11] Since Dr O'Doherty's application is not that Mr Kelly's claim ought to be struck out under Order 18 Rule 19(1)(a) on the ground that it discloses no reasonable cause of action, but rather it is an application under Rule 19(1)(b) and (d), this application is not restricted to a consideration of the pleadings alone. Rather, the effect of the Rule is that the parties are entitled to offer evidence on affidavit.

[12] The purpose of the striking out provisions is essentially to protect defendants from hopeless litigation. But it may not be invoked to deprive plaintiffs of their right to bring an arguable matter before the courts.

[13] In *Lonrho v Al Fayed* [1992] 1 AC 448 the court held that, on an application to strike out an action on the basis that it discloses no reasonable cause of action, the cause pleaded must be unarguable or almost incontestably bad.

[14] In *O'Dwyer and Others v Chief Constable of the Royal Ulster Constabulary* [1997] NI 403 the Court of Appeal for Northern Ireland reviewed the authorities on the test to be applied in such applications. It held that the summary procedure for striking out pleadings was only to be used in "plain and obvious" cases; it should be confined to cases where the cause of action was "obviously and almost incontestably bad"; and that an order striking out should not be made "unless the case is unarguable".

[15] The Court of Appeal in *O'Dwyer* quoted Sir Thomas Bingham in *E (A Minor) v Dorset CC* [1995] 2 AC 633 at 693-694, a passage approved by the House of Lords:

> "I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts but applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case and there should be no risk of injustice to plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition) or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached."

[16] Where the law in a particular field is not settled but rather is a new and developing field, the court should be appropriately cautious with applications to strike out, particularly where the court is being asked to determine such points on assumed or scanty facts pleaded in the Statement of Claim. (*Lonrho plc v Tebbit* (1991) 4 All ER 973 and *Rush v Police Service of Northern Ireland and the Secretary of State for Northern Ireland* [2011] NIQB 28.)

[17] Paragraph 18/19/06 of The White Book (1999 edition) explains that the expression "frivolous or vexatious" means cases which are obviously unsustainable and cases which are an abuse of the process of the court.

Defendant's Submissions

[18] When responding to Mr Kelly's initial Letter of Clam, Dr O'Doherty's solicitor responded that, in the event proceedings were issued seeking damages for defamation, Dr O'Doherty would rely on the following facts and matters:

> "1. Publication of the words spoken by our client in the radio shows referred to is protected by qualified privilege at common law, as it constituted publication on a matter of public interest.
>
> 2. Mr Adams, the prison officer who was shot in the head, has identified your client as the person who shot him in the head. We attach a copy of Mr Adams' formal statement, published on the BBC website.
>
> 3. According to the official file into the incident in the Public Record Office for Northern Ireland (PRONI), records that "Prisoner 52 Kelly shot Officer Adams who was on duty in the control (room)."
>
> 4. Insofar as it may be necessary, our client will rely on his right to freedom of expression as enshrined in Article 10 of the European Convention on Human Rights.
>
> 5. Our client denies that your client has suffered any loss or damage to his reputation. Our client will rely in mitigation or extinction of damages on the following facts or matters which are relevant to or demonstrate, the true nature of your client's reputation at the date that radio interviews were aired:
>
> 5.1 Your client's general reputation is as a person who for many years has been identified publicly as a former member of the Provisional Irish Republican Army ("the Provisional IRA") and who has acknowledged such membership in his book about escape from the Maze prison and in other interviews.

5.2 The Provisional IRA is a terrorist organisation, proscribed by law, which was prepared to, and did, perpetrate serious crimes of violence including many hundreds of murders.

5.3 Your client has admitted membership of the Provisional IRA and at no time has your client sought to publicly disassociate himself from murders carried out by that organisation or condemn the carrying out of such murders or any other unlawful activities carried out by the Provisional IRA.

5.4 Your client's general reputation is as a person who supported the violent actions of the Provisional IRA, including the murders committed by that organisation, or that he condoned such murders, or that he was ambivalent as to whether such murders were perpetrated by the organisation of which he was publicly identified as a member.

5.5 Your client was sentenced to two life sentences plus twenty years for causing explosions and conspiracy to cause explosions in relation to bombs in London on 8 March 1973 (the Old Bailey Bombings). One person died as a result of the explosions and it has been reported that circa 200 others were injured.

In the circumstances any comments made by our client in the two radio shows complained about had no adverse effect on the reputation of your client and your client has suffered no damage as the result of our client's comments.

Alternatively, any damage which might have been caused to your client's reputation falls within the *de minimus* principle."

[19] There are essentially four elements to the application made on behalf of Dr O'Doherty:

(i) That the proceedings ought to be struck out under Order 18 Rule 19 on the basis that they are scandalous, frivolous or vexatious;

(ii) That the proceedings ought to be struck out under Order 18 Rule 19 on the basis that they are an abuse of process;

(iii) That the proceedings ought to be struck out under section 8 of the Defamation Act 1996; and

(iv) That the proceedings ought to be struck out under the principles applied in *Jameel v Dow Jones and Co* [2005] EWCA Civ 75 namely that the cost of pursuing the proceedings would be out of all proportion to what

they might achieve. As part of this argument, Miss Herdman essentially submitted that Mr Kelly's reputation was such that Dr O'Doherty's comments would not have had the effect of lowering him in the mind of right-thinking people.

The issue of qualified privilege, which was raised in Dr O'Doherty's solicitor's letter, was not broached by either counsel during the application and so will not be considered in this judgment.

[20] The principal argument on behalf of Dr O'Doherty was that Mr Kelly was a convicted prisoner who, by his own admission, escaped from lawful custody in 1983 and was a leader of that escape during which a prison officer, Mr Adams, was critically injured. In his book, *The Escape – The Inside Story of the 1983 Escape from Long Kesh Prison* published in 2013, Mr Kelly admits that during the escape he was armed with a gun and threatened to shoot a prison officer. It was therefore scandalous and vexatious for Mr Kelly in such circumstances to claim damages for defamation. In her first grounding affidavit for this application, Ms McCloskey asserts that the fact that, many decades later, he is now an MLA is entirely irrelevant to the events that happened in 1983 which form the subject matter of these proceedings.

[21] Ms McCloskey's second affidavit emphasises that, although Mr Kelly was acquitted in a criminal trial in respect of the shooting of Mr Adams, he fails to acknowledge that these defamation proceedings are civil proceedings and adopt a different standard of proof, namely the balance of probabilities. Ms McCloskey states that an acquittal in criminal proceedings, which consider guilt beyond a reasonable doubt, is not in any way conclusive of liability for wrongful acts nor does it entitle Mr Kelly to commence proceedings for alleged loss to his reputation in the context of the escape.

Plaintiff's Submissions

[22] There were essentially five main submissions made on behalf of Mr Kelly:

(i) That, although Mr Kelly was prosecuted in 1987 for the shooting of Mr Adams, he was, however, acquitted of that offence.
(ii) That the manner in which Mr Kelly's book, *The Escape*, was written, makes it unclear which of the prisoners, Mr Kelly or Mr Storey, fired the shot which hit Mr Adams.
(iii) That the BBC *Breakout* documentary which includes an interview with Mr Kelly contains no admission that Mr Kelly shot Mr Adams.
(iv) That a number of pieces of evidence offered on behalf of Dr O'Doherty as regards Mr Kelly's reputation are inadmissible.

(v) That Dr O'Doherty's statement, which implied serious criminality punishable by imprisonment, would almost inevitably surpass the *Jameel* threshold of a minimum level of seriousness.

The Scandalous, Frivolous or Vexatious Application

[23] Deciding whether these defamation proceedings are scandalous, frivolous, or vexatious under Order 18 Rule 19 requires a consideration of a number of matters which I shall now deal with in turn.

The Maze Escape Trial

[24] A major feature of the Mr Kelly's argument in this application is that he was acquitted in criminal proceedings in respect of involvement in the shooting of Mr Adams. The trial was held before Lord Lowry, then Lord Chief Justice, who delivered his judgment on 27 April 1988. Lord Lowry stated that the Crown case had been that Mr Kelly was the actual prisoner who shot Mr Adams. When it came to the part of his judgment in which he acquitted Mr Kelly of offences in connection with the shooting of Mr Adams, Lord Lowry stated:

> "As we shall see, Storey, Mead, McAllister and McFarlane had leading roles in the takeover and it would be natural to expect that Kelly, too, being also an orderly, would have had an important part to play, such as the neutralisation of the control room, the nerve centre from which the alarm would be given. He was identified by PO Adams as his assailant and also by another prison officer. There is clearly a prima facie case on counts 21 [attempted murder of Mr Adams] and 22 [causing grievous bodily harm to Mr Adams] against Kelly. But there are a great many awkward questions about inconsistencies and discrepancies which can be found in detail in the transcript of Mr McSparran's closing submissions. There are more than the inevitable and customary "loose ends" which a tribunal of fact is normally entitled to disregard in a complex criminal case, if proof of guilt is otherwise convincing. When I add to them the general submission of counsel and my own reflections of the identification evidence in this case, I cannot conscientiously be satisfied beyond a reasonable doubt that Kelly is the right man. He may well be, but that is not enough."

[25] Lord Lowry's written judgment also contains important material in respect of the evidence of the prison officers. He decided that an accurate reconstruction of events, and particularly the ascertainment of which prisoners did what during the escape, depended largely on the evidence of

the prison officer witnesses. The prison officers were obviously taken by surprise in a situation not conducive to calm observation and appraisal of persons and events. Being in large measure on the losing side and having allowed things to happen which it was their duty to prevent, they underwent an unenviable and humiliating experience which they would wish to forget. They made official reports of varying adequacy. In many cases the prison officers subsequently contradicted those reports to a greater or lesser degree. They contradicted each other both in statements to the police and in their evidence. Their evidence sometimes contradicted their own written statements and their depositions.

[26] Lord Lowry did not deny that some of the prison officer witnesses might have the clearest, and also the most accurate recollection of persons and events. The difficulty was to sort the wheat from the chaff and to decide what and whose evidence was completely reliable. He also recognised that he could not disregard the time which had elapsed since the escape. There were, in addition, three further factors which he considered reduced the reliance to be accorded to the prison officers' evidence. Some of the officers might not have been carrying out their duties properly. It was a reasonable possibility that they were not all at their posts in H7 at the material time, so easily were the laid down precautions set at naught in this high-security prison. This meant that they had a motive to misdescribe events in order to conceal any infractions on their own part. Secondly, they could be more than usually ill-disposed towards the escapers who had outwitted them and seriously injured a few of them. Thirdly, they had a motive to exaggerate the number and the weaponry of the prisoners who overcame them.

[27] Although Miss Herdman submits that I should take account of Mr Adams' witness statement dated 27 December 1986 in which he stated that it was Mr Kelly who fired the two shots, I have concluded that I cannot rely in any way on the evidence of any of the prison officers, including Mr Adams, in reaching my decision on this application. Given the difficulties recognised by Lord Lowry with that evidence, and not having heard the officers give oral evidence and be cross-examined, I consider that it would be unsafe to do so.

[28] Miss Herdman submitted I should take into account the conclusions of the Henessey Report into the Maze Escape but, given that it is based mainly of the evidence of the prison staff, I do not consider that this would be safe to do, for the reasons I have already explained.

[29] The fact that a person is acquitted in criminal proceedings regarding a shooting of a victim does not nevertheless bring to an end all determinations as to his legal liability for the shooting. Most legal systems distinguish between the criminal and the civil, generally using separate courts, different procedures, and different evidential rules. The traditional view is that crimes are public wrongs and that the criminal law addresses those who harm

society through morally culpable acts in order that punishment may be imposed and potential offenders may thereby be deterred from committing similar offences. However, many cases which have been prosecuted as criminal offences in the criminal courts are also capable of being litigated as torts, that is to say civil wrongs, in the civil courts.

[30] One of the most significant differences between criminal and civil proceedings is the standard of proof. Criminal offences require to be proved beyond a reasonable doubt. Torts in civil proceedings on the other hand require to be provided on the balance of probabilities. In *Re H and R (Child Sexual Abuse: Standard of Proof)* [1996] 1 All ER 1, the well known words of Lord Nicholls describe the standard of proof in civil cases:

> ". . .The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.
>
> Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in In *re Dellow's Will Trusts* [1964] 1 W.L.R. 451, 455: 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.' "

[31] There are a significant number of occasions where the evidence used in a criminal trial has been insufficient to prove beyond a reasonable doubt that

the defendant had committed the offence with which he was charged, but that evidence has nevertheless been sufficient to allow successful civil proceedings. The following are examples.

[32] In 1991 Lynn Siddons was strangled and stabbed to death on a canal bank. Fitzroy Brookes was tried and acquitted at a criminal trial in respect of her death. In *R v Derby Stipendiary Magistrates ex parte Brooks* [1995] 4 All ER 526 her mother brought a civil action for battery on behalf of her daughter's estate. The claim was made against Fitzroy Brookes and his stepfather, Michael Brookes. In effect, it was alleged that one or both of them were Lynn Siddons' murderers. Her mother's motive was to target and expose the stepfather, whom she firmly believed was the primary author of her daughter's death. The court held that Lynn died following strangulation by the stepfather and that the stepson had no hand in that. However, despite his previous acquittal in the criminal proceedings, Fitzroy Brookes was found partially responsible in the civil action for the pain and terror occasioned by the stabbing, wherein he was a joint tortfeasor with his stepfather.

[33] In 1993 Sabir Raja brought civil proceedings for fraud against Nicholas van Hoogstraten. In 1999 Raja was murdered and Knapp, Croke and van Hoogstraten were prosecuted for the murder. Knapp and Croke were convicted and sentenced to life imprisonment. Van Hoogstraten was convicted of manslaughter but his conviction was quashed on appeal and a retrial ordered. His re-indictment for manslaughter was subsequently quashed. Raja's widow, as administratrix of Raja's estate and in her personal capacity, together with his grandchildren, commenced civil actions against van Hoogstraten for damages in respect of the murder. In 2005 the court held in *Raja v Hoogstraten and others* [2005] EWHC 2890 (Ch) that it was satisfied on the balance of probabilities, (and if it were necessary beyond reasonable doubt), that van Hoogstraten had recruited two highly dangerous thugs to murder Raja in order to halt the civil action against him and then to obtain the release or settlement of Raja's claims against him on highly favourable terms.

[34] In 2002 Naresh Shah was attacked and fatally stabbed at his home. A police investigation led to a prosecution of five men and two women. One defendant was convicted of murder and three were convicted of conspiracy to inflict grievous bodily harm. Kelly Anne Gale, along with two others, were acquitted. Shah's family were unhappy with the outcome of the criminal proceedings and his mother commenced civil proceedings against Gale on the basis that she was a joint tortfeasor of the battery inflicted on Shah and/or had conspired to assault him. The court held in *Shah v Gal*e [2005] EWHC 1087 (QB) that Gale had pointed to Shah's house as the home of another man whom other defendants wished to attack. By agreeing to do so, she lent herself to a joint enterprise to inflict injury on whoever was attacked and she was responsible in tort for that.

[35] The case before me is not, of course, one where the family of Mr Adams has brought civil proceedings against Mr Kelly. However the

important point here is that the evidence which was insufficient to satisfy Lord Lowry that Mr Kelly had shot Mr Adams might well be sufficient to satisfy a High Court judge in civil proceedings that Mr Kelly had done so. If this were the position, then the use of such evidence by Dr O'Doherty would also be sufficient to defeat Mr Kelly's defamation claim. It is therefore not enough for Mr McKenna simply to argue that Mr Kelly was acquitted at his criminal trial of charges related to the shooting of Mr Adams as if that amounted to a conclusive argument in respect of this application.

[36] Having considered the evidence referred to in the written judgment of Lord Lowry, I am not, however, satisfied that that evidence alone is sufficient to satisfy a court on the balance of probabilities that Mr Kelly fired the shot that hit Mr Adams. Of course, it is not on this evidence alone that Dr O'Doherty relies. He also relies upon the material published in Mr Kelly's books *The Escape* and *Playing My Part*. Before turning to consider that material, however, I must deal with the concept of joint enterprise which was referred to by both counsel.

Joint Enterprise and Common Design

[37] The term "joint enterprise" was mentioned in the submissions of both, counsel in these proceedings. In her submissions, Miss Herdman stated that either Mr Kelly or Mr Storey "acting in concert in the course of a joint enterprise", shot Mr Adams in the head. Mr McKenna attacked the concept of joint enterprise as applied in 1988 by Lord Lowry. Mr McKenna submitted that the leading authority at the time, *Chan Wing Siu & Others v R* [1985] AC 168 is no longer regarded as good law since the decision in *Jogee and Ruddock v The Queen (Jamaica)* [2016] UKPC 7.

[38] In my view counsel for Dr O'Doherty has erroneously referred the court to the concept of joint enterprise and this therefore requires some explanation. Joint enterprise is a Common Law concept used in the field of the criminal law. The doctrine originated in the case of *Chan Wing-Siu* [1985] AC 168 and was developed in later cases. In *Chan Wing-Siu*, Sir Robin Cooke, delivering the judgment of the Privy Council, said:

> "What public policy requires was rightly identified in the submissions for the Crown. Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they in fact are used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance on a nuance of prior assessment, only too likely to have been optimistic."

[39] *Chan Wing-Siu* therefore laid down a principle that, if two people set out to commit an offence (crime A), and in the course of it one of them commits another offence (crime B), the second person is guilty as an accessory to crime B if he foresaw it as a possibility, but did not necessarily intend it.

[40] In the Maze escape trial Lord Lowry applied the law on joint enterprise as it then stood. However, in the decision of *Jogee and Ruddock*, as Mr McKenna pointed out, the Privy Council subsequently conducted a review of the authorities on the issue, and concluded that the introduction of the principle was based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments. The court recognised the significance of reversing a statement of principle which had been followed by the Privy Council and the House of Lords on a number of occasions, but considered that it was right to do so.

[41] The principle of joint enterprise, therefore, has no applicability to these civil proceedings as it is a principle which only applies in criminal law proceedings.

[42] So, if the concept of joint enterprise is not an appropriate concept or principle to be considered in civil proceedings, is there a principle applicable in civil proceedings which allows one individual to be considered jointly liable with another person? In the decision of *Sea Shepherd UK v Fish & Fish Ltd* [2015] UKSC 10 the Supreme Court dealt with this issue of accessory liability in tort. The claim in that case was for loss and damage allegedly suffered by Fish and Fish Ltd in an incident in the Mediterranean Sea on 17 June 2010 when conservationists mounted an operation designed to disrupt the bluefin tuna fishing activities of Fish & Fish Ltd.

[43] The appeal arose from the determination of a preliminary issue as to whether the incident was directed and/or authorised and/or carried out by Sea Shepherd UK, its servants or agents, and whether Sea Shepherd UK was liable, directly or vicariously, for any damage sustained by Fish & Fish Ltd. At trial, Hamblen J had decided the issue in favour of Sea Shepherd UK and dismissed the claim against it. His decision was then overturned by the Court of Appeal. The Supreme Court allowed Sea Shepherd UK's appeal. The facts of the case are not particularly important to understand. As a number of the Justices mentioned, this type of tortious liability is fact sensitive and the outcome of each case must depend on its own circumstances.

[44] Lord Toulson outlined the legal principles which require to be applied in the following manner:

"Joint liability in tort may arise in a number of ways. Two or more defendants may act as principal tortfeasors, for example by jointly signing and publishing a defamatory document. A defendant may incur joint liability by procuring the commission of a tort by inducement, incitement or persuasion (*CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013, 1058, per Lord Templeman). A defendant may incur vicarious joint liability for a tort committed by an agent or employee. We are not concerned in this appeal with any of those heads of liability.

We are concerned with a different category in which the defendant, D, has allegedly assisted the principal tortfeasor, P, in the commission of tortious acts. It might have been expected that the law of tort would mirror the criminal law on aiders and abettors, but that is not how the law has developed, as the House of Lords has recognised (*CBS v Amstrad* at p 1059 and *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [2000] 1 AC 486, 500). Beatson LJ referred in his judgment to the criticisms which some scholars have made about the law in this respect, and to some of the policy considerations which might be considered relevant, but it is not a topic which the parties have raised. It is common knowledge that the criminal law in this area has caused considerable problems, and Beatson LJ quotes Weir, *Economic Torts* (1997) p 32, n 31 for the statement, indeed understatement, that "accessory liability in the criminal law has not been joyous". There is much to be said for keeping the law in this area as simple as possible. The main authorities were referred to by Hamblen J.

To establish accessory liability in tort it is not enough to show that D did acts which facilitated P's commission of the tort. D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort. This requires proof of two elements. D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort. I do not consider it necessary or desirable to gloss the principle further.

The principle was expressed crisply in the statement in *Clerk and Lindsell on Torts*, 7th ed, p 59, that "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common

design", which was cited by all the members of the Court of Appeal in *The Koursk* [1924] P 140, 151, 156, 159.

The subsequent cases are, as Mustill LJ said in *Unilever Plc v Gillette (UK) Ltd* [1989] RPC 583, 608, little more than illustrations of the application of the principle which he valuably summarised in the passage cited by Hamblen J in para 21 of his judgment (see para 12 above).

Peter Gibson LJ was not putting forward a different principle in the passage in *Sabaf SpA v Meneghetti SpA* [2002] EWCA Civ 976, [2003] RPC 264, cited by Hamblen J in para 24 of his judgment, but was expressing the underlying concept that the defendant must have involved himself in the commission of the tort in such a way as to justify the conclusion that he combined with the other tortfeasor(s) to commit the tort. That is another way of expressing what Mustill LJ referred to as "the parties combin[ing] to secure the doing of acts which in the event prove to be [tortious]".

It follows that there was no error in Hamblen J's summary of the legal principles, nor in his considering whether the matters relied on by the claimant had any significance to the commission of the tort. It was another way of considering whether the appellant had combined to secure the doing of acts which proved (if they should prove) to be tortious. There is no formula for determining that question and it would be unwise to attempt to produce one, as Bankes LJ said in *The Koursk* at p 151:

"It would be unwise to attempt to define the necessary amount of connection. Each case must depend upon its own circumstances."

The Meaning of Dr O'Doherty's Words

[45] Mr Kelly sues for defamation in respect of the words spoken by Dr O'Doherty in the two interviews which I have referred to. In *Jeynes v News Magazine Limited* [2008] EWCA Civ 130 Sir Anthony Clarke MR explained how the meaning of words ought to be approached in defamation actions:

"The legal principles relevant to meaning have been summarised many times and are not in dispute. …

They are derived from a number of cases including, notably, *Skuse v Granada Television Limited* [1996] EMLR 278,

per Sir Thomas Bingham MR at 285-7. They may be summarised in this way:

> (1) The governing principle is reasonableness.
>
> (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available.
>
> (3) Over-elaborate analysis is best avoided.
>
> (4) The intention of the publisher is irrelevant.
>
> (5) The article must be read as a whole, and any 'bane and antidote' taken together.
>
> (6) The hypothetical reader is taken to be representative of those who would read the publication in question.
>
> (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, 'can only emerge as the product of some strained, or forced, or utterly unreasonable interpretation…' (see Eady J in *Gillick v Brook Advisory Centres* approved by this court [2001] EWCA Civ 1263 at paragraph 7 and Gatley on Libel and Slander (10th Edition), paragraph 30.6).
>
> (8) It follows that 'it is not enough to say that by some person or another the words *might* be understood in a defamatory sense.' *Neville v Fine Arts Company* [1897] AC 68 per Lord Halsbury LC at 73."

[46] In terms of the reasonable meaning of the words spoken by Dr O'Doherty, I do not consider that the reasonable meaning of Dr O'Doherty's words is that they should be narrowly interpreted so as only to mean that it was Mr Kelly's finger which was on the trigger of the gun when it fired the shot that hit Mr Adams. Such is, of course, a reasonable meaning of the words but it is not in my view the only reasonable meaning. Rather I consider that a secondary reasonable meaning includes that Mr Kelly and Mr Storey were

acting together in a common design, within the meaning of the law as expounded by the Supreme Court in *Sea Shepherd UK v Fish & Fish Ltd*, and that one of them pulled the trigger that fired the shot, in circumstances where both of them are legally responsible in civil law for the battery. To rule otherwise would have the effect of allowing counsel to argue that, because Dr O'Doherty had not gotten his legal terminology correct, he would be liable in defamation even though Mr Kelly had been jointly responsible because he had been part of a common design to subdue the prison officers by force and, during the execution of the common design, one of the other participants had decided to fire the bullet that hit Mr Adams.

Mr Kelly's Books: "The Escape" and "Playing My Part"

[47] Having dealt with the principle of common design, I now turn to consider the material written by Mr Kelly about the escape in his books. His first book, *The Escape*, deals in its first chapter with the development of the escape plan. The book begins:

> "Gerry Kelly had not slept well, which was unusual for him. The reason for his unrest lay under his pillow. He reached up and touched the long cigar-shaped package. It contained highly sensitive information including maps and diagrams. He had studied the contents over several hours after lock-up the previous night. It was an elaborate escape plan and it filled him with hope and dread in equal measure."

Mr Kelly then discusses the plan with Mr Storey who asks Mr Kelly for his opinion on it. Mr Kelly writes:

> " 'We're in H7 which is a self-contained prison within a self-contained phase of the overall prison camp, which is contained within a British Ministry of Defence perimeter, which also contains a large British Army Camp.' Storey wondered where this was going but Kelly rushed on, leaving no room for interruption. 'So the plan is for us to arrest the two dozen screws on duty in the Block without any of them hitting any of the 20 odd alarm buttons, or any of the several intercoms, two way radios or telephones. Then a number of us will don screws' uniforms, after liberating them from their owners and arrest the screw on duty at the main gate.' "

[48] Mr Kelly then summarises the remainder of the plan and informs Mr Storey of his conclusion:

> "It's beyond cheeky Bob. It's complex and audacious. I like it more and more and I actually think it can be pulled off. If anyone can do it the

IRA can do it. I'm definitely in – if there's a place?' he added, pretending not to be presumptuous."

[49] Mr Kelly then tells Mr Storey that he has two questions. The first is who knows about the plan at the moment. He is told that only four people know of the plan. Mr Kelly then describes the conversation concerning his second question:

> "The second one is: We obviously need guns to take the Circle area and the Main Gate area. Will the IRA agree to that? ' Storey hesitated and Kelly interjected: 'Just to explain, Bob. It's just that I have known of previous schemes where POWs have asked for guns or explosives and the leadership has been very reluctant. I can understand why, but …
>
> Storey had had enough time to weigh up his answer: 'We already have them, Gerry' he answered definitively.
>
> 'I'm impressed', Kelly replied with honesty. 'Let's do it A Chara', he finished with a broad smile."

[50] In his book Mr Kelly later writes the following section about the implementation of the escape plan and how the shooting of Mr Adams occurred:

> "The guard raised his hands with incredulity. He started to stagger backwards towards the toilet door. Kelly didn't want him back in the toilets, as he knew there were windows facing onto the yard and front gate of the block which could be broken to warn the guard on the main gate of H7. So he looked directly into the guard's eyes above the gun-sight. He moved towards him and said, 'If you go any further I will shoot you!' The guard stopped. Kelly told him to lie down on the ground with his hands over his head. He started to get down on the floor.
>
> The control room guard saw this as his opportunity to move. He was lying face down, his head out towards a door which opened inwards. It was lying open against the inside wall of the control room. While the metal grill gate had been opened outwards by Kelly earlier, the inside door was opaque. The door was close to his left hand; he reached over in an instant, gripping the edge of the door and slammed it shut.
>
> Walter Doherty was by then on the ground. It was as if the door had slammed right inside the heads of both Kelly and Storey who were in the circle area at that moment. It galvanised them into action. They saw the closed door, immediately thought of the number of intercoms, telephones, two-way radios and alarm bells in the H7 control room.

> One leapt towards the door. He put his hand on the door-knob and in one motion turned it and hit the heavy door with his shoulder. The door opened about two or three inches only. The guard was obviously pushing against the door. While he was not very tall he was heavy., weighing maybe 200 lbs. the prisoner put a foot in the door to stop it closing further and started to push hard. He got another one or two inches out of it. It was hard work. There was little give. The only comfort was that he knew that while the guard was concentrating on trying to close the door he couldn't be near the phones or intercoms. He squeezed the gun round the door and fired a shot at waist level on the blind. The gun went off with a bang but the door didn't give. Shifting the angle of his wrist up very slightly, he fired another shot. The door gave way and he pushed it open wide enough to squeeze through. The guard was lying on the floor in a heap. He opened the door to its full extent and looked at the guard face down on the floor. He was completely still.
>
> This was a defining moment in the escape. Everyone who had embarked on it knew that something like this could happen. It had been agreed that verbal aggression should be used liberally by the Volunteers so that as little physical aggression as possible would be necessary. Up to this point the psychology had worked well. However, Volunteers were clear that if it was necessary to use force to physically protect volunteers or to safeguard the escape there could be no hesitation."

[51] Mr Kelly has written his book in such a way as to conceal who fired the shot that hit the prison officer. If it is assumed for the sake of argument that it was Mr Storey who fired the shot, then Mr Kelly's book does not reveal what he was doing in the critical moment when the second shot was fired. But it is clear from his statement, "It galvanised *them* into action" that he did something, even if he does not tell the reader what that was. A key concept in judicial fact-finding is the concept of inherent probability or improbability of representations of fact. The real test of the truth of evidence is its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. As Baroness Hale famously stated in *In re B* [2008] UKHL 35, if an animal is seen outside Regent's Park Zoo on grass regularly used for walking dogs, then it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog. Therefore, even without Mr Kelly's statement "It galvanised *them* into action" about his participation, a court would, in my view, conclude that, having been an active participant in the escape moments earlier, it was inherently improbable that Mr Kelly suddenly became a passive bystander, stood there, and did nothing at such a critical moment in the execution of the plan.

[52] Mr Kelly also deals with the escape in his second book, *Playing My Part*. In that book he writes:

> "Behind it all an escape committee had been formed under Larry Marley. ….
>
> The escape plan was complex and needed precise timing. The abridged version goes something like this.
>
> After lunch on 25th September five men, including myself, would gather in the secure 'circle' area at the centre of the H-Block. All would be armed. The trigger word for all those involved was 'Bumper', which was the floor polishing machine. Bik McFarlane would shout down the wings asking where the bumper was. Bobby Storey would then bring the bumper out to the circle area. Without a word being spoken, the five Volunteers, who were to be armed would arrest all the guards in the circle area. All the other guards – twenty-four in total – were to be arrested in a total of two minutes. At the same time, all twenty alarms throughout the block were to be covered. Guards were to be stripped of uniforms for a number of the escapees to wear. The front gate of H7 was then to be taken by prisoners dressed as guards. When the kitchen lorry arrived with food, the driver was to be arrested and all escapees would board the lorry, while a 'rearguard' of Volunteers held the arrested guards captive."

[53] Lord Toulson's key statement of principle in *Sea Shepherd UK v Fish and Fish Ltd* is as follows:

> "D must have acted in a way which furthered the commission of the tort by P; and D must have done so in pursuance of a common design to do or secure the doing of the acts which constituted the tort."

[54] In the particular circumstances of the case before me, the underlying tort which Mr Kelly is said to have committed is the not a tort of "wounding" or a tort of "attempted murder". It is the tort of battery. (In the criminal proceedings the charges were attempted murder and causing grievous bodily harm with intent. However, there are no such torts known to the civil law.) Clerk & Lindsell on Torts (23rd edition) states at paragraph 14-09:

> " 'The least touching of another in anger is battery.' The direct imposition of any unwanted physical contact on another person may constitute the tort of battery. There is no requirement to prove that the contact caused or threatened any physical injury or harm. 'An

intention to injure is not essential to an action for trespass to the person. It is the mere trespass by itself that is the offence.' The culpable touching may take several forms. Thus, so long as it is direct, anything which amounts to a blow, whether inflicted by hand, weapon or missile, is a battery. It is a battery to throw water over someone or to spit in his face. It is a battery to overturn a chair on which someone is sitting."

One of the key elements of the entire escape was the subduing and false imprisonment of the prison staff in the control room of H7 so that they could not raise the alarm. In order to have a viable defence of truth to these defamation proceedings, all that Dr O'Doherty has to show is that, at a minimum, on the balance of probabilities, Mr Kelly acted in a way which furthered the commission of a battery by Mr Storey on Mr Adams; and Mr Kelly must have done so in pursuance of a common design to do or secure the doing of the battery.

[55] When one combines the findings of Lord Lowry in *R v Burns and Others* with the additional material which Mr Kelly has written in his books, a surface level analysis of the facts reveals the following:

(a) On 25 September 1983, 38 prisoners tried to escape from H Block No 7. (Lowry, page 2).
(b) The escape was a carefully planned and executed operation. (Lowry, page 3, and *Playing My Part*, pages 175-176)
(c) Mr Kelly was not the original designer of the plan but he was asked to review it and comment on it. (*The Escape*, pages 1-3).
(d) Mr Kelly suggested that that the execution of the plan would require the possession of firearms. (*The Escape*, page 5).
(e) Mr Kelly committed himself to taking part in the execution of the plan. (*The Escape*, page 5).
(f) The enterprise involved the overpowering and restraint by the prisoners of a large number of prison officers, with the aid of pistols (of which five were recovered) and other offensive weapons such as chisels, Stanley knives, hammers and screwdrivers belonging to the tool kits (of which 28 were subsequently picked up), the latter having been provided by the prison authorities for recreational use by the prisoners. One prison officer, James Ferris, died (the direct cause being heart failure) and another, John Henry Adams, received a near-fatal bullet wound in the head. (Lowry, page 3).
(g) The repeated use by Mr Kelly of the word "arrest" in respect of what was to happen to the prison officers implies the intention of the prisoners' use of force on the officers. (*The Escape*, page 3)
(h) Mr Kelly and Mr Storey were in the circle area. (*The Escape*, page 75).

(i) Mr Kelly opened the metal grille gate of the control room. (*The Escape*, page 75).
(j) At one point, moments before the shooting of John Adams, Mr Kelly had either *a* gun, or *the* gun from which the bullet was fired, in his hand. (*The Escape*, page 75).
(k) Mr Kelly pointed the gun which he held at a prison officer and said, "If you go any further I will shoot you!" (*The Escape*, page 75).
(l) Mr Kelly told that guard to lie down on the ground with his hands over his head. (*The Escape*, page 75).
(m) Mr Kelly does not disassociate himself from the use of force for the purpose of escaping. Indeed, quite the opposite. Mr Kelly stated: "This was a defining moment in the escape. Everyone who had embarked on it knew that something like this could happen. It had been agreed that verbal aggression should be used liberally by the Volunteers so that as little physical aggression as possible would be necessary. Up to this point the psychology had worked well. However, Volunteers were clear that if it was necessary to use force to physically protect volunteers or to safeguard the escape there could be no hesitation." (*The Escape*, page 76). Further, the use of the word "force" clearly amounts to an admission by Mr Kelly that there was an agreement among the escapees that, if they found it necessary to do so, the tort of battery would be committed.
(n) When the door was slammed shut by a prison officer, "It galvanised *them* into action." (*The Escape*, page 75). Mr Kelly therefore made it clear that both men each performed some act although he does not identify what his own act was.
(o) Either Mr Kelly or Mr Storey then leapt towards the door, pushed it partially open with his shoulder, squeezed the gun around the door and fired two shots, one of which hit Mr Adams in the head. (*The Escape*, page 75). By the forcing of the door against him and by the firing of the shot that hit him, a battery was committed in respect of Mr Adams.
(p) The inherent probability is that at that moment both Mr Kelly and Mr Storey both tried to force the door to the control room open and that whichever one of them had the gun in his hand at the relevant moment fired the shot which hit Mr Adams. Hence the prisoner who did not have the gun in his hand at that moment assisted the other in the battery of Mr Adams by the transmission of force through the pushing of the door and by widening the gap through which the gun could be fired.

[56] I conclude therefore that the facts demonstrate that there was a common design, within the meaning of that term as explained by the Supreme Court in *Sea Shepherd UK v Fish and Fish Ltd*., by Mr Kelly and Mr Storey. Therefore, regardless of which one of them fired the shot that hit Mr Adams, what Mr Kelly has written in his books, in my view, makes it

extremely difficult, if not impossible, for him to rebut the argument that he was not a joint tortfeasor in respect of the battery. Thus, these facts lead to a complete defence for Dr O'Doherty in respect of the defamation action Mr Kelly has brought.

[57] What Mr Kelly has written in his books is, in my view, a clear statement of common design in respect of the battery of Mr Adams. Even if one accepts the submission by Mr McKenna that Mr Kelly has not explicitly admitted pulling the trigger, the content of his books appears to make Mr Kelly civilly liable, on the balance of probabilities, for the shooting of Mr Adams. In the light of that, these defamation proceedings against Dr O'Doherty are completely untenable. For that reason the court strikes them out on the basis that they are scandalous, frivolous and vexatious.

[58] In reaching this decision I have not taken into account, despite Miss Herdman's urging, the fact that Mr Kelly has failed to file an affidavit denying that he shot Mr Adams and instead relies upon, "A neither confirm nor deny approach" in respect of the incident. Miss Herdman offered no authority supporting the argument that the absence of such an affidavit was sufficient for me to draw an adverse inference against Mr Kelly.

The Tort of Conspiracy

[59] Before moving on to the next major element of Dr O'Doherty's submissions, some observations are merited in respect of the averment in Ms McCloskey's second affidavit where she stated:

> "The Plaintiff is inexorably and intimately linked to every aspect of the prison escape including the shooting of the prison officer."

This statement, taken together with references in counsel's submissions to joint enterprise (albeit the term is used erroneously as I have already indicated) comes very close to making a somewhat novel argument that Mr Kelly had tortious liability for the tort of conspiracy. The reason that it might be a novel argument is because conspiracy is regarded as an economic tort (Clerk and Lindsell on Torts, 23rd edition, paras 23-98 to 23-128). Nevertheless, the courts have indicated that, of all the economic torts, it is the one whose boundaries are perhaps the hardest to define in principled terms. The tort was described by the Supreme Court in *JSC BTA Bank v Khrapunov* [2018] UKSC 19:

> "7. The modern tort of conspiracy was developed in the late 19th and early 20th century, as a device for imposing civil liability on the organisers of strikes and other industrial action, once the Conspiracy and Protection of Property Act

1875 had provided that combinations in furtherance of trade disputes should no longer be indictable as crimes. It is an anomalous tort because it may make actionable acts which would be lawful apart from the element of combination. The ostensible rationale, that acts done in combination are inherently more coercive than those done by a single actor, has not always been found persuasive, least of all when the single actor may be a powerful corporation. There is much to be said for the view expressed by Lord Walker in *Revenue and Customs Comrs v Total Network SL* [2008] 1 AC 1174, para 78, that an unarticulated factor in the development of the tort was the conviction of late Victorian judges that large-scale collective action in the political and economic sphere by those outside the traditional governing class was a potential threat to the constitution and the framework of society. Nonetheless, the tort of conspiracy has an established place in the law of tort and its essential elements have been clarified by a series of modern decisions of high authority, most of them in contexts far removed from the modern tort's origin in the law relating to industrial disputes.

8. It has been recognised since the decision of the House of Lords in *Quinn v Leathem* [1901] AC 495 that the tort takes two forms: (i) conspiracy to injure, where the overt acts done pursuant to the conspiracy may be lawful but the predominant purpose is to injure the claimant; and (ii) conspiracy to do by unlawful means an act which may be lawful in itself, albeit that injury to the claimant is not the predominant purpose. In *Lonrho Plc v Fayed* [1992] 1 AC 448, Lord Bridge, with whom the rest of the Appellate Committee agreed, reviewed the earlier authorities and summarised the position as follows, at pp 465-466:

> "Where conspirators act with the predominant purpose of injuring the plaintiff and in fact inflict damage on him, but do nothing which would have been actionable if done by an individual acting alone, it is in the fact of their concerted action for that illegitimate purpose that the law, however anomalous it may now seem, finds a sufficient ground to condemn their action as illegal and tortious. But when conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary

> purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful."

We shall call these two forms of conspiracy a "lawful means" and an "unlawful means" conspiracy respectively. The terminology is not exact, because a cause of action in conspiracy may be based on a predominant intention to injure the claimant whether the means are lawful or unlawful. But it seems to us to be more satisfactory than using terms which appear to distinguish between "conspiracies to injure" and other conspiracies. As we shall show, all actionable conspiracies are conspiracies to injure, although the intent required may take a variety of different forms.

9. Conspiracy is both a crime, now of limited ambit, and a tort. The essence of the crime is the agreement or understanding that the parties will act unlawfully, whether or not it is implemented. The overt acts done pursuant to it are relevant, if at all, only as evidence of the agreement or understanding. It is sometimes suggested that the position in tort is different. Lord Diplock, for example, thought that "the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement": *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173, 188. This is true in the obvious sense that a tortious conspiracy, like most other tortious acts, must have caused loss to the claimant, or the cause of action will be incomplete. It follows that a conspiracy must necessarily have been acted on. But there is no more to it than that. The critical point is that the tort of conspiracy is not simply a particular form of joint tortfeasance. In the first place, once it is established that a conspiracy has caused loss, it is actionable as a distinct tort. Secondly, it is clear that it is not a form of secondary liability, but a primary liability. This point had been made by Lord Wright in *Crofter Hand Woven Harris Tweed Ltd v Veitch* [1942] AC 435, 462: "the plaintiff's right is that he should not be damnified by a conspiracy to injure him, and it is in the fact of the conspiracy that the unlawfulness resides." It was reaffirmed by the House of Lords in *Revenue and Customs Comrs v Total Network SL* [2008] AC 1174, paras 102 (Lord Walker), 116 (Lord Mance), 225 (Lord Neuberger). Third, the fact of combination may alter the legal character and consequences of the overt acts. In particular, it may give rise to liability which would not attach

> to the overt acts in the absence of combination. This latter feature of the tort was what led Lord Wright in *Crofter*, *loc cit*, to say that it was "in the fact of the conspiracy that the unlawfulness resides." He was speaking of a lawful means conspiracy, but as Lord Hope pointed out in *Revenue and Customs Comrs v Total Network SL* at para 44, the same applies to an unlawful means conspiracy, at any rate where the means used, while not predominantly intended to injure the claimant, were directed against him. There is clearly much force in his observation at para 41 that if a lawful means conspiracy is actionable on proof of a predominant intention to injure, "harm caused by a conspiracy where the means used were unlawful would seem no less in need of a remedy."

[60] However, while the position might be arguable that the tort of conspiracy could be developed by the Common Law so as to apply to non-economic losses in such contexts as the prison escape, the point was not argued before me in sufficient detail to justify a proper consideration of the issue. Furthermore, as I indicated earlier, where the law in a particular field is not settled, but rather is a new and developing field, the court should be appropriately cautious with applications to strike out. So, for those reasons I have not taken this issue into account in this strike out application.

The Abuse of Process Application

[61] In the light of my conclusions as to a proper surface reading of the facts, are the defamation proceedings an abuse of the process of the court? In *AB v Universitair Ziekenhuis Gent and Belfast Health & Social Care Trust* [2021] NIQB 47 McFarland J comprehensively summarised the position in this jurisdiction regarding applications for the striking out of pleadings on the ground that they were an abuse of process:

> "[38] Order 1A of the Rules of the Court of Judicature sets out the overriding objective of the Rules of the Court of Judicature. It provides:
>
> > "1A. - (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.
> >
> > (2) Dealing with a case justly includes, so far as is practicable -
> >
> > (a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate to:

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.

(3) The Court must seek to give effect to the overriding objective when it -

(a) exercises any power given to it by the Rules; or

(b) interprets any rule.

(4) Paragraph (3) above shall apply subject to the provisions in Order 116A, rule 2(1), Order 116B, rule 2(1), Order 116C, rule 2(1) and Order 126, rule 2(1).

[39] In the context of these applications emphasis is placed on saving expense, expedition and fairness, and allotting an appropriate share of the court's resources.

[40] Order 19 (1) provides that the court may:

"at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that – …

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court."

[41] The power of the court is an inherent power to regulate the proceedings before it. The court will always exercise this power with care, particularly when it is being asked to strike out proceedings

before trial, as it will deny the plaintiff the remedy that he seeks without a trial of the issues. It raises issues concerning the right to a fair trial (Article 6 of the European Convention). In *McAteer v Lismore* [2000] NI 476 at 471, Girvan J stated that:

> "An application to strike out proceedings at this stage of the proceedings if acceded to would bring the proceedings to an end and there would be no further trial of the dispute. An application to strike out raises issues under Article 6 of the Convention for such an application could result in depriving a plaintiff of his right under Article 6 to a fair and public hearing in respect of the determination of the party's civil rights (which includes a right in property)."

However, both the common law, and the European Convention, guarantee a fair trial to both parties. In particular, the convention is intended to guarantee not rights that are theoretical or illusory, but rights that are both practical and effective (see *Airey v Ireland* (6289/73 9th October 1979). As Yip J in *Magee v Willmott* [2020] EWHC 1378 stated at [48] striking out proceedings "*will not offend Article 6 provided that doing so is proportionate.*"

[42] When an abuse of process is alleged, it is important that the court approaches this in the correct manner. Dealing with abuse of process is an inherent power of the court to regulate the business before it. Many of the relevant authorities are from England, and in recent times, they have focussed on an application of the English CPR, which do not apply to Northern Ireland. The actual rules may not be the same, however the overriding principles are similar, if not identical. The English CPR 3.4 (2) provides:

> "The court may strike out a statement of case if it appears to the court:
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

[43] Lord Clarke in *Summers v Fairclough Homes* [2012] UKSC 26, specifically reviewed the pre-CPR law in relation to civil abuse of process at [35]:

> "The pre-CPR authorities established a number of propositions as follows:
>
> (i) The court had power to strike out a claim for want of prosecution, not only in cases of inordinate and inexcusable delay which caused prejudice to the defendant, but also where the court was satisfied that the default was "intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court": Birkett v James [1978] AC 297 per Lord Diplock at p 318F-G. In the latter case it was not necessary to show that a fair trial was not possible or that there was prejudice to the defendant. See also, for example, Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426, per Lord Woolf MR (with whom Waller and Robert Walker LJJ agreed) at p 1436H.
>
> (ii) In a classic, much followed, statement in Hunter v Chief Constable of the West Midlands Police [1982] AC 529 Lord Diplock described the court's power to deal with abuse of process thus at p 536C:
>
> > "This is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied. … It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed

> categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

(iii) The court had power to strike out a claim on the ground of abuse of process, even though the effect of doing so would be to extinguish substantive rights. It follows from the conclusion in Birkett v James that the court could strike out a claim as an abuse of process for intentional and contumelious conduct amounting to an abuse of the process of the court without the necessity to show prejudice that the fact that a strike out might extinguish substantive rights is not a bar to such an order.

(iv) Although it appears clear that in the vast majority of cases in which the court struck out a claim it did so at an interlocutory stage and not after a trial or trials on liability and quantum, the cases show that the power to strike out remained even after a trial in an appropriate case. The relevant authorities, such as they are, were considered by Colman J in National Westminster Bank plc v Rabobank Nederland [2006] EWHC 2959 (Comm), where he summarised the position thus in paragraphs 27 and 28:

> "27. In my judgment, there can be no doubt that the court does have jurisdiction to strike out a claim or any severable part of a claim of its own volition whether immediately before or during the course of a trial. This is clear from the combined effect of CPR 1.4, 3.3 and 3.4 as well as 3PD 1.2, and by reason of its inherent jurisdiction.
>
> 28. However, the occasion to exercise this jurisdiction after the start of the trial is likely to be very rare. The normal course will be for all applications to strike out a claim or part of a claim on the merits to be made under CPR 3.4 or 24.2 and determined well in advance of the trial."

> (v) We agree with Colman J. His conclusions are consistent with Glasgow Navigation Co v Iron Ore Co [1910] AC 293, Webster v Bakewell RDC (1916) 115 LT 678, Harrow LBC v Johnstone [1997] 1 WLR 459, Bentley v Jones Harris & Co [2001] EWCA Civ 1724 per Latham LJ at paragraph 75 and The Royal Brompton Hospital NHST v Hammond [2001] EWCA Civ 550; [2001] Lloyd's Rep PN 526, per Clarke LJ at paragraphs 104–109, especially at paragraph 107.

[44] The correct approach to dealing with alleged abuse of process is for the court to adopt a two-stage test. First the court has to determine whether the plaintiff's conduct is an abuse of process. If so, the court is then required to exercise its discretion as to whether or not to strike out the proceedings or to take such other steps or make such other orders as are appropriate. That second stage question requires a balancing exercise, and in particular will require a consideration of proportionality (see *Asturion Foundation v Alibrahim* [2020] EWCA Civ 32 and *Cable –v- Liverpool Victoria* [2020] EWCA Civ 1015).

[45] As to what constitutes an abuse of process, it would not be appropriate to lay down a test or rule. As Lord Diplock said in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529 at 536c it would be unwise to create fixed categories (quoted above at [43]). Lord Bingham CJ in *Attorney-General v Barker* [2000] 1 FLR 759 at [19] gave a working definition as "*a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.*" A failure to comply with the rules, or directions, of the court can amount to an abuse of process (see *Cable* at [44]).

[46] The jurisdiction should be exercised sparingly. The abuse needs to be clearly shown as stated in the judgment of Lloyd LJ in *Stuart v Goldberg Linde* [2008] EWCA Civ 2 at [65]:

> "It is consistent with [Article 6 ECHR] to allow the court to strike out a claim which is an abuse of the process, but at common law it must be clearly shown to be an abuse before it can be struck out."

As befits any draconian step, it will always be a last resort as it will deprive a plaintiff of a substantive right (see Lord Clarke in *Summers* at [49]). Colton J in *J19 v Facebook* [2017] NIQB 42 at [36] summarised the position as follows:

> "It is clear that this power should only be exercised in very clear and obvious cases when one is relying on misconduct of a party. On the basis of the authorities to which I have referred this conduct

> has been described as 'misconduct so serious that it would be an affront to the court to permit him to continue …' or 'intentional and contumelious conduct.'"
>
> [47] Although Lloyd LJ referred to the need to clearly show the abuse of process, and this is quoted with approval by Coulson LJ in *Cable*, this cannot be taken as meaning that there is a potentially higher standard of proof above the normal civil standard of proof."

[62] In the action before me Mr Kelly has instituted defamation proceedings against Dr O'Doherty for publicly stating that Mr Kelly shot Mr Adams in circumstances where the books Mr Kelly has published clearly demonstrate (without any need to engage in a minute and protracted examination of the facts) that he participated in a common design to arrest prison staff in order to escape and that, as part of this common design, he and the other escapees "were clear that if it was necessary to use force to physically protect Volunteers or to safeguard the escape then there could be no hesitation." It is not overtly clear whether it was Mr Kelly or Mr Storey who fired the shot that hit Mr Adams in the head. What is clear is that one of the escapees decided that it was necessary to use force to safeguard the escape and that, having entered into the common design, Mr Kelly would be as legally liable for the shooting in civil proceedings as if he had pulled the trigger himself. Initiating defamation proceedings in these circumstances is, without doubt, an abuse of process.

[63] The second stage of the two-stage test identified by McFarland J as to the exercise of judicial discretion now therefore requires to be considered.

[64] Miss Herdman submits that the purpose of the defamation proceedings taken against Dr O'Doherty (but not against the BBC who aired the interview) and against Miss Edwards (but not against the Belfast Telegraph who published her comments) is to frighten those who are his critics and stifle the expression of their opinions of him by the threat of legal costs. She points out that the stress arising from these High Court proceedings against Dr O'Doherty has now existed for over three years. Ms McCloskey's second affidavit on behalf of Dr O'Doherty particularly notes that Mr Kelly has not sought to sue the BBC despite the fact that the Nolan interview remained on the BBC website for two weeks after the initial broadcast. She states that the litigation tactic deployed "focuses on suing a journalist with limited means rather than a national broadcaster." Miss Herdman described the proceedings against Dr O'Doherty as a cynical attempt to frighten him as he is an outspoken critic of Mr Kelly's political party. Miss Herdman therefore argues that the proceedings amount to a "SLAPP".

[65] The concept of "SLAPPs" (Strategic Lawsuits Against Public Participation) has in recent years entered the public discourse. Until recently, when the Economic Crime and Corporate Transparency Act 2023 introduced a limited set of provisions in relation to reporting on economic crime, the UK did not have any anti-SLAPP legislation. In October 2023 the UK government issued a policy paper on the issue. It defined SLAPPs as:

> "legal actions typically brought by corporations or individuals with the intention of harassing, intimidating and financially or psychologically exhausting opponents via improper use of the legal system."

It noted that:

> "Actions are typically brought against investigative journalists, writers and publishers, and are designed to silence criticism."

and that:

> "SLAPPs are a rising problem and amount to abusive proceedings."

[66] An indication of the current situation with regard to SLAPPs in the United Kingdom is that the Solicitors Regulation Authority in England and Wales issued a Warning Notice to the profession in November 2022 indicating their concern that law firms were pursuing abusive litigation such as SLAPPs on behalf of their clients. It does not appear that the Law Society in Northern Ireland has yet published similar guidance to the profession in this jurisdiction. It may well be that the statutory requirement of a review of defamation law in Northern Ireland which is required under section 11 of the Defamation Act (Northern Ireland) 2022 will make proposals for this jurisdiction in respect of either the "serious damage" to reputation threshold which now applies in England and Wales but not here (and which would provide some protection against SLAPPs) or proposals to introduce fully fledged anti-SLAPP provisions.

[67] In articulating her argument, Miss Herdman submitted that there have been a number of publications which have contained statements that Mr Kelly shot Mr Adams. The day after the escape, the Secretary of State for Northern Ireland announced a non-statutory inquiry (which would therefore have allowed for the institution of proceedings in respect of defamatory statements made by witnesses) which was headed by Her Majesty's Chief Inspector of Prisons, James Hennessy. Paragraph 2.05 of the Hennessy Report, published on 26 January 1984, states:

> "Officer *** was another who tried to frustrate the takeover. Lying on the floor of the communications room, he surreptitiously raised himself up in an attempt to reach his

> stave when he thought Kelly's attention had been diverted. Before he could do so, Kelly fired two shots at him: he collapsed on the floor with a bullet through the head."

Miss Herdman also observed that there have been a number of other publications which have made the same statement. In particular she noted that, in a 2008 documentary on the escape broadcast by the BBC, the presenter stated:

> "As the other prison officer was being overpowered, John Adams was trying to raise the alarm. Kelly fired two shots, one of which hit Adams above the eye."

As an indication of the wide reporting that Mr Kelly had shot Mr Adams, Counsel even drew my attention to the fact that the Wikipedia page about the Maze escape states that Mr Adams was shot in the head by Mr Kelly. For some reason, however, it is only these two freelance journalists, Dr O'Doherty and Miss Edwards, whom Mr Kelly has singled out and pursued for defamation.

[68] In *Hemming v Poulton* [2023] EWHC 3001 (KB), Hill J, in a case which concerned litigation brought by a former Member of Parliament against a freelance journalist and broadcaster, observed:

> "The category of potentially abusive proceedings brought for an 'improper collateral purpose' is described in the White Book at 3.4.15 thus:
>
> > "It is an abuse of process to pursue a claim for an improper collateral purpose. However, what is an improper collateral purpose is not easy to define and few cases have been struck out solely on this basis…
> >
> > The cases suggest two distinct categories of such misuse of process: [1] the achievement of a collateral advantage beyond the proper scope of the action; and [2] the conduct of the proceedings themselves (including the initiation of the claim itself) is not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation.
> >
> > Only in the most clear and obvious case will it be appropriate upon preliminary application to strike out proceedings as an abuse of process so as to

> prevent a plaintiff from bringing an apparently proper cause of action to trial."

[69] Although this is a quotation from the current version of the White Book in England and Wales dealing with the Civil Procedure Rules which apply in that jurisdiction, I nevertheless consider that the concept of abuse of process in this jurisdiction also includes the circumstances where litigation is initiated for an improper collateral purpose. This has been the position for many years. For example, in *In re Majory* [1955] Ch. 600 at pp. 623–624, Sir Raymond Evershed MR said:

> "The so-called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused."

[70] The field of political speech (and I use this term in the widest possible sense so as to include not only what politicians say but also what others say about politicians, their policies and their actions) is a field which must be carefully handled lest the fabric of democracy be damaged. Defamation actions in this field need to be carefully considered in case they are being used to attack legitimate free speech. As Mrs Justice Steyn said in *Riley v Sivier* {2022] EWHC 2891 (KB):

> "The special importance of expression in the political sphere, a freedom which is at the very core of the concept of a democratic society, is well recognised; and the concept of political expression is a broad one. The limits of acceptable criticism are wider in respect of political expression concerning politicians."

[71] As Lord Steyn observed in *Reynolds v Times Newspapers and Others* [2001] 2 AC 127, the correct approach to the line between permissible and impermissible political speech was indicated by the European Court of Human Rights in *Lingens v. Austria* (1986) 8 E.H.R. 407, as follows (at 419, para. 42):

> "The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private

> individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. No doubt article 10(2) enables the reputation of others--that is to say, of all individuals--to be protected, and this protection extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues."

[72] Of course every individual has the right to defend their good name but, as elected representatives, politicians have a duty to display a greater degree of restraint when it comes to taking to legal action against journalists. The absence of any defamation proceedings in respect of the wide reporting over the years that Mr Kelly shot Mr Adams, taken together with recent proceedings having been instituted only against these two particular freelance journalists, suggests that, rather than being a genuine attempt to defend a reputation which has been damaged by an untruth, the proceedings are what has been referred to as a SLAPP, namely an attempt to silence two bothersome journalists with the threat of legal costs. The proceedings appear to be a strategic effort to intimidate them, to deprive them of time and resources, and ultimately to silence them. This would amount to the proceedings having been brought for an improper collateral purpose.

[73] It is difficult to discern any valid reason why defamation proceedings against Dr O'Doherty and Ms Edwards were brought after what Mr Kelly had written his book *The Escape*. There was neither affidavit evidence from Mr Kelly nor any submissions from Mr McKenna which attempted to explain or justify the initiation of defamation proceedings against the two journalists and the absence of such proceedings against the two media organisations which carried their words. On the balance of probabilities therefore the proceedings do bear the hallmarks of a SLAPP and have been initiated not for the genuine purposes of vindicating a reputation injured by defamatory statements, but rather for the purpose of stifling the voices of his troublesome critics. I note that the Solicitors Regulation Authority in England and Wales in its guidance to the profession observes that one of the "red flags" that helps identify a SLAPP is that the client asks that the claim is targeted only against individuals where other corporate defendants are more appropriate. Freelance journalists are particularly vulnerable without the support of a media outlet behind them This is clearly the position in these proceedings. The abuse of process in this case is so blatant that it would be utterly unjust if the court were to allow the proceedings to continue. The court therefore has no hesitation in striking them out.

The Defamation Act 1996 Application

[74] Dr O'Doherty also makes an application under section 8 of the Defamation Act 1996 for summary disposal of these proceedings on the basis that Mr Kelly's action has no realistic prospect of success.

[75] Section 8 provides:

> "(1) In defamation proceedings the court may dispose summarily of the plaintiff's claim in accordance with the following provisions.
>
> (2) The court may dismiss the plaintiff's claim if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried.
>
> (3) The court may give judgment for the plaintiff and grant him summary relief (see section 9) if it appears to the court that there is no defence to the claim which has a realistic prospect of success, and that there is no other reason why the claim should be tried.
>
> Unless the plaintiff asks for summary relief, the court shall not act under this subsection unless it is satisfied that summary relief will adequately compensate him for the wrong he has suffered.
>
> (4) In considering whether a claim should be tried the court shall have regard to—
>
> > (a) whether all the persons who are or might be defendants in respect of the publication complained of are before the court;
> >
> > (b) whether summary disposal of the claim against another defendant would be inappropriate;
> >
> > (c) the extent to which there is a conflict of evidence;
> >
> > (d) the seriousness of the alleged wrong (as regards the content of the statement and the extent of publication); and
> >
> > (e) whether it is justifiable in the circumstances to proceed to a full trial.
> >
> > (5) Proceedings under this section shall be heard and determined without a jury."

[76] There is clearly an overlap between this statutory test for striking out defamation proceedings on the basis that there is no realistic prospect of success and the test applied under Order 18 Rule 19 that the cause pleaded must be unarguable or almost incontestably bad. However they are not identical and require to be considered separately.

[77] Borrowing from and adapting the language used by Lewison J in *Easyair v Opal* [2009] EWHC 339 (Ch), where he set out the principles applicable to the equivalent test for summary disposal in summary judgment applications, I consider that the approach under section 8 of the Defamation Act 1996 should be as follows:

> (1) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success.
>
> (2) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable.
>
> (3) In reaching its conclusion the court must not conduct a "mini-trial".
>
> (4) This does not mean that the court must take at face value and without analysis everything that a plaintiff says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by the documentary evidence.
>
> (5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary disposal, but also the evidence that can reasonably be expected to be available at trial.
>
> (6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.
>
> (7) If the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

[78] In the light of my assessment of the facts of what occurred on 25 September 1983 and in the light of my assessment of the law in respect of joint

tortfeasors, I must conclude that Mr Kelly's proceedings have no realistic prospect of success and there is no reason why they should be tried. In my view the present proceedings meet the test for summary disposal. I do not consider that in the light of the findings of Lord Lowry in *R v Burns and Others* followed by what Mr Kelly has written in his books that there is any realistic chance of Mr Kelly's defamation proceedings being successful. I therefore would also strike the action out on that basis.

The *Jameel* Application

[79] I must now deal with Miss Herdman's submission as to whether these proceedings pass the minimum threshold of seriousness. This test was introduced with a view to excluding trivial claims. In *Lachaux v Independent Print Ltd and another* [2019] UKSC 27 Lord Sumption observed that caselaw in the last two decades has determined that the damage to reputation in an apparently actionable case must pass a minimum threshold of seriousness. The first of two notable cases was *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946. The plaintiff had sued the publishers of the Wall Street Journal for a statement published online in Brussels to the effect that he had been funding terrorism. The statement was shown to have reached just five people in England and Wales. The Court of Appeal rejected a submission that the conclusive presumption of general damage was incompatible with article 10 of the Human Rights Convention. Lord Phillips of Worth Matravers MR, delivering the leading judgment, observed (para 37) that:

> "English law has been well served by a principle under which liability turns on the objective question of whether the publication is one which tends to injure the claimant's reputation."

[80] But he held that the presumption could not be applied consistently with the Convention in those cases, said to be rare, where damage was shown to be so trivial that the interference with freedom of expression could not be said to be necessary for the protection of the claimant's reputation. The appropriate course in such a case was to strike out the claim, not on the ground that it failed to disclose a cause of action, but as an abuse of process. The Court of Appeal held that it was an abuse of process for the action before them to proceed "where so little is now seen to be at stake", and duly struck it out.

[81] The effect of this decision was to introduce a procedural threshold of seriousness to be applied to the damage to the claimant's reputation. Two things are clear from the language of Lord Phillips' judgment. One is that the threshold was low. The damage must be more than minimal. That is all. Secondly, the Court of Appeal must have thought that the operation of the threshold might depend, as it did in the case before them, on the evidence of

actual damage and not just on the inherently injurious character of the statement in question.

[82] The second notable case on this issue was *Thornton v Telegraph Media Group Ltd* [2011] 1 WLR 1985. It arose out of an application by the Defendant newspaper to strike out part of the particulars of claim in a libel action on the ground that the statement complained of was incapable of being defamatory. Allowing the application, Tugendhat J held that, in addition to the procedural threshold recognised in *Jameel*, there was a substantive threshold of seriousness to be surmounted before a statement could be regarded as meeting the legal definition of "defamatory". The judge's definition (para 96) was that a statement "may be defamatory of him because it substantially affects in an adverse manner the attitude of other people towards him, or has a tendency so to do". He derived this formula from dicta of Lord Atkin in *Sim v Stretch* [1936] 2 All ER 1237. At para 94, he dealt with the relationship between the definition thus arrived at and the presumption of general damage, in terms which suggested that (unlike the *Jameel* test) the application of the threshold depended on the inherent propensity of the words to injure the claimant's reputation:

> "If the likelihood of adverse consequences for a claimant is part of the definition of what is defamatory, then the presumption of damage is the logical corollary of what is already included in the definition. And conversely, the fact that in law damage is presumed is itself an argument why an imputation should not be held to be defamatory unless it has a tendency to have adverse effects upon the claimant. It is difficult to justify why there should be a presumption of damage if words can be defamatory while having no likely adverse consequence for the claimant. The Court of Appeal in Jameel (Yousef)'s case [2005] QB 946 declined to find that the presumption of damage was itself in conflict with article 10 (see para 37), but recognised that if in fact there was no or minimal actual damage an action for defamation could constitute an interference with freedom of expression which was not necessary for the protection of the claimant's reputation: see para 40."

[83] In *Higinbotham (formerly BWK) v Teekhungam & Anor* [2018] EWHC 1880 (QB) Nicklin J helpfully summarised the principles to be applied in a *Jameel* application:

> "(i) The Court has jurisdiction to stay or strike out a claim where no real or substantial wrong has been committed and litigating the claim will yield no tangible or legitimate benefit to the claimant proportionate to the likely costs and use of court procedures: in other words, "the game is not worth the candle": *Jameel* [69]-[70] *per* Lord Phillips MR and *Schellenberg -v- BBC* [2000] EMLR 296, 319 *per* Eady J.

The jurisdiction is useful where a claim "is obviously pointless or wasteful": *Vidal-Hall -v- Google Inc* [2016] QB 1003 [136] *per* Lord Dyson MR.

(ii) Nevertheless, striking out is a draconian power and it should only be used in exceptional cases: *Stelios Haji-Ioannou -v- Dixon* [2009] EWHC 178 (QB) [30] *per* Sharp J.

(iii) It is not appropriate to carry out a detailed assessment of the merits of the claim. Unless obvious that it has very little prospect of success, the claim should be taken at face value: *Ansari -v- Knowles* [2014] EWCA Civ 1448 [17] per Moore-Bick LJ and [27] per Vos LJ.

(iv) The Court should only conclude that continued litigation of the claim would be disproportionate to what could legitimately be achieved where it is impossible "to fashion any procedure by which that claim can be adjudicated in a proportionate way": *Ames –v- Spamhaus Project Ltd* [2015] 1 WLR 3409 [33]-[36] *per* Warby J citing *Sullivan –v- Bristol Film Studios Ltd* [2012] EMLR 27 [29]-[32] *per* Lewison LJ."

[84] The *Jameel* submission requires to be considered in two particular sets of circumstances. Firstly, if Dr O'Doherty's comments must be understood as meaning that it was Mr Kelly who actually pulled the trigger, how defamatory is it for Dr O'Doherty to have made that statement where the evidence does not demonstrate that it was true, but it does show that Mr Kelly was a joint tortfeasor with Mr Storey who fired the shot? I consider that those circumstances do meet the test for a successful *Jameel* application because a hypothetical, right-thinking person would see both participants as being equally liable for the shooting.

[85] Secondly, if a consideration of the facts does not justify an interpretation that Mr Kelly shot Mr Adams, because either his finger was not on the trigger or because he was not a joint tortfeasor with Mr Storey who had fired the shot, did the words of Dr O'Doherty seriously damage Mr Kelly's reputation in the minds of hypothetical right-thinking people? Essentially Miss Herdman argued that Mr Kelly had no reputation to lose given his past criminal convictions. This second set of circumstances requires a significantly longer consideration.

[86] Miss Herdman argued that Mr Kelly's reputation is informed by the following:

(a) Mr Kelly has publicly accepted his membership of the Provisional IRA, an organisation proscribed by law;

(b) Mr Kelly was convicted of the Old Bailey bombings and sentenced to a significant prison sentence;

(c) Mr Kelly was convicted of the false imprisonment of five prison officers during the prison escape;

(d) Mr Kelly has publicly accepted being involved in the prison escape in a leadership role, during which a prison officer was shot in the head and another died of a heart attack;

(e) Mr Kelly has publicly accepted being in possession of a gun during the prison escape, pointing it at Mr Adams and threatening to shoot him;

(f) Mr Kelly's own book on the prison escape narrows the pool of attempted suspects down to two people, Mr Kelly and Mr Storey, who were, on any view, acting as part of a joint enterprise;

(g) Mr Kelly has spoken in various interviews of his great pride in the escape.

[87] With great bluntness Miss Herdman expressed it this way in her written submission, stating that Mr Kelly is:

> "… a convicted bomber and former member of an organisation proscribed by law and responsible for the maiming of many hundreds of people …"

While bluntly expressed, Miss Herdman makes a significant point. I consider that a right-thinking person would take the view that anyone who is guilty to the criminal standard of proof of exploding car bombs in a capital city, putting the lives of dozens or hundreds of people at risk, has lost his moral compass as he places little value on human life because he is prepared to take risk with their lives as collateral damage.

[88] Mr McKenna argued that no evidence in respect of criminal convictions had been exhibited to the papers for this application which conformed with section 9 of the Civil Evidence (Northern Ireland) Act 1971. I do not regard this as a weighty argument. Indeed, in my view it represents a misunderstanding of section 9 of the 1971 Act. A purposive interpretation of section 9 indicates that its purpose was to make proof of a conviction to be conclusive evidence. Hence it represents a conclusive reversal of the decision in *Hollington v Hewthorn* [1943] 1 KB 587, CA in defamation cases. Section 9 was not therefore passed for the purpose of restricting the way in which a conviction could be proved. The fact of a criminal conviction can be proved in a variety of ways. It can be proved by an admission to an interrogatory, or by presentation of a certificate of conviction, or by the oral testimony of a witness who was present at the trial. Given that the application before me is an

interlocutory application (and not a full trial), the fact of the conviction can proved before me on the balance of probabilities by the affidavit evidence exhibiting Mr Kelly's second book, *Playing My Part* which contains extensive material on the Old Bailey bombings, the trial and Mr Kelly's subsequent conviction. Mr Kelly's convictions in respect of the 1983 escape are similarly proved by the judgment of Lowry LCJ exhibited to the affidavit evidence on behalf of Mr Kelly.

[89] A plaintiff's reputation is a reputation as accumulated from one source or another over the period of time that precedes the occasion of the libel that is in suit." **(***Associated Newspapers Ltd and Others v Dingle* [1964] AC 371 per Lord Radcliffe).

[90] In his written submission Mr McKenna submitted that :

> "The matters relied upon, which go directly to the issue of reputation, are that the plaintiff has publicly admitted membership of a proscribed organisation and has previous convictions. The courts have held that in actions for defamation, the rule in *Scott v Sampson* [1882] 8 QBD 491 prohibits a defendant from adducing evidence of specific acts of misconduct going to the issue of reputation; nor may a defendant cross-examine the claimant about them. In *Burstein v Times Newspapers* [2001] 1 WLR 579 at [29] the Court of Appeal in E&W cited *Speidel v Plato Films Ltd* [1961] AC 1090, where the House of Lords invoked the rule and held that evidence of particular acts of misconduct on the part of the plaintiff could not be given in reduction of damages where the defendants had failed to justify the libel complained of in reliance on that evidence."

Mr McKenna's written submission continued:

> "… the defendant is confined in evidence on the issue of reputation to those matters … which are the matters relating to the circumstances in which the libel was made. The specific conduct relating to the Old Bailey Bombings insofar as it goes to general reputation is inadmissible on that basis. It has no relevance to the circumstances in which the libel arose going to justification as its only relevance is that the plaintiff was incarcerated at HMP Maze (which is not in dispute)."

[91] This submission misunderstands the rule in *Scott v Sampson* and the consequences of the subsequent caselaw. In *Scott v Sampson* the evidence at issue was evidence of rumours, not of previous convictions. In *Burstein v Times Newspapers* May LJ summarised the position:

> "The admissibility of evidence of the claimant's bad reputation centres on the decision of the Queen's Bench Divisional Court in *Scott v. Sampson* (1882) 8 QBD 491. In summary, the court held that evidence of general bad reputation was admissible in reduction of damages; but that evidence of rumours that the plaintiff had done what was charged in the libel and evidence of particular acts of misconduct on the part of the plaintiff tending to show his character and disposition were inadmissible."

May LJ then explains what happened in the subsequent caselaw:

> "In *Plato Films Limited v. Speidel* [1961] AC 1090, an attempt was made to persuade the House of Lords to modify the decision in *Scott v. Sampson.* The plaintiff, who was the Supreme Commander of Allied Land Forces in Central Europe, brought an action against the defendants claiming that he had been libelled in a film in which he was depicted as being privy to the murders of King Alexander of Yugoslavia and M. Barthou in 1934, and as having betrayed Field-Marshall Rommel in June 1944. The defendants pleaded justification, but also wanted to adduce evidence in reduction of damages. This was to the effect that the publication of which the plaintiff complained was part of a film in which he was further depicted as having been guilty of other discreditable conduct the truth of which he did not in his amended statement of claim deny. The defendants wanted to adduce this evidence as (A) "circumstances under which the alleged libel was published", and (B) as matters relating to the character of the plaintiff. Under the second heading, it was said that the plaintiff was widely reputed to have been and in fact was guilty of the conduct alleged against him in the film. The House of Lord held that (A) was inadmissible and should be struck out; and that, as to (B), evidence of particular acts of misconduct on the part of the plaintiff could not be given in reduction of damages where the defendants had failed to justify the libel complained of. "

[92] I am satisfied that the court is entitled to take Mr Kelly's previous criminal convictions into account in reaching a conclusion as to what his reputation is or was. *Goody v Odhams Press Ltd* [1967] 1 Q.B. 333 concerns defamation proceedings which followed the Great Train Robbery. In 1963, over £2,500,000 was stolen from a mail train. The following year Mr Goody was convicted of conspiring to stop the mail and, being armed with an offensive weapon, robbery of 120 mailbags. He was sentenced to 30 years' imprisonment. In 1964, the defendants' newspaper, The People, published a story headed, "A suburban housewife reveals how she was caught up in the great mailbag plot." The article contained many references to the plaintiff and

described the leading part played by him. On September 17, 1964, the plaintiff brought an action against the defendants claiming damages for libel. In respect of the admissibility of previous criminal convictions, Lord Denning MR held:

> "The defendants plead in the first place that Goody is of bad reputation as a thief and robber given to violence. That is clearly admissible. But, in addition, they seek to give evidence of his previous convictions starting in the year 1948. These include a conviction in March, 1948, of robbery with violence, for which he was sentenced to 21 months' imprisonment and twelve strokes of the birch, and several other convictions, culminating in the conviction for the great train robbery in March, 1964. Mr. Lewis says that these previous convictions are not admissible in mitigation of damages. He relies on the decision in *Scott v. Sampson*, which was approved by the House of Lords in *Plato Films Ltd. v. Speidel*. Those cases show that in mitigation of damages you can give evidence of general bad reputation, but you cannot give evidence of particular instances of misconduct. These previous convictions are, says Mr. Lewis, only particular instances of misconduct. The defendants cannot give them as evidence. They can only put a police officer in the box to say that this man is of bad reputation and given to violence, but the officer cannot in evidence in chief give the previous convictions.
>
> I do not accept Mr. Lewis's argument. I think that previous convictions are admissible. They stand in a class by themselves. They are the raw material upon which bad reputation is built up. They have taken place in open court. They are matters of public knowledge. They are accepted by people generally as giving the best guide to his reputation and standing. They must of course be relevant, in this sense, that they must be convictions in the relevant sector of his life and have taken place within a relevant period such as to affect his current reputation. But being relevant, they are admissible. They are very different from previous instances of misconduct, for those have not been tried out or resulted in convictions or come before a court of law. To introduce those might lead to endless disputes. Whereas previous convictions are virtually indisputable."

[93] Nevertheless, since Mr Kelly's conviction and imprisonment he has served as a Member of the Northern Ireland Assembly and indeed as a Minister in the Northern Ireland Executive. Does this now mean that he has rebuilt his reputation since his criminal convictions for terrorist offences? In Miss Herdman's view Mr Kelly's reputation has not been restored through

his political service because he has gloried in his crimes and has never apologised for them. Although Mr Kelly may have stepped away from violence in recent times, Miss Herdman submits he has shown no regret for its use in the past. On this issue Mr McKenna emphasised that Mr Kelly had been part of his party's negotiating team in the negotiations which led to the Good Friday Agreement. This was at a time when there was considerable debate within the Republican movement in relation to whether there should be the laying down of arms and a move away from the use of violence. That of course was an assertion by Mr McKenna of the type that judges often referred to as "evidence from the Bar". It is not actually evidence, as evidence requires to be given orally by a witness or in the form of an affidavit. Mr McKenna conceded that it was difficult for him to argue that Mr Kelly had not placed little value on the lives of those whom he saw as his opponents. Nevertheless, Mr McKenna argued that the mere fact that the issue of whether Mr Kelly's reputation had been restored was in play during the submissions of counsel should be taken as an indicator that the *Jameel* application should fail.

[94] I bear in mind that damaged reputations are capable of being restored. A notable example of this was the reputation of John Profumo. Profumo had been the Secretary of the State for War who resigned both from ministerial office and as a Member of Parliament after apparently lying to the House of Commons in 1963 over the issue of whether he had had a sexual relationship with Christine Keeler. This had been particularly problematic as Ms Keeler had apparently also been in a relationship with someone who worked in the Soviet Embassy. The entry concerning Profumo in the Encyclopaedia Britanica states that, "he rebuilt his life by working for the next four decades, initially washing dishes, at Toynbee Hall (in London's East End), which offered help and comfort for the city's poor." The rebuilding of Profumo's reputation was demonstrated by the fact that in 1975 he was granted a CBE in the Birthday Honours List.

[95] The issue therefore in considering this submission is simply, "Would Mr Kelly's reputation have been damaged by Dr O'Doherty's allegation, if that allegation had been false?" The answer to that question depends of course on whom one asks. All politicians have their supporters and detractors and political opinions in modern societies appear to have grown even more polarised and divided in recent years. Because of the difficulty of answering questions such as one above, the law creates fictious characters. These include "The man on the Clapham omnibus", "The fair-minded and informed observer", "The hypothetical reasonable reader" and "The right-thinking person". In assessing the answer to this question, the court turns to the last of these creations.

[96] The characteristics of the right-thinking person include that the person:

i. will be fair-minded and reasonable (*Charleston v News Group Newspapers Ltd [1995] 2 A.C. 65).*

ii. will not be naïve, but will also not be unduly suspicious. (*Jeynes v News Magazines Ltd* [2008] EWCA Civ 130)

iii. will be aware of matters of ordinary general knowledge (*Monroe v Hopkins* [2017] EWHC 433 (QB))

iv. is not avid for scandal and someone who does not, and should not, select one bad meaning where other nondefamatory meanings are available. (*Jeynes v News Magazines Ltd* [2008] EWCA Civ 130)

v. will not construe words as would a lawyer, for he is not inhibited by the rules of evidence (*Bargold v Mirror Newspapers* [1981] 1 N.S.W.L.R. 9*).*

vi. does not live in an ivory tower. *(Farquhar v Bottom* [1980] 2 NSWLR 380 at 385).

[97] In order to resist Dr O'Doherty's *Jameel* application, there needed to be some evidence before the court that Mr Kelly's reputation had recovered. The closest that there came to such evidence being before the court was in parts of his second book, *Playing My Part*, where it dealt with his involvement in the Old Bailey bombings. There are some instances where Mr Kelly expresses regret for the injuries to people caught up in the explosion:

> "I looked down at the headline in the paper which read 'Bomb Toll 242.' My mind was in turmoil at the headline. I thought, 'It's not possible. I knew there were to be one-hour warnings and, from experience in Belfast, that should have been more than enough time to clear the surrounding area."(Page 64).

> "We had since learned that there were injuries but no fatalities from the explosions and that two of the devices had gone off, while two were defused. I was relieved that there had been no fatalities but was shocked at the report of the injuries. This operation was planned to have a maximum political impact without casualties." (Page 65).

These regrets, however, did not cause Mr Kelly to a renunciation of his terrorist activities as further excerpts from the book demonstrate:

> "We were all debriefed about the escape itself and our past histories as Volunteers. People were also asked whether they wanted to stay in Ireland and return to active service, or to go abroad with new identities and live life outside of the

> conflict. I felt vaguely insulted by the question but understood that the leadership was offering a dignified way out for anyone who wanted a different life. Everyone said that they wished to be active, so training camps were set up to retrain us in the art of urban and rural guerrilla warfare." (Page 178).
>
> "Not long after the escape I had been asked if I would be prepared to go to continental Europe to do some unspecified work for the struggle. I had refused on the basis that, after ten years in goal, I wanted to gain active experience on the ground again, before agreeing to a move abroad to do – well I didn't know exactly what." (Page 182).

In the chapter entitled "*Statement to the Extradition Court*" Mr Kelly describes a statement which he gave to a Dutch court during extradition proceedings after he had been arrested in Holland in 1986. The chapter contains no repudiation of terrorist activities.

In his epilogue, Mr Kelly ends his book this way:

> "But this book ends in in 1989 when I was thirty five years of age. I may have more to say later, but let's see how this goes for now. I will finish by saying that I am proud of my time as an IRA Volunteer. I am equally proud of being part of the peace and political negotiations – which didn't end in 1998 as I might have naively expected then. To be elected by the people of North Belfast and to serve them for over 20 years is a privilege I never thought I would be given when I stepped on the path of active resistance to British Rule so many years ago. This is 2019 and understandably there are many different narratives to the conflicts between he Irish people and the British government. But for me, whether as combatant or politician, or ordinary citizen I remain, among other things, an unrepentant Fenian …" (Page 285).

[98] Miss Herdman submits that there is no evidence before me that Mr Kelly has ever expressed any regret over the Old Bailey bombings or the escape from the Maze Prison. If anything, she posits that the evidence before me in the form of Mr Kelly's two autobiographies presents him as justifying and boasting in the actions which led to his various convictions. Miss Herdman submitted that he "gloried" in his actions. These excerpts from Mr Kelly's book entirely justify Miss Herdman's submission that Mr Kelly's reputation cannot be assessed as having been restored in the mind of hypothetical right-thinking people.

[99] There was no evidence to the contrary submitted on behalf of Mr Kelly as to a restored reputation. Certainly, I can take judicial notice of the fact that Mr Kelly is now a Member of the Northern Ireland Legislative Assembly. But entry into politics is not necessarily the same thing as a restored reputation in the minds of right-thinking people. Mr Kelly had not, for example, filed an affidavit in which he stated that he now regretted his terrorist activities. The most that was before the court was a certain amount of regret at the injuries caused by him and his co-conspirators during the Old Bailey bombings. However, the destruction of property in a capital city by car bombs is presented as being justified in his thinking. In the absence of such a renunciation, a hypothetical right-thinking reader would see the shooting of Mr Adams as something that Mr Kelly might well have done in the support of his political and military objectives (particularly in the light of his statement in *The Escape* on page 76 that the Volunteers were clear that if it was necessary to use force then there could be no hesitation).

[100] On the evidence adduced to the court in respect of this application (and I *strongly* emphasise those words) a right-thinking person would therefore have to conclude on the basis of that evidence that Mr Kelly's convictions for these offences resulted in him having a bad reputation and that, despite his political service, his reputation was still bad.

[101] In my view Miss Herdman's argument on the *Jameel* submission is weaker than the stronger arguments which she has raised in respect of the Order 18 Rule 19 submissions, and the section 8 of the Defamation Act 1996 submission. The difficulty is that it is so much more problematic for a court to assess the level of the reputation held by Mr Kelly at the time when Dr O'Doherty made the complained of comments as compared with the more simple exercise of considering what Mr Kelly wrote on a few pages of *The Escape*. Nevertheless, on the balance of probabilities, Miss Herdman's argument succeeds. The hypothetical right-thinking person, knowing from his or her general knowledge that:

(i) Mr Kelly had been a member of a terrorist organisation;

(ii) Mr Kelly had been convicted of offences regarding terrorist explosions in a major city in England which had led to some 200 people being injured;

(iii) Mr Kelly had played a significant role in the unlawful escape from the maze prison which had led him to also be convicted for the false imprisonment of five prison officers;

(iv) there was no evidence before the court that Mr Kelly had ever expressed regret at what he had done,

would, I consider, conclude that an incorrect allegation that he had shot a prison officer in the head would not have damaged Mr Kelly's reputation because that action would have been within the range of possible actions which Mr Kelly might have been willing to carry out in the pursuit of his objectives.

Conclusion

[102] In conclusion therefore:

(i) I strike out Mr Kelly's defamation action against Dr O'Doherty under Order 18 Rule 19 on the basis that the proceedings are scandalous, frivolous, and vexatious.
(ii) I strike out Mr Kelly's defamation action against Dr O'Doherty under Order 18 Rule 19 on the basis that the proceedings are an abuse of process.
(iii) I strike out Mr Kelly's defamation action against Dr O'Doherty under section 8 of the Defamation Act 1996 on the basis that it has no realistic prospect of success.
(iv) I strike out Mr Kelly's defamation action against Dr O'Doherty on the basis of the principles set out in *Jameel v Dow Jones* that they fail to pass the minimum threshold of seriousness.

[103] This decision obviously has implications for Mr Kelly's similar defamation proceedings against Miss Edwards which will not be lost on his legal advisers and hers.

[104] It is generally recognised within the legal profession that the writing of "criminal memoirs" (that term is used as the title for Part 7 of the Criminal Justice and Coroners Act 2009) can potentially have a number of legal consequences.

[105] Firstly, since the amendment of the law on double jeopardy, where an author has been tried and acquitted of criminal offences, and his criminal memoir contains material which amounts to new and compelling evidence against him, he may expose himself to re-prosecution for that offence under Part 10 of the Criminal Justice Act 2003 if his book contains new evidence.

[106] Secondly, an author may expose himself to civil proceedings in respect of any damage or loss caused by behaviour now admitted in his book. (Given the passage of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023) civil proceedings in respect of those tortious assaults on the prison officers, including Mr Adams, would, however, be *prima facie* prohibited by section 43 of the Act).

[107] Thirdly, an author may expose himself to potential legal action by the National Crime Agency for recovery of any exploitation proceeds made from the sale of his criminal memoir where the qualifying conditions are met under Part 7 of the Coroners and Justice Act 2009. ("Criminal Memoirs", House of Commons Library Research Briefing, 23 May 2012). Arguably an action of this sort would not fall within the definitions of a "Troubles-related civil action" as defined by section 43 of the 2023 Act.

[108] The application before me, however, demonstrates that there is a fourth potential legal consequence of penning a criminal memoir, namely that it may limit the ability of an author to institute defamation proceedings when others discuss his past actions. Without the publication of Mr Kelly's books, Dr O'Doherty's interviews would likely have been found to have been defamatory. Since the publication of the material contained in Mr Kelly's books, what Dr O'Doherty said is, on the balance of probabilities, not capable of being regarded as a defamatory description of what occurred on 25 September 1983.

Costs

[109] Order 62 Rule 3(3) provides:

> ""If the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the court shall order the costs to follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.""

[110] Order 62 Rule 3(4) provides:

> ""(4) The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where -
>
> (a) the order is made that the costs of one party to proceedings be paid by another party to those proceedings, or
>
> (b) an order is made for the payment of costs out of any fund (including the legal aid fund), or
>
> (c) no order for costs is required
>
> unless it appears to the court to be appropriate to order costs to be taxed on the indemnity basis.""

Order 62 Rule 12, dealing with the basis of taxation, provides as follows:

> "'12.-(1) On a taxation of costs on the standard basis there shall be allowed a reasonable amount in respect of all costs reasonably incurred and any doubts which the Taxing Master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party; and in these Rules the term ''the standard basis'' in relation to the taxation of costs shall be construed accordingly.
>
> (2) On a taxation on the indemnity basis all costs shall be allowed except insofar as they are of an unreasonable amount or have been unreasonably incurred and any doubts which the Taxing Master may have as to whether the costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the receiving party, and in these rules the term ''the indemnity basis'' in relation to the taxation of costs shall be construed accordingly."'

[111] The award of indemnity costs in this jurisdiction has been considered in a number of authorities including *Craven and Others v Giambrone and Others* [2013] NIQB 61, *CG v Facebook Ireland Limited and Joseph McCloskey (No. 2)* [2015] NIQB 28 and *Monaghan v Graham* [2013] NIQB 53 and *H v H* [2016] NICA 6. As the Court of Appeal indicated in the last of those decisions, the principles adopted were in effect those cited in the English authorities and followed in England and Wales notwithstanding the different legislation and statutory rules.

[112] In *London Borough of Southwark v IBM UK Ltd* [2011] EWHC 653 (TCC) Aikenhead J stated what he described as unexceptionable propositions in respect of indemnity costs:

> "(a) An award of costs on an indemnity basis is not intended to be penal and regard must be had to what in the circumstances is fair and reasonable: *Reid Minty v Taylor [2002] 1 WLR 2800,* Paragraph 20.
>
> (b) Indemnity costs are not limited to cases in which the court wishes to express disapproval of the way in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral

probity or deserving of moral condemnation: *Reid Minty*, Paragraph 28.

(c) The court's discretion is wide and generous but there must be some conduct or some circumstance which takes the case out of the norm: *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (A Firm)* [2002] C.P. Rep. 67, Paragraphs 12, 19 & 32

(d) The conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight: *Kiam v MGN Ltd (No2)* [2002] 1 WLR 2810, Paragraph 12.

(e) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, but the pursuit of a hopeless claim, or a claim which the party pursuing it should have realised was hopeless, may well lead to such an order: "[T]o maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs": *Wates Construction Ltd v HGP Greentree Allchurch Evans Ltd* [2006] BLR 45, Paragraph 27 and *Noorani v Calver* [2009] EWHC 592 (QB), Paragraph 9.

(f) There is no injustice to a claimant in denying it the benefit of an assessment on a proportionate basis when the claimant showed no interest in proportionality in casting its claim disproportionately widely and requiring the defendant to meet such a claim: *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2010] 5 Costs L.R. 709, Paragraph 68.

(g) If one party has made a real effort to find a reasonable solution to the proceedings and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis: *Reid Minty*, Paragraph 37.

(h) Rejection of a reasonable offer to settle will not of itself automatically result in an order for indemnity costs but where the successful party has behaved reasonably and the losing party has behaved unreasonably the rejection of an offer may result in such an order: *Noorani*, Paragraph 12.

> (i) Rejection of 2 reasonable offers can of itself justify an order for indemnity costs: *Franks v Sinclair (Costs)* [2006] EWHC 3656."

[113] The Court of Appeal in England has declined to define the circumstances in which a court could or should make an order for costs on the indemnity basis. In *Excelsior Commercial and Industrial Holdings v Salisbury Hamer Aspden and Johnson* [2002] EWCA Civ 879 Lord Woolf at paragraph [30] cited with approval a judgment of Simon Brown LJ in *Kiam v MGN Limited (No. 2)* [2002] 2 All ER 242 who, at [12] had said:

> "'"I for my part understand the court there to have been deciding no more than that conduct, albeit falling short of misconduct deserving of moral condemnation, can be so unreasonable as to justify an order for indemnity costs. With that I respectfully agree. To my mind, however, such conduct would need to be unreasonable to a high degree; unreasonable in this context certainly does not mean merely wrong or misguided in hindsight. An indemnity costs order made under Part 44 …. does I think carry at least some stigma. It is of its nature penal rather than exhortatory."'"

[114] Lord Woolf at paragraph [34] said, in addition, as follows:

> "'"There is an infinite variety of situations that can come before the courts and which justify the making of an indemnity order …. I do not respond to Mr Davison'"s submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances where they should not … This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."'"

[115] In *Fitzpatrick Contractors v Tyco Fire and Integrated Solutions (UK) Limited* [2008] EWHC 1391 (TCC) (cited with approval in *Siegel v Pummell* [2015] EWHC 195 (QB)) Coulson J said at Paragraph 3 sub-paragraph (iv):

> "'"Examples of conduct that have led to such an order for indemnity costs include the use of litigation for

> ulterior commercial purposes … and the making of an unjustified personal attack on one party by the other …"""

[116] Cook on Costs (2012 edition) states at paragraph 24.9:

> "Traditionally costs on the indemnity basis have only been awarded where there has been some culpability or abuse of process such as:
>
> - deceit or underhandedness by a party;
> - abuse of the court's procedure;
> - failure to come to court with open hands;
> - the making of tenuous and speculative claims;
> - reliance on utterly unjustified defences;
> - the introduction and reliance upon voluminous and unnecessary evidence;
> - extraneous motives for the litigation (an example of which is the use of litigation for an ulterior commercial purpose – see *Amoco (UK) Exploration v British American Offshore Ltd [2002] BLR 135* below); or
> - discontinuance without explanation where allegations of serious dishonesty and fraud have been made.
>
> What seems clear is the exercise of the discretion by the court is best considered by reference to specific examples of where the court has made indemnity costs orders. It is one of those instances where it is hard to pinpoint specific conduct, but one knows it when one sees it!"

[117] I note that in May 2022 the Law Society for England and Wales, in response to the Ministry of Justice's call for evidence on the subject matter of SLAPPs, called for an exploration of the readiness of the courts to allow indemnity costs. In my view, where a court is satisfied on the balance of probabilities that a defamation action amounts to a SLAPP, then an award of costs to the defendant on an indemnity basis is an inevitable consequence as a demonstration of the court's repudiation of the way in which a plaintiff has abused the processes of the court. I therefore award Dr O'Doherty both the costs of this application and the costs of the action on an indemnity basis.