

APPROVED



THE COURT OF APPEAL

Record No.: 2018/472

Neutral Citation Number [2021] IECA 310

Donnelly J.
Noonan J.
Ní Raifeartaigh J.

BETWEEN/

JOHN DEMPSEY

APPELLANT

-and-

JOSEPH BARRETT

RESPONDENT

-and-

Record No.: 2018/473

BETWEEN/

STEPHEN LOFTUS

APPELLANT

-and-

JOSEPH BARRETT

RESPONDENT

JUDGMENT of Ms. Justice Donnelly delivered on the 19th day of November, 2021.

1. This is an uncontested appeal brought by the plaintiffs/appellants (hereinafter referred to as “the plaintiffs” or by their individual names as appropriate) against the orders of MacGrath J. in the High Court which followed jury verdicts rejecting the plaintiffs’ claims. Each plaintiff

initiated separate defamation proceedings; the trial of their actions was heard together before a jury in the High Court as the claims arose from the same alleged incident. Both plaintiffs claimed that they were defamed by the defendant who is the respondent to this appeal (for ease, I shall refer to Mr. Barrett as “the defendant”). The plaintiffs were represented by their solicitor at the defamation trial and the defendant was a litigant in person. Following a six-day trial, the jury provided the following answers to the first two questions put before them for determination in each case:-

“Was the document prepared by the Defendant defamatory of the Plaintiff?”

The jury answered “yes” which lead to the requirement for them to answer the next question:-

“If Yes, was the document published by the Defendant?”

The jury answered “no” to this question. As a result, there was no need for the jury to answer any further questions as the plaintiffs had failed to prove an essential part of their case. These questions related to a) whether the contents were true and b) damages.

2. The plaintiffs are seeking orders to set aside the determination of the jury on the issue of publication; orders setting aside the orders of the High Court dismissing the plaintiffs’ claims; and a retrial.

Background

The circumstances leading up to the publication of the defamatory leaflet

3. The alleged defamation has its origins in a building contract between the plaintiffs who were involved in property development and the defendant who was contracted by the plaintiffs to carry out building works. There was a dispute regarding payment for the said works which lead to the defendant initiating proceedings which were ultimately stayed and referred for arbitration pursuant to the arbitration clause in the building contract. The arbitration was settled and the award was made on consent in favour of the defendant in the sum of €42,500 together with costs and the arbitrator’s costs of €16,000 including interest. Due to the economic

recession, the plaintiffs have always maintained they were not in a position to discharge the sums awarded in the arbitration. The failure to pay the award as it became due led to increasingly fraught tensions between the defendant and the plaintiffs.

4. On the 10th December, 2014, two months after the arbitration award was emailed to the parties, the plaintiff Mr. Loftus received an email from the defendant asking to speak about the award. The award had not been paid in time. The defendant sent another email to Mr. Loftus stating that he would be parked outside his workplace with a megaphone and threatened that he would “make a wanker” out of Mr. Loftus in front of everyone in his office. The next day, another email from the defendant was sent to Mr. Loftus and five of his colleagues with the subject line “Stephen Loftus is a thief” with the body of the email echoing his previous threat of shouting with a megaphone that he owed over €100,000 to the defendant and that he was “scum” and refused to pay him what he was owed. The defendant attached a leaflet to this email which stated:-

“Bankruptcy’s in the post lads!!

Pay ur judgements!!

Partners in crime!!

White collar crime pays!!

Pay your bills

John Dempsey

Stephen Loftus

[NUMBER] Palmerston Road

Director Prem Plus

Rathmines”

5. The publication in December 2014 of this leaflet is not the subject matter of the defamation proceedings leading to this trial. It is a subsequent publication of leaflets worded in the same manner which lead to this appeal and I will refer in detail to the allegations surrounding that publication later in this judgment. Rather than take legal action based upon

the December 2014 publication, the plaintiffs tried to settle the matter by increasing their offers. Following a rejection by the defendant of Mr. Loftus' offer of €25,000 on the grounds that it did not include interest and was too low, the defendant then instructed solicitors who wrote to Mr. Dempsey on the 8th July, 2015 informing him that the defendant is instituting proceedings in relation to the arbitration award. The sum claimed was €58,500 plus costs of €44,080.74. The defendant also threatened to institute bankruptcy proceedings against the plaintiffs.

6. The plaintiffs did not hear from the defendant until the 11th April, 2016 when he emailed Mr. Loftus to meet. The two parties met on the 15th April, 2015 and a settlement was agreed wherein Mr. Loftus would pay the defendant €35,000. The defendant then arranged to meet the plaintiff, Mr. Dempsey, to reach a settlement on the 25th April, 2016. Mr. Dempsey explained his dire financial situation, showing letters from banks concerning his debts and the names of the people he was dealing with in the banks.

7. Various communications ensued between the plaintiffs and the defendant. By the 28th April, 2016 the defendant decided he did not want to settle with either of the plaintiffs and renewed his threats to institute bankruptcy proceedings instead.

8. On the 2nd May, 2016 the defendant stated by text that unless Mr. Dempsey paid what was owed to him, Mr. Dempsey would have committed an act of bankruptcy and the defendant would send a copy of his bankruptcy case against Mr. Dempsey to his managers and other creditors. He also went on to state:-

“Your broke john. Mite as well xcept it.. Ur done!! Finished!! Washed up.. And the best part is that is me doing it to you.. I will be posting notices into all ur neighbours letterboxes informing them and most likely I'll do the same on all the college facebook pages informing any creditors that your El bankrupt too.. Next week I'll enjoy more than the money.. Loser!!!”

The parties were unable to reach a settlement through further correspondence and on the 5th May, 2016, the defendant sent a message to Mr. Dempsey stating “Full size advertisement goin in tomorrow for Monday’s papers” followed by a demand for the arbitrary sum of €150,000. The defendant refused all offers made by the plaintiffs and even demanded the grossly exaggerated sum of €10 million from the plaintiffs. The defendant later admitted at trial that this was to prevent the matters coming to a resolve and to get the plaintiffs into the “hot seat”.

9. On the 11th May, 2016, the defendant texted the plaintiffs, stating:-

“Official assignee of the court paid. Job done.. YOU ARE BANKRUPT!!! Catherine Dwyer investec case and asset manager.. She should be in touch john.. Now, who’s next.. Stephen.. Facebook got told about you today.. I left it a little cryptic.. Check prem group page..”

10. In direct evidence, Mr. Dempsey explained that Ms. Dwyer works in Investec – one of the banks to which Mr. Dempsey is indebted. Mr. Dempsey contacted Ms. Dwyer and she informed him that, contrary to what the defendant claimed, she did not hear anything about Mr. Dempsey. Mr. Dempsey stated that the defendant must have known about Investec from the letters he showed the defendant in the meeting on the 25th April, 2016. On the same date, the defendant messaged Mr. Dempsey attaching the same leaflet described in para. 4 of this judgment. The email with the attached leaflet stated: “Doors, letterboxes, on trees.. Lampposts.. 250 getting delivered in doors and 250 sent here there and everywhere.. Gona be a long nite..”. Mr. Dempsey replied stating “Joe. This is wrong. Please don’t do this as I have offered you everything I can”. The defendant then set up a meeting with the two plaintiffs on the 16th May, 2016. This however, proved to be unfruitful as the defendant rejected the offer made the plaintiffs of €70,000. The defendant initiated bankruptcy proceedings and the day after the meeting, the defendant texted the plaintiffs stating: “Lodging papers with the examiner... Time’s up lads...”

On the 20th May, 2016, the defendant threatened that he “Might do a few leaflets later.. And a few posts on facebook.” The next day, the defendant messaged “Leaflets headin into letterboxes later 2nite.. Time to tell the neighbours..” On the 23rd May, 2016 the defendant texted “Today I’m going hell for leather.. Time to step things up..”

The publication of the defamatory leaflets

11. On the 22nd May, 2016, a number of defamatory leaflets with the wording described in para. 4 of this judgment were dropped into the letterboxes of the plaintiffs’ neighbours. At 10:25am, the defendant texted Mr. Loftus stating “Nice car”. In evidence, Mr. Loftus took this to mean that the defendant was outside his house and that was the morning that the defendant “leafleted our neighbours”.

12. Mr. Loftus gave evidence that he received a telephone call from Mr. Dempsey stating that “a number of his neighbours had been leafleted and they had contacted him”. The leaflet was identically worded to that which had been sent to Mr. Loftus and his colleagues in 2014. Mr. Dempsey was at a party in a neighbour’s house on the 22nd May, 2016 when he received a text message from his neighbour at approximately 8:30pm that they received a leaflet. Mr. Dempsey told the Court that he left “straight away, in a panic” and stated that at 10pm he received a further call from a neighbour about the leaflets. Mr. Dempsey stated that the next day he did what he described as “the walk of shame” whereby he “had to walk down [his] road knocking on a number of doors and ask them had they received a leaflet.” A number of neighbours had received the leaflets.

13. Four neighbours who had received these leaflets through their letterboxes gave evidence at the trial to establish publication. None of these witnesses saw the person who posted the leaflets into their letterboxes and that was a factor emphasised by the defendant in his cross-examination. There was no direct evidence that the defendant had published the leaflets.

Correspondence after the publication of the defamatory leaflets

14. Mr. Loftus instructed a solicitor, Mr. Nugent, on the 23rd May, 2016. Mr. Nugent wrote to the defendant outlining that the notice he had published and distributed was “self-evidently defamatory, alleging as it does that our client is a criminal.” The letter called on the defendant to retract the leaflets and to issue a correction and an apology alongside a proposal to compensate Mr. Loftus for the extreme distress and humiliation he had suffered.

15. The defendant replied to Mr. Nugent on the 23rd May, 2016 with the words “Fuk off” and added “watch what I do now...” On the same date, the defendant stated in an email to Mr. Dempsey “You Wana go again?? Ha.. Ye never learn.. Alrite so.. Bring on ur smelly court action.. [...] Your bankrupt anyway.. And der’s no way to change it”. In a following email, the defendant stated “And Catherine Dwyer got told today.. I’m going to ruin you now.. I have no fear.. None.. At all.. Ever.. You.. My friend.. Cannot say the same!!!”

16. On the same date, the defendant emailed the plaintiffs stating:-

“...The next leaflet will just simply say.. John Dempsey is bankrupt. With the date.. And Stephen Loftus is bankrupt.. With the date. And I’m gona make sure any court case is covered by a reporter.. Because I don’t mind what they put in the paperZ.. I will torment your life until I’m satisfied.. And no judge or cop or smelly solicitor/barristers secretary is gona stop me.. I’m gona get a mega phone an drive up and down ur Fukin road next.. You don’t seem to get it.. I want this to go on and on.. I’m enjoying myself now.. Two scumbag robbing thieving weasels is all ye’s are and I’m gona tell everyone!!! See ye’s soon!!!”

17. The defendant emailed Mr. Nugent on the 23rd May, 2016 stating:-

“...unless you have a bundle of cash for me I don’t want to hear from you again!! Solicitor my arse.. Your only a barristers secretary.. I will drag any court case with

continuance and motions until ur sick of it too and believe me.. I have great staying power.. Now f[...] off ye poxy ambulance chaser!!!”

18. In reply to Mr. Nugent imploring him to seek legal advice, the defendant stated *inter alia* that “Tell ur client if he has a brain cell left in his tiny head. Just pay me!!! And I’ll go away...” Counsel for the plaintiffs highlighted to this Court that at no point in the correspondence did the defendant deny that he delivered the leaflets to the plaintiffs’ neighbours. Rather, the defendant renewed his threat to publish defamatory leaflets in the Rathmines area and in an email to Mr. Nugent on the 24th May, 2016, the defendant claimed that Mr. Dempsey had sent someone to his house to threaten him and went on to state that Mr. Nugent’s “scumbag of a client” had:-

“told numerous people that I constructed a building incorrectly.. Despite losing in court ur client still slanders me to anyone that will listen.. So tit-for-tat time.. I will be in rathmines today handing out leaflets simply saying that both of your clients have been adjudicated bankrupt. Now.. I’ve left out the part that says he’s as you say.. Hurt over.. But the rest.. It’s my legal right to publish an award issued by the court to me...”
(Emphasis in the plaintiffs’ submissions).

The allegations of the defendant were denied by Mr. Nugent and the subsequent allegations that Mr. Dempsey had a criminal record were denied and were entirely false.

19. The defendant sent an email to the plaintiffs on the 24th May, 2016 stating “Pay me and I stop.. Not till then.. Dig deep.. And just pay ur bill.. And it all goes away..” In a subsequent email the defendant wrote “Handing out stuff in rathmines today.. Coffee shops. Pubs.. Estate agents..” before adding “And hotels... lots of hotels.. How did I forget hotels.. I’ll google a list of the ones I need..” In his evidence, Mr. Loftus stated that he works in the hotel industry hence the particular reference to hotels.

20. The defendant first denied placing the leaflets in letterboxes other than Mr. Dempsey's, and in an email sent to Mr. Nugent and the plaintiffs, on the 24th May, 2016, he claimed two men threatened his mother and that his telephone calls were recorded and that he recorded Mr. Nugent stating that he was going to send more. This was strongly denied by Mr. Nugent and the plaintiffs. In a further email that evening, the defendant sent an email to the plaintiffs:-

“[t]wo little bankruptarino's.. Bad move getting that dickhead to send lads to my door. I'm gona Fuk u up rightly now.. You think I embarrassed ye so far???
You watch how embarrassing it's gona to get you scumbags!!!”

Counsel for the plaintiffs submits that it is unclear what “embarrassment” he was referring to in circumstances where he claimed only to have posted a leaflet into Mr. Dempsey's letterbox. Counsel for the plaintiffs submits that the source of embarrassment was in fact due to the plaintiffs' neighbours being furnished with the defamatory leaflet which the defendant prepared.

21. On the same date, the defendant in an email to Mr. Nugent stated:-

“Arbitrator's award getting handed out tomorrow to everyone outside pre plus office [the plaintiff's workplace]... It's a public judgement and award and I'm allowed to do what I like with it...”

He also stated that he is going to “put it everywhere”.

22. The defendant's defences to the statements of claim were discursive but in among his list of grievances with the plaintiffs, the defences contained the plea that only one letter (leaflet) was delivered and that was to Mr. Dempsey and this was private. The defences stated “this letter was not disclosed to any other parties or public forum.” Later in each defence the following plea was made “[w]e believe that this case is nothing more than another petty, pedantic and frivolous claim perpetrated by the plaintiff to distract from the matter that there is judgement against him in another claim...”.

23. In evidence, the defendant denied posting the leaflets to the neighbour's letterboxes, only admitting that he posted the leaflet into Mr. Dempsey's letterbox. When cross examining Mr. Dempsey, the defendant suggested to Mr. Dempsey that it was a possibility that he, Mr. Dempsey, had photocopied the leaflets and sent them to his neighbours himself to which Mr. Dempsey replied "[a]bsolutely not" and that the suggestion was "[s]o ridiculous. You said that you posted this leaflet into 250 letterboxes. You've said that in writing."

The Trial Process

24. The trial ran before a jury over the course of six days in November 2018. The solicitor for the plaintiffs opened the case very briefly. He did not refer to the defendant's defence regarding the issue of whether he published the leaflets and concentrated on the words being defamatory, the absence of justification and the claim for aggravated damages. The defendant opened his case and concentrated on the lack of payment for the work he had done. The trial judge drew the attention of the jury to the line of defence that the letter was not disclosed to any party other than one of the plaintiffs. The trial judge noted that this was a complete defence. He also drew the jury's attention to the fact that the defendant was a litigant in person and that while certain allowances were made to litigants in person, the law only allowed certain defences to defamation actions.

25. The two plaintiffs, four of their neighbours and unusually, their solicitor who was acting as an advocate, gave evidence at the trial. The defendant gave evidence in his own defence and was cross-examined at length. The trial judge made a ruling to exclude an affidavit from one of the plaintiffs which the defendant sought to introduce. The following day when the reasons for the ruling were to be given and the matter expected to go to the jury, the defendant failed to appear in the courtroom. The High Court judge expressed the view (in the absence of the jury) that his failure may have been due to the ruling against him on this issue and also on the issue of the defendant's entitlement to damages. It was explained to the jury that the

defendant did not agree with a certain ruling made in the absence of the jury and that he had elected not to be present. They were told that all the evidence had been given and they would have to base their decision on the evidence.

26. The solicitor for the plaintiffs made a speech to the jury. He explained why the words bankrupt and criminal were defamatory of his clients in the circumstances. He dealt with damages and aggravated damages. He did not address at all the denial of publication which was the defence raised by the defendant.

27. In his careful charge to the jury, the trial judge outlined the law generally in respect of defamation and the jury's role in the trial. He told them they must concentrate on the evidence. He advised them that publication under s. 6 of the Defamation Act, 2009 required publication beyond the person who is alleged to have been defamed by the contents. In dealing with the facts of the case, the trial judge said that the case was about the contention by the plaintiffs that the defendant distributed the leaflets to their neighbours. He referred to the background to the leaflets and the earlier publication by email of the same leaflet. The trial judge then dealt with the defence of the defendant including his reliance on the truth of the contents. What is relevant for this appeal is the trial judge's charge to the jury on the issue of publication:

“To deal now with the defence, Mr. Barrett has maintained in his defence that the letter was, in fact, delivered to the post box of only one of the plaintiffs – that's Mr. Dempsey – that it was to a private address and that it was not disclosed to any other parties, nor was it disclosed in a public forum. He gave evidence of that yesterday and that has been his case all along. It is pleaded in his defence and he gave evidence of that. If you accept that evidence, then that will have a very significant bearing on how you determine this case.”

28. In the course of reminding the jury of the evidence, the trial judge also said:-

“...you must not alone be satisfied that the publication of the document was defamatory of Mr. Loftus and Mr. Dempsey but it must be shown that Mr. Barrett was responsible for publishing it. In this case, it essentially means distributing it or bringing it to the attention of third parties. Some emphasis was placed during the course of the evidence on the fact that Mr. Barrett wrote on the 21st of May 2016 and I think it’s on page 42A of your booklet: ‘leaflets heading into letterboxes later tonight. Time to tell the neighbours’. Now, that may be relevant to your consideration as to whether Mr. Barret did, in fact, distribute the documents to neighbours. On its own, it is a statement of intention, not an admission that something had, in fact, been done, but you must consider the totality of the evidence to assist you. In determining whether you are satisfied that publication took place, you must take into account the evidence of Mr. Dempsey’s neighbours in Palmerston Road. You have Mr. M. who gave evidence. He lives at No. [...]. Mr. Mc lives at No. [...]. You must bear in mind that they were neighbours and acquaintances of Mr. Dempsey, but if you accept their evidence that each of them found in their letterboxes the document in question and then read it, then that is evidence of publication upon which you can rely. The same comment may be made in respect, I think, of Mr. G., who also resides on that road. It is true that neither could give a definite date as to when this happened and it is also true that neither gave evidence of seeing Mr. Barrett or any person placing the brochure in their letterboxes. Further, while both accepted in cross-examination that it was possible somebody else may have put the document in their letterbox and that is evidence you can take on board, *there is very little evidence of such other potential sources*. But you must be satisfied based on the entirety of the evidence before you as a matter of probability that Mr. Barret was responsible for the distribution and placing of the documents in those letterboxes.” (*Emphasis added*).

29. The solicitor for the plaintiffs made a number of requisitions after the charge but none of these dealt with an issue about any legal or factual matter to do with the issue of publication of the leaflet.

The Appeal

30. The plaintiffs filed notices of appeal in which ten grounds of appeal were pleaded. In the course of the appeal, counsel for the plaintiff indicated that having reviewed the transcript he was only proceeding on the first five grounds. In essence, those grounds raised the following issues:

- i) That having regard to the conspectus of evidence before them, no reasonable jury could have reached the decision that the defendant had not published the defamatory leaflets.
- ii) That the decision of the jury was perverse

31. The defendant did not file a response or engage in any way with the appeal. Nonetheless, it is for the plaintiffs to demonstrate that their appeals must be allowed.

32. Four of the five grounds abandoned by the plaintiff at the hearing claimed:

- (a) the trial judge erred in the manner in which he charged and directed the jury;
- (b) the trial judge erred in, in particular, in his summation of the law and evidence relevant to the jury's assessment of the issue of publication;
- (c) the trial judge erred in leaving to the jury "the question as to whether the said defamatory document had been published by the defendant, in circumstances where the evidence on the defendant on this question, having regard to the other uncontroverted evidence, was incapable of being believed"; and
- (d) the trial judge erred in failing to direct the jury to find that the defendant had published the defamatory document.

The Plaintiffs' Submissions

33. Counsel appearing for the plaintiffs on appeal acknowledged that the trial judge's charge had been endorsed by the plaintiffs' solicitor at the trial. Nonetheless, counsel argued with great skill and erudition as to why this verdict could not stand. His principal argument relies upon the decision of the Supreme Court in *McDonagh v. Sunday Newspapers Ltd* [2018] 2 I.R. 1 which was a recent clarification of the role of an appellate court in reversing findings of fact by a jury in the context of a defamation trial. Counsel accepts that an appellate court cannot substitute a finding of fact made by the jury for its own, but that there are exceptional circumstances that permit an appellate court to interfere with a jury's finding of fact; relying on the *dicta* of Charleton J. in *McDonagh v. Sunday Newspapers Ltd* at para. 170 as follows:-

"...circumstances exist where it may be necessary to overturn a jury verdict in a defamation case because all of the evidence tendered at trial pointed in one direction, notwithstanding the respect that must generally be afforded to such verdicts. Such a decision will not be reached lightly and could only occur in exceptional circumstances."

34. Counsel for the plaintiffs submits that the evidence in this case could have only lead to the conclusion that the defendant published the defamatory leaflets. The finding made by the jury that the defendant did not publish these leaflets could only, as submitted by counsel for the plaintiffs, be treated as a perverse verdict.

35. Counsel for the plaintiffs submits that the evidence adduced at trial must be assessed against the background of the defendant's contemporaneous communications with the plaintiffs and their solicitor. The plaintiffs submit that the defendant does not deny that he prepared the defamatory leaflet and that he sent it to Mr. Loftus' work colleagues. The plaintiffs submit that this fact undermines the credibility of the defendant's cross-examination where he alleged that he refrained from delivering the leaflet to anyone in May 2016, yet in

December 2014 he did not care about the consequences of sending the leaflets to Mr. Loftus' colleagues.

36. The plaintiffs submit that the evidence before the trial court clearly showed a campaign of abuse by the defendant to each of the plaintiffs, threatening the publication of the defamatory leaflets. The plaintiffs submit that the defendant had motive to publish the leaflets in order to induce the plaintiffs to grossly overpay the defendant and expressly stated to the plaintiffs that he enjoyed tormenting them.

37. The plaintiffs submit that the defendant admitted that he was in Rathmines on the 22nd May, 2016 and admitted he delivered a leaflet to Mr. Dempsey's letterbox. He also admitted that on the same date, he texted Mr. Loftus stating "nice car" which showed he was in the area at the relevant time. Further, the plaintiffs submit that the defendant contradicted himself at the trial. The defendant stated that he was aware Mr. Loftus did not receive a leaflet as he had not delivered a leaflet to Mr. Loftus' house. However, the defendant maintained at trial that Mr. Dempsey posted the leaflets. The question that arises, as submitted by the plaintiffs, is *how* could the defendant had known that Mr. Dempsey did not place a leaflet into Mr. Loftus' letterbox as well?

38. Counsel submits that the conduct of the defendant both prior to and during the proceedings casts a real doubt on his credibility. Counsel submits that following the publication of the leaflets, the defendant belatedly denied publishing the leaflets only after renewing and repeating his threats to publish more leaflets. The defendant also admitted to stealing private papers belonging to the plaintiffs' legal team during the arbitration and he alleged that the plaintiffs had sent men to threaten him – an allegation that was not substantiated. The defendant admitted in cross-examination that he did not report the matter to the gardaí despite earlier asserting that he had reported alleged threats against him to the gardaí. The defendant also alleged that the plaintiffs' solicitor had sent "two hard men" to his

mother's house which, it was found, to be without foundation. This shows, as submitted by the plaintiffs, that the defendant had a history of inventing evidence that lacked foundation.

39. Counsel for the plaintiffs submits that there is no rational explanation for the determination of the jury on the question of publication but rather, the jury were clouded in their sympathy for the defendant and were not guided by an objective and rational analysis of the evidence. Counsel submits that it may have been the case that the jury considered the fact that without having evidence of witnesses actually seeing the defendant post the defamatory leaflets, they may not have appreciated their entitlement to draw inferences from the evidence adduced at trial.

ANALYSIS AND DECISION

40. The defence of the defendant had two planks; the first was that he did not publish the leaflets (other than to Mr. Dempsey) and the second was that the contents of the leaflet were true. Publication is an essential ingredient of the tort of defamation and the onus of proof lies with the plaintiff. Truth is a defence to an action in defamation under the Defamation Act, 2009 and the onus lies on the defendant to prove the defence. Questions on both of these issues were left to the jury. The question as to whether the contents of the leaflets were true did not ultimately have to be decided by the jury because they answered "no" to the question of whether the leaflet had been published by the defendant.

41. The plaintiffs abandoned the grounds of appeal which claimed errors on the part of the trial judge in leaving the question of publication to the jury or in failing to direct them adequately on publication. Counsel accepted at the hearing that these issues had not been raised at the trial and understandably considered that he could not advance them at the hearing of the appeal. His submission was that the Supreme Court decision in *McDonagh v. Sunday Newspapers Ltd* was authority for the proposition that even where issues were left to a jury to determine, the verdict can be overturned.

42. At the hearing of this appeal, the Court queried with counsel for the plaintiff whether the Court could overturn on appeal any issue which had been left to the jury, in particular where there had been no application to the trial judge to direct the jury as to the manner in which the jury must answer that issue. Counsel refers to the proofs in an action for defamation; a defamatory statement and publication are the two essential ingredients of the tort. In his submission, the issue of defamation concerned a community value and there was an obligation to leave it to the jury. Counsel submits that in a similar way, publication was central to the issue and had to be left to the jury. He also points to it being a central part of the defence in this case. In those circumstances he submits that it would perhaps also have been inappropriate if there had been an attempt to withdraw it from the jury.

43. The question still remains as to whether an appellate court can ever deem a verdict on an issue to be perverse when no such application was made. There may be some doubt about the issue in the authorities. The decision of the Supreme Court in *Barrett v. Independent Newspapers* [1986] I.R. 13 supports the view that an essential ingredient (in that case whether the words in question were defamatory) must be left to a jury to decide without direction from the trial judge. On the other hand, there is arguably a tension between that finding and the subsequent decision of the Supreme Court in *McEntee v. Quinnsworth Ltd*, (Unreported, Supreme Court, 7th December, 1993) which was an action for slander, assault and wrongful arrest. The jury had been asked a question as to whether the plaintiffs had stolen the goods as alleged. Finlay C.J., who had been in the minority in *Barrett v. Independent Newspapers*, outlined the following as a legal principle:-

“if the verdict of the jury were to be held by this court as being so perverse or unreasonable as not to be sustainable then it would have followed that there should have been a ruling by the learned trial judge withdrawing that question from the discretion of the jury and directing them to answer it ‘yes’”

44. Charleton J. in *McDonagh v Sunday Newspapers Ltd.*, with whose judgment a majority of the Court expressed agreement, observed, having referred to the extended *dicta* which followed the above quote of Finlay C.J., that “[i]ssues should not be included on an issue paper where the facts are entirely one way.” However, although the decision in *Barrett v. Independent Newspapers Ltd.* was discussed by Charleton J., the focus of his consideration was mainly on the issue of how to approach the issue of a perverse verdict rather than a concern as to whether certain issues ought to have been left to the discretion of a jury, and therefore the issue appears to be unresolved in this jurisdiction.

45. In this judgment I have concluded that the jury verdicts were not perverse. In those circumstances, it is not necessary to reach any conclusion on what effect, if any, the failure to make an application to have the jury directed that they may only answer an issue in one way would have on the appeal on grounds of perversity. If such an issue does arise in any future case a court would also be likely to have the benefit of hearing submissions addressing both sides of that argument.

How must an appellate court address an appeal claiming the verdict of the jury was perverse?

46. The leading authority on how to approach an appeal which claims that the verdict of the jury was perverse is that of *McDonagh v. Sunday Newspapers Ltd.* The facts leading to the appeal in *McDonagh v. Sunday Newspapers Ltd* were that the defendant newspaper had published an article alleging that the plaintiff was a drug dealer, loan shark, tax evader and criminal. At the defamation trial, the newspaper relied upon the defence of justification in respect of the allegation that the plaintiff was a drug dealer and loan shark but the jury rejected this; in other words, the jury found that the plaintiff was not a drug dealer or loan shark. In reaching its verdict however, the jury failed to answer a question posed as to whether the reputation of the plaintiff had been materially injured by the allegations not proved to be true, in circumstances where the allegations that the plaintiff was a tax evader and criminal were

found to be true. The jury assessed damages at €900,000. The Court of Appeal reversed the finding on liability, finding instead that the evidence established that the plaintiff was a drug dealer, thus reversing the jury's determination on this key finding of fact. In its decision, the Supreme Court allowed the appeal but upheld the jury verdict on liability and requested further submissions on a retrial.

47. For the purposes of this appeal, the approach the Supreme Court took to the issue as to when a jury verdict could be overturned is relevant. Both McKechnie J. and Charleton J. gave judgments with a majority of the Supreme Court agreeing with the judgment of Charleton J. It is important to note however that McKechnie J. agreed with the majority that the jury's finding on liability ought to stand.

48. In dealing with the role of appellate courts as to facts found, Charleton J. observed that every possible prior authority had been searched and that up to the Court of Appeal there were no appellate decisions making a finding of fact which differed from facts decided by the jury. There were instances of awards of damages being substituted for that of the jury. A jury does not of course provide a written analysis of why it reached its decision, but that even when there is a written or oral judgment of a trial judge setting out what facts have been determined as correct and why, a party arguing for reversal will bear a heavy burden, citing *Ryanair Ltd. v. Billigfluege.de GmbH* [2015] IESC 11. Charleton J. referred to the decision of *Hay v. O'Grady* [1992] 1 I.R. 210 as being the template for the review of facts on appeal. One of the principles he quoted is as follows:-

“if the findings of fact made by the trial judge [or jury in this case] are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them.” (Emphasis added).

49. Having quoted from *Hay v. O'Grady* Charleton J. stated at para. 165:-

“Indeed, there may be cases where an issue of fact ought never to have been left by the trial judge to the jury for its decision. This would arise where no evidence supported a fact asserted or the state of the evidence rendered a finding on that fact unsustainable. Once, however, there is evidence both ways, then the question of whether a fact is found or rejected is a matter of what weight the tribunal of fact ascribes to particular evidence. Just because there is more evidence in terms of witnesses on one side of a case does not mean that the truth resides where numbers are greatest.”

50. Charleton J. quoted with apparent approval from Finlay C.J. in *McEntee v. Quinnsworth Ltd.*, who had held that the verdict in that case was not so perverse or unreasonable to be unsustainable. Finlay C.J. said at para. 46:-

“Having regard to the principles enunciated in the cases of Dunne (an infant) v. The National Maternity Hospital and Hay v. O’Grady it seems quite clear to me that once a jury were satisfied of the honesty and integrity as witnesses of the two Plaintiffs in this case they were well entitled on their evidence to accept that they had not been guilty of theft. In so doing the fact that they were rejecting the evidence of [...] the store security man and of the other security man who though submitted as an independent witness was in fact under contract to the Defendants and in instances other than the direct evidence concerning theft possibly preferring the evidence of the Plaintiffs to some of the evidence of the members of the Garda Síochána who were later called to the scene does not in any way invalidate their verdict.”

51. Charleton J. went on to refer to *Barrett v. Independent Newspapers* and he quoted from Henchy J. who warned against the temptation of an appellate court thinking that a jury verdict as to what was defamatory should be condemned as perverse merely because it does not accord with that of a judge. He quoted Henchy J. who said a jury verdict is *“to be deemed perverse*

only when no jury of reasonable men, applying the law laid down for them by the judge and directing their minds to such facts as are reasonably open to them to find, could have reached the conclusion that the words were not defamatory”.

52. Charleton J. also referred to the *dicta* in *Cooper-Flynn v. Raidió Teilifís Éireann* [2004] 2 I.R. 72 and *de Rossa v. Independent Newspapers plc* [1999] 4 I.R. 432 to illustrate that the determinations of juries in defamation cases may only be set aside with particular caution. Charleton J. having referred to the House of Lords decision in *Grobbelaar v. News Group Newspapers Ltd.* [2002] 1 WLR 3024, stated: “*A jury verdict is only to be overturned where it is unsupported by evidence.*” He repeated what Henchy J. had said in *Barrett v. Independent Newspapers* that “*the community verdict*” of a jury cannot be condemned “*merely because it does not accord with that of a judge*”.

53. Counsel for the plaintiffs relied upon the follow *dicta* of Henchy J. in *Northern Bank Finance v. Charlton* [1979] I.R. 149 at p. 192 of the reported judgment:-

“The court of appeal will only set aside a finding of fact based on one version of the evidence when, on taking a conspectus of the evidence as a whole, oral and otherwise, it appears to the court that, notwithstanding the advantages which the tribunal of fact had in seeing and hearing the witnesses, the version of the evidence which was acted on could not reasonably be correct.”

54. Charleton J. cited that *dicta* stating that Finlay C.J. in *McEntee v. Quinnsworth Ltd.* reiterated this core principle and quoted Finlay C.J. as follows:-

“This principle that the appellate court should not overturn a decision on fact made either by a judge sitting without a jury or by a jury who have seen and heard the witnesses is no mere procedural limitation on our appellate function. It is fundamental and the precise issues with regard to which it is raised in this case illuminate its importance as a fundamental principle of justice. If the submission made by the

Defendants on this part of their appeal were to be accepted by this court then in effect what this court would have done would have been in the case of two persons in respect of whom a jury were satisfied that it had not been proved they were guilty of theft to condemn them as thieves with all the consequential damage to their reputation never having heard of seen either of them giving evidence.”

55. Charleton J. pointed out that errors of law are central to the function of the appellate courts. Certain issues are matters of law such as the question of what is capable of lowering a plaintiff in the eyes of ordinary reasonable members of the community.

56. Charleton J. having reviewed the above cases, stated the principle set out at para. 34 above and relied upon by the plaintiffs, that notwithstanding the respect that must generally be afforded to such verdicts, there may be circumstances where it may be necessary to overturn a jury in a defamation case because all of the evidence tendered at trial pointed in one direction. Charleton J. stated that such a decision will not be reached lightly and could only occur *in exceptional circumstances*.

57. On the facts of *McDonagh v. Sunday Newspapers Ltd.* the Supreme Court acknowledged that the plaintiff's approach to cross-examination of the defendant's witnesses was problematic. The Court did not accept however that the trial judge ought to have given a strong warning on credibility as held by the Court of Appeal; to do so would be to require the judge to enter the arena on the side of the defendant. The Supreme Court did not consider that in the overall aspect that there was enough to dismiss the lengthy trial as unsatisfactory. They did however overturn the Court of Appeal on liability and asked for further submissions on the issue of the unanswered question by the jury *i.e.* as to the impact of the findings on reputation.

Was the decision of the jury in each of these cases perverse?

58. This Court must apply the principles set out in *McDonagh v. Sunday Newspapers Ltd.* to this appeal. In addressing the question of whether this finding was reasonably open to the

jury, I am mindful of the fact that the trial judge gave an explanation to this jury about the law and the evidence on the issue of publication which, *prima facie*, appears correct. It must be taken into account therefore that there was no direction to the jury (or indeed submission on behalf of the plaintiffs) that the defendant's evidence was incapable of belief.

59. The *McDonagh v. Sunday Newspapers Ltd.* decision highlighted the absence of any decision (apart from that of the Court of Appeal in that case) where an appellate court had intervened to substitute its finding of fact for facts rejected by the jury. The plaintiffs' notice of appeal seeks to set aside the verdict of the jury and to order a retrial. That is also what is sought in written submissions. The logic of the plaintiffs' case however, is that if the verdict as to liability was perverse on the basis that all the evidence pointed only in the direction that the defendant published the leaflets, then the retrial would only be as to the remaining issues left to the jury *i.e.* truth and damages (if that answer is required). Therefore, the plaintiffs' submission is to ask this Court to reach a conclusion that this defendant did publish the leaflets.

60. Counsel for the plaintiffs laid great emphasis on how *McDonagh v. Sunday Newspapers Ltd.* permitted the Court to take this step where there were exceptional circumstances. His submissions laid emphasis on this being an exceptional case. Exceptional cases are those which are not the norm. Indeed, it is difficult to be able to point to any particular rule or means of identifying exceptionality. Such cases tend to be more easily recognised than defined. *McDonagh v. Sunday Newspapers Ltd.* itself did not reach that level of exceptionality required. I think however that there may be a danger that in making constant reference to exceptional circumstances that one is setting up a test of "exceptionality". That is not the test, that is in effect a result of applying the test that Charleton J. stated in *McDonagh v. Sunday Newspapers Ltd.* set out at para. 34 above. It will only be in an exceptional set of circumstances that this test will have been reached.

61. There are two aspects that counsel for the plaintiffs urged the court to consider in relation to the test for assessing evidence. The first was that, relying on the principle in *Hay v. O'Grady*, that this Court was in as good a position as the jury to draw inferences of fact. He said that the circumstantial evidence in this case pointed only towards the inference that the defendant had published the leaflets. I do not consider that to be a correct application of the *Hay v. O'Grady* principle. The drawing of inferences depends on a finding as to the primary facts. In this case direct oral evidence was given by the defendant on the crucial contention that he did not publish the leaflets. That was the very primary fact at issue. Moreover, this was a trial before a jury where the main protagonists gave evidence and where the defendant conducted the litigation himself. This evidence was to be assessed by the jury, the trier of fact, where the drama of the trial was being played out before their eyes. This was quintessentially a matter where the jury had to reach a decision on the primary facts using their entitlement to draw appropriate inferences from the evidence.

62. The second aspect that counsel for the plaintiffs emphasised was the quote from Henchy J. in *Northern Bank Finance v. Charlton* which Charleton J. relied upon in *McDonagh v. Sunday Newspapers Ltd.* This was to the effect that the appellate court could set aside a finding of fact based on one version of the evidence when taking a conspectus of the evidence as a whole, that notwithstanding the fact that the tribunal of fact had advantages in seeing and hearing the witnesses, the version of the evidence which was acted upon could not reasonably be correct. Counsel urged the Court to accept that this was a lower standard than that the evidence had to be "*incapable of belief*" before the finding of fact would be overturned.

63. In my view it is vital that the statement by Henchy J. in *Northern Bank Finance v. Charlton* is understood correctly. There is a danger than an appellate court might stray into deciding the case on which version of events is more likely to be reasonably true. That is to usurp the function of the trial court. The appellate court may only interfere if the evidence

demonstrates that the version of facts found could not “*reasonably be correct*”. Charleton J. reached the conclusion having reviewed all the relevant case law that it would only be necessary to overturn a jury verdict in a defamation case because all of the evidence tendered at trial pointed in one direction. That is what is meant by the evidence could not reasonably be correct. Another way of saying that is that there must have been no evidence upon which the jury could rely.

64. Counsel for the plaintiffs admirably marshalled the evidence that supported the contention that these leaflets were published by the defendant. Some of this has already been highlighted. I will refer to some of the more relevant parts of the evidence to which our attention was drawn. It was admitted in evidence before the trial court that the defendant stated in various correspondence that:-

- a. “I will be posting notices into all ur neighbours letterboxes”;
- b. While attaching the defamatory leaflet to an email sent by the defendant to the plaintiffs the defendant wrote *inter alia* that he is going to distribute the leaflets on “Doors, letterboxes, on trees.. Lampposts.. 250 getting delivered in doors and 250 sent here there and everywhere”;
- c. “Might do a few leaflets later..”; and
- d. “Leaflets headin into letterboxes later 2nite.. Time to tell the neighbours..”.

After the plaintiffs threatened the defendant with defamation proceedings, the following relevant information that pertained to publication was stated by the defendant:-

- a. “watch what I do now...” followed by a further email stating *inter alia* “[y]ou wana go again?”;
- b. “I will be in rathmines today handing out leaflets simply saying that both of your clients have been adjudicated bankrupt..”; and
- c. “Handing out stuff in rathmines today..”.

65. At no point however, in the correspondence nor in cross examination did the defendant admit to posting the defamatory leaflets into the neighbours' letterboxes. No evidence was put forward by the plaintiffs to establish that the defendant was the person who had put the leaflets into the letter boxes. The plaintiffs called neighbours to give evidence about receipt of the defamatory leaflets into their letterboxes. While this may lead to an *inference* indeed, even a *strong inference*, that the defendant posted the defamatory leaflets, the evidence as to the defendant being the publisher was not direct evidence but was circumstantial. It must be acknowledged that circumstantial evidence can be *strong* or even *very strong* evidence of a fact, indeed in many criminal cases proof of guilt beyond reasonable doubt may rely *entirely* on circumstantial evidence.

66. As against that the defendant gave direct evidence that he did not publish the leaflets on the day in question. The defendant put forward the defence that he did not post the defamatory leaflets into the neighbours' letterboxes. In his cross-examination, the following exchange occurred:-

“Q. And in relation to what this case is actually about, Mr. Barrett, which it isn't an arbitration and your view on what the arbitration is about, the leaflets that you – that were distributed, you're denying that you distributed them, is that the case?

A. I put one in John's letterbox, that was it.

Q. And nowhere else?

A. Not that day, no.”

Further on in his cross examination, the defendant stated:-

Q. Okay. And you heard the evidence of the people who received them. And why would you not have put one – you told – you emailed everybody who's been through this. You threatened repeatedly you were going to tell the neighbours.

You had already furnished a copy of the leaflet. Why didn't you put it? What stopped you putting it into the letterboxes?

A. Into Stephen's

Q. No, all the neighbours who came in here. We've only had a tiny portion?

A. I'm no dope, that's why.

Q. Okay?

A. I'm no dope.

Q. Okay?

A. But he – well, come here. Listen, see, the thing is remember John said he'd done the walk of shame? His walk of shame was in Starbucks when he had to go from the Starbucks in Rathmines and walk up to me.

Q. I'm, asking you --?

A. That was his walk of shame. That's how he was able to look and say that he done a walk of shame.

Q. I'm asking --?

A. Well, do you know what I'd say he done that night? I'd say he done the Mickey Flanagan 'We're back in the game' walk, when he was walking down to deliver them in to his own neighbours.

Q. JUDGE: Mr. Barrett, please. I just need you to –

A. He delivered them to his own neighbours to sue his own case.

Q. JUDGE: -- concentrate on the questions you're being asked.

A. He delivered them to his own neighbours.”

67. It is clear therefore, that two alternatives were put before the jury in the evidence. These were that the defendant posting the defamatory leaflets to the neighbours of the plaintiffs and Mr. Dempsey posting them to his neighbours himself. In support of the plaintiffs' position was

the previous publication by the defendant of leaflets with the same wordings, the statements he had made of his intention to do so (and drawn to the jury's attention by the judge as an admission of intention not as a fact that he had done so), his emails/texts afterwards, the evidence of neighbours that the letters were delivered and his general behaviour.

68. On the other hand, there is little to support the defendant's version of events. At the level of consistency but not amounting to supporting evidence, the defendant had pleaded that he had not published the material in his defence. He had never admitted his involvement directly in writing, he cross-examined Mr. Dempsey on the basis that he, Mr. Dempsey, had distributed the leaflet to neighbours and also cross-examined the neighbours to elicit evidence from them that they could not identify him as the person who delivered the leaflets. At a more abstract level it just might be plausible that the defendant was indeed "no dope" and would not put himself in the position where he could be sued for defamation. It might also be plausible that a person who had been through what Mr. Dempsey had been through had finally snapped and decided to engineer the event himself.

69. Is this a situation where this Court can safely trespass on this "*community verdict of [this] jury*" and reverse its finding on the basis that no reasonable jury who directed their minds to these facts could have reached this conclusion? Was there in fact no evidence on which this jury could have found that the defendant did not publish these leaflets by dropping it through the letterboxes of the neighbours on the date in question? Was the defendant's evidence to be considered as merely an assertion or unsustainable evidence or, is it credible evidence that a jury is entitled to take into account?

70. In deciding this issue, it is important to note that a defendant is entitled to put a plaintiff on proof of the essential ingredients of the tort alleged against him. A defendant does not bear the onus of proof. A defendant is entitled to deny a claim against him. The credibility of that denial will be assessed by the jury. This was not a case where the jury were expressly asked

to consider that his evidence was “incapable of belief”. The jury were left to consider the direct evidence given by the defendant stating that he did not publish the leaflets and they also had to take into account his evidence that Mr. Dempsey may have published the leaflets.

71. Only the jury know the precise reason *why* they found in favour of the defendant on the issue of publication. Perhaps the jury were not satisfied of the plaintiffs’ case that there was circumstantial documentary evidence pointing to the fact that the defendant published the leaflets. They might have been satisfied, having considered the defendant’s evidence, that he was too clever to risk doing something clearly defamatory. Merely because the defendant in his direct evidence not only denied publication but put forward an alternative version of events, does not automatically mean that his alternative version of events was accepted by the jury. The jury may have been of the view that, upon review of the circumstantial evidence pointing towards the defendant as the person who published the leaflets, the plaintiffs have not satisfied them on the balance of probabilities that the defendant published the leaflets. Their verdict does not mean that they believed the defendant that Mr. Dempsey posted the leaflets, it is a verdict that the plaintiffs had not satisfied the jury that the defendant was the one who published it.

72. I am satisfied that the plaintiffs have not reached the threshold required for this court to interfere with the verdict on the grounds that it was perverse. It matters not what conclusion this Court or indeed any other jury might have concluded on the evidence. The important factor is that there was evidence from which there was at least a rational explanation as to why the jury might have reached the conclusion that they did.

Conclusion

73. In accordance with the principles set out in *McDonagh v. Sunday Newspapers Ltd.*, the plaintiffs had to reach a high threshold to set aside the jury verdict. While the evidence might have been strongly in their favour on the issue of publication, it is not correct to say that the

evidence only pointed in one direction. There was evidence, in the form of direct oral testimony from the defendant, that he had not published the defamatory leaflets on the occasion in question. Therefore, the plaintiffs cannot succeed in their appeals.

74. For the reasons set out in this judgment, I would dismiss the plaintiffs' appeals.

75. *In circumstances where this judgment is being delivered electronically, Noonan and Ní Raifeartaigh J.J. have authorised me to record their agreement with it.*